# NYS Court of Appeals Criminal Decisions for May 7, 2020

## People v. Holz

Fourth Department Presiding Justice Whalen's dissent (People v. Holz, 167 AD3d 1417, 1422 [4th Dep't 2018]) is vindicated by the Court's unanimous reversal here, authored by Judge Fahey.

CPL 710.70(2) indicates that "[a]n order finally denying a motion to suppress evidence may be reviewed upon an appeal from an ensuing judgment of conviction notwithstanding the fact that such judgment is entered upon a plea of guilty." Defendant pleaded guilty to a single count of burglary to resolve two burglary charges. The same dwelling was burglarized on two different dates. There was a De Bour issue involving jewelry being taken during the second burglary; defendant lost his suppression motion relative to this count.

The AD erroneously concluded it did not have jurisdiction to address the suppression order because it was not related to the singular count which defendant specifically pleaded guilty. In fact, it was an "ensuing judgment of conviction." "Ensue" means "to take place afterward or as a result." The right to review a suppression order under this provision includes all counts encompassed by the plea agreement, not just the counts defendant specifically pleaded guilty to. This reading of the statute, which includes "the broadest of relational terms," is supported by its text and history, as well as the intent of the legislature when the provision was enacted in 1971. It is important that the appellate divisions are able to review potential errors relating to judgments of convictions that are not otherwise waived or forfeited. This interpretation recognizes the practical realities of plea bargaining, which often involves resolving multiple charges in a single disposition. Erroneous suppression decisions should not be insulated from appellate review.

## People v. Maffei

The Chief Judge authored the majority opinion in this 6 to 1 decision. Judge Rivera wrote a dissent. The Second Department is affirmed and the defendant's ineffective assistance of counsel ("IAC") claim for his attorney failing to challenge a particular prospective juror is rejected. A CPL 440 motion would be needed to flesh out any potential defense strategy in not challenging this juror.

The defendant was charged with depraved indifference murder regarding a well-publicized fatal drive-by shooting. The prospective juror in question ("juror #10") had seen the case reported in the media. His cousin and uncle were members of law enforcement. Several times he affirmed having made up his mind about the case while giving only

ambiguous assurances that he could be fair and impartial. Yet defense counsel did not challenge juror #10 for cause or by peremptory.

Even in the face of pretrial publicity, defendants are entitled under the state and federal constitutions to a fair and impartial jury verdict based on the evidence. Duncan v. Louisiana, 391 U.S. 145, 153 (1968); People v. Torpey, 63 NY2d 361, 365 (1984). A determination of this issue requires a review of the totality of the *voir dire* record. People v. Johnson, 94 NY2d 600, 614-616 (2000); People v. Cahill, 2 NY3d 14, 38-40 (2003).

But it was the defendant's burden to establish that defense counsel had no strategic or other legitimate reason for not challenging the prospective juror. This, according to the Court, required a post-conviction motion to address matters outside of the direct appellate record. The Court reminds here that most IAC claims should be pursued through a CPL 440 motion, which would ultimately allow for adequate appellate review. Among other things, the record was silent as to the identity of four prospective jurors who affirmatively answered that they would acquit if the People presented insufficient evidence of guilt. While trial courts should err on the side of granting cause challenges, as at worse you're trading one impartial juror for another, defendants have a right to pick who they want on their jury. A transcript does not reveal the demeanor, facial expression and "other subliminal responses" when prospective jurors are questioned. If the accused and his or her attorney discuss things over (outside of the record) and have a gut feeling about an otherwise unappealing potential juror, it's the defendant's prerogative.

In dissent, Judge Rivera pointed to the Sixth Circuit's decision in Miller v. Webb, 385 F3d 666, 675-676 (6th Cir. 2004), where counsel's failure to challenge a biased juror constituted IAC. (This decision was distinguished by the majority in its second footnote.) Indeed, a prospective juror challenged for cause where he or she indicates a state of mind likely to preclude the rendering of an impartial verdict must provide an unequivocal statement that he or she will be impartial. People v. Arnold, 96 NY3d 358, 363-364 (2001). Here, despite thorough questioning by the trial court on the topic of impartiality, juror #10, on multiple occasions, was unable to unequivocally say that he could be fair and impartial. Particularly in light of the state IAC standard being (at least on paper) more protective of defendant's rights than the federal standard, there could be no legitimate or reasonable trial strategy to support keeping juror #10 on the jury. As Judge Rivera observed, if you wouldn't board a plane with a pilot who was unable to confirm being able to fly the plane, why would you place your liberty in the hands of a juror who, in response to being asked if he could be impartial, says things like: "I hope so" and "I'm not sure"? Jury selection is solely within the tactical province of defense counsel, with no veto power for the client. *See generally*, People v. Colville, 20 NY3d 20, 32 (2012). Discussions outside of the record regarding whether defendant himself wanted to keep juror #10 would be important to the attorney-client relationship, but should not substantively change the IAC analysis.

***And don't forget the footnotes:*** There's some back and forth with the majority about whether Judge Rivera's first two footnotes, addressing the heavy pretrial publicity through cited media accounts of the case, ventured too far outside of the appellate record. *See*

*also*, dissent, FN 6. Further, Judge Rivera provides some interesting social science factors in FN 10 addressing the likely candor of prospective jurors, depending on who asks the questions and how they are posed. And finally, look at Judge Rivera's FN 12 where she addresses the potential impact of forcing indigent defendants to file CPL 440 motions to vindicate their constitutional rights to an impartial verdict. *But see also*, County Law § 722 (last sentence of last paragraph addressing the assignment of CPL 440 counsel; *a 2019 amendment that came about largely because of NYSDA's efforts*).