

NYS Court of Appeals Criminal Decisions: April 18, 2024

People v. Sims

This is a unanimous memorandum, affirming the AD. The Court rejected defendant's argument that the lower court conducted an inadequate inquiry regarding his plea condition violation. Indeed, the defendant was provided an opportunity to dispute the factual basis for the alleged violation. Any ineffective assistance of counsel issues should be addressed in a CPL 440.10 motion. The defendant's post-plea statements to the probation officer did not require further inquiry by the court.

NYS Court of Appeals Criminal Decisions: April 23, 2024

People v. Williams

This is a unanimous reversal of the First Department regarding a drug conviction, authored by Judge Troutman. An undercover officer testified regarding a buy-and-bust and provided a confirmatory identification. The court erroneously denied the defendant's motion for an independent source hearing, instead relying on the officer's testimony at a limited probable cause suppression hearing to make the determination. Details regarding the independent source issue were not addressed. Though he described the defendant's clothing, the officer never interacted with him in the past. Further, the trial court found the arresting officer unreliable at the probable cause hearing and suppressed the confirmatory ID and physical evidence, i.e., the prerecorded buy money and the defendant's cell phone – but not a general ID of defendant at trial. The People were required to demonstrate that the ID was acquired by means sufficiently distinguishable from the arrest to be purged of any illegality. *People v. Jones*, 21 NY3d 449, 455 (2013); *Wong Sun v. United States*, 371 US 471, 488 (1963). The lower court should have suppressed any ID of the defendant.

People v. Mosley

This is a unanimous reversal of the Fourth Department, authored by Judge Halligan. A new trial is ordered, as the trial court erroneously permitted testimony from a non-eyewitness identifying a poor-quality surveillance video, despite the witness not being sufficiently familiar with the defendant.

The video, testified to by a homicide detective as purportedly showing the defendant, was the only evidence connecting the defendant to this Syracuse shooting. Previously viewing photos of the defendant is not enough. Though the detective knew defendant for a year and a half and could describe him physically, the officer recalled only one specific

previous date where he observed the defendant face-to-face. This testimony was neither helpful nor reliable. Some factors to consider: the witness's general familiarity with the individual, whether this familiarity spanned an extended period of time, whether this familiarity was around the time of the crime, and whether the defendant possessed a specific physical trait (such as a scar, distinctive gait or tattoo). Instead, this testimony usurped the province of the jury (as opposed to merely assisting them in making an independent assessment), as the defendant was not wearing a disguise and had not changed his appearance since the crime.

The quality of the surveillance footage is another factor. During deliberations, the jury unsuccessfully sought a magnifying glass in order to view the video better. All of this is the People's burden to establish. A thorough record must be made to afford appellate review. Cautionary instructions are also to be considered best practice. At bar, the video was of poor quality and the defendant did not possess a distinctive physical trait. The jury was thus equally well-positioned to identify the defendant and was not aided by the testimony in question. It also didn't help that the lay witness in question was a member of law enforcement, who would likely be more credited by the jury. The evidence of guilt was not overwhelming. In sum, in light of all the circumstances, the admission of this improper lay non-eyewitness identification testimony constituted an abuse of the trial court's discretion. The error was not harmless.

Judge Rivera authored a **concurrency**, observing that surveillance videos of such poor quality (where the jury cannot discern the perpetrator's physical characteristics) are inadmissible as a matter of law. If the image is clear, it is still inadmissible where the jury can make their own observations and compare it with the defendant in court, and the defendant's appearance has not changed since the recorded event. Though agreeing with its conclusion, Judge Rivera disagreed with the majority's totality of the circumstances approach, which could increase the likelihood of misidentification (especially where a member of law enforcement testifies or there exists a cross-racial dynamic). Despite this, Judge Rivera observed that a defining physical feature (like a tattoo or perhaps wearing a distinctive sweater the witness knitted for the defendant) could be a factor in excusing an otherwise blurry video or photo. Low quality video evidence should not, however, be improperly bolstered.

People v. Fisher

This is a unanimous reversal of the Third Department regarding a drug possession prosecution. The Chief Judge authored the opinion.

Here, a sworn juror untimely informed the trial court that after the first day of jury selection the defendant had followed her home in his car. Though mistaken, the juror was certain in her belief. The facts establish this juror was "grossly unqualified" pursuant to CPL 270.35, as she "possessed a state of mind which would prevent the rendering of an

impartial verdict.” See, *People v. Buford*, 69 NY2d 290, 298 (1987). A new trial was ordered.

Though the court elicited some assurances of impartiality from the juror that she would put aside her concerns, those responses were insufficient under the circumstances. Assurances of impartiality “are not magic words.” A sworn juror must be dismissed if the record clearly demonstrates that he or she cannot render an impartial verdict. Bias harbored directly against a defendant strikes at the core of the right to an impartial jury. There must be a showing that the bias will not affect the verdict. At bar, juror number 6 had a specific bias (stemming from out-of-court events) regarding the defendant’s character. She never stated she stopped believing that the defendant followed her or that she was no longer in fear -- only that she would follow the trial court’s instructions. Indeed, she was 95 % sure the incident occurred. Moreover, the juror failed to timely report the incident to the court; instead she waited three days to reveal her concerns -- after the case was submitted to the jury. Context is critical. The trial court’s conclusion that the juror was most likely wrong in her beliefs about the purported incident further supported removing her as a juror. Finally, the juror’s assurances of impartiality weren’t even unequivocal. The defendant’s motion for a mistrial should have been granted.

People v. Dunton

This 6 to 1 decision is a successful People’s appeal, authored by Judge Rivera. A visiting judge (Justice Aarons of the Third Department) dissented. The AD erred in granting the defendant’s writ of error *coram nobis* petition. Because a prior warning was not practical under the circumstances, it did not violate the defendant’s statutory (*CPL 260.20*) and constitutional (*US Const., amend. VI; NY Const., art. I, § 6*) rights to be present during the entire announcement of the verdict; appellate counsel was thus not ineffective for omitting this non-meritorious claim.

The defendant was on trial for a Manhattan shooting. The court and law enforcement considered the defendant a security threat. He had a number of violent outbursts while detained at Rikers Island, leading to 6 or 7 pending indictments. As the trial went on, the court was appraised of the defendant’s continued violent (out of court) conduct, including his punching a corrections officer. There was strict security during his transportation to court. Security measures continued while in court as well.

Defendants have a right to be present for all material stages of the trial, including the reading of the verdict and polling of the jury. *People v. Sanders*, 39 NY3d 216, 221 (2023). *CPL 260.20*, however, permits a defendant’s removal where he or she is disorderly or disruptive. A trial court may dispense with constitutional and statutory warnings where they are impractical to give. At bar, notice of the defendant’s violent conduct outside of court led the judge and law enforcement to be on heightened alert of a potential in-court outburst during the reading of the verdict. Over the defendant’s objections, he was handcuffed. The foreperson read the guilty verdicts for the first five counts without

incident. The defendant then interrupted and yelled at the jury and the judge three times, using profanity. The defendant was then removed from what was apparently a small courtroom. In his absence, the sixth and seventh guilty verdicts were announced.

On appeal, appellate counsel raised a number of issues but omitted the defendant's removal from court during the reading of the verdicts. After the Second Department decided *People v. Antione*, 189 AD3d 1445, 1446 (2d Dept 2020), appellate counsel's supervisor filed a *coram nobis* motion in support of the defendant's ineffective assistance of counsel claim for failing to raise the court removal issue. The First Department granted the motion and ordered a new trial based on this purported mode of proceedings error. The Court of Appeals now reverses the AD.

The Court found the trial court to have properly exercised its discretion under the circumstances, which included the defendant posing an imminent risk of harm. Even defense counsel was unable to control his client. A trial judge has the inherent authority and affirmative obligation to control conduct and decorum in court. This was a reasonable and on-the-spot decision by the court. Providing warnings here imperiled the safety of those inside the court.

Appellate advocacy is meaningful if it reflects a competent grasp of the facts, the law and appellate procedure, supported by appropriate authority and argument. See, *People v. Alvarez*, 33 NY3d 286, 290 (2019); *People v. Stultz*, 2 NY3d 277, 285 (2004). Appellate counsel, who was not required to raise every issue of merit, was not ineffective for not raising the court removal issue. Further, the majority is critical of appellate counsel's *coram nobis* affirmation in support for not explaining why the issue in question was not considered.

The **dissent** accuses the majority of overstating the threat defendant posed and inappropriately expanding the practicality exception to having to provide a defendant warnings before removing him or her from court. The Court should be careful not to place too much emphasis on a defendant's out-of-court behavior in arriving at this exception. Here, there was a sufficient opportunity to provide the defendant at least a one-sentence warning before ordering his removal. See generally, *Illinois v. Allen*, 397 US 337, 342-343 (1970). Such a removal should be a rare occasion. Further, *Parker* warnings, which warn of the trial continuing if a defendant fails to appear, do not supersede CPL 260.20.

NYS Court of Appeals Criminal Decisions: April 25, 2024

People v. Weinstein

This is easily the Court's biggest *Molineux* decision in years. The First Department is reversed and a new trial is ordered. The infamous Harvey Weinstein, a powerful and predatory Hollywood producer, was tried for three sexual assaults occurring in Manhattan

hotels and an apartment. Though acquitted of several counts, the defendant was convicted of first-degree criminal sexual act and third-degree rape for incidents occurring in 2006 and 2013. The court sentenced him to 23 years in prison.

There was no physical evidence supporting the complainants' testimony. The People, not surprisingly, were permitted by the trial court to stack the deck in the prosecution's favor with three so-called *Molineux* witnesses who testified to uncharged tails of sexual misconduct. This was in addition to an extensive list of prejudicial *Sandoval* incidents. These issues were not harmless, but rather had a combined "synergistic effect" that deprived the defendant of a fair trial, compelling a 4 to 3 Court of Appeals to grant a new trial. Judge Rivera authored the 40-page majority opinion. Judges Singas and Cannataro wrote separate dissents, joined by each other and Judge Garcia.

To begin with, the Court quickly rejected the defendant's CPL 30.10 statute of limitations argument. The defendant leaving the state prior to the authorities learning of the allegations tolled the time under 30.10(4)(a) for when the prosecution had to bring the charges. Footnote 6, however, seems to leave the door open for a potential future argument to reject this tolling provision where there is a sufficient record of when law enforcement learns of the allegations in question.

People v. Molineux, 168 NY 264 (1901) stands for the propositions that defendants are presumed innocent and should only be tried on the instant charges, as opposed to uncharged prior propensity-driven evidence. Defendants should not have to face at trial irrelevant, prejudicial and untested allegations of prior bad acts. When not presented for the sole purpose of establishing an accused's propensity to commit the charged offenses, the DA is permitted to present evidence which may include motive, intent, absence of mistake or accident, common plan or scheme and identity. But the trial court must first weigh the probative value against its prejudicial effect. The majority does a full exploration of the premise behind *Molineux*. See, e.g., *People v. Vargas*, 88 NY2d 856, 857 (1996); *People v. Alvino*, 71 NY2d 233, 241-242 (1987); *People v. Ventimiglia*, 52 NY2d 350, 359 (1981). Indeed, propensity evidence has a bias-inducing effect that undermines the truth-seeking function of a criminal trial.

The defendant was a well-known powerhouse in the entertainment industry, legendary for coercing young women (his professional subordinates) into *quid quo pro* sexual exchanges to advance their careers. The trial testimony included what might be described as ambiguous responses by the complainants, as well as subsequent relationships following the indicted incidents. The prosecution witnesses included a forensic psychiatrist and an expert in rape trauma syndrome, who addressed complainants familiar with their attackers and those who do not promptly report the crimes. Though purportedly presented for purposes of establishing the defendant's intent and for understanding the complainants' lack of consent, the uncharged allegations here had no material non-propensity purpose. The majority concluded that *Molineux*-based evidence of intent is only admissible where the criminal acts are equivocal to the extent that a defendant's intention is not easily inferred from the criminal acts alone. The admission of

prior uncharged conduct was unnecessary and improper, as it impermissibly bolstered the complainants' credibility. The trial court's limiting instructions did not sufficiently protect the defendant's right to a fair trial.

The *Sandoval* list of prior criminal, vicious or immoral acts (supposedly) relevant to veracity permitted for potential cross-examination by the trial court was frankly over the top. *People v. Sandoval*, 34 NY2d 371, 374 (1974). Among other things, it included the defendant purportedly directing his wife to lie, hiding women's clothing, scheduling a business meeting under false pretenses, throwing staplers at people, abandoning a colleague by the side of a road in a foreign country and throwing a table of food. Like *Molineux*, the potential admission of *Sandoval* evidence must be balanced between its probative value and prejudicial effect and is ultimately reviewed under an abuse of discretion standard. These "breathtakingly inclusive" examples of bullying, fits of anger and verbal abuse of subordinates had little, if any, connection to evaluating the defendant's veracity. What reasonable defendant is going to take the stand and face the impact of this avalanche of impeachment? In sum, the trial court abused its discretion in its rulings on both of these issues.

The **dissenting** judges concluded the majority was closing its eyes to the enduring effect of rape culture on notions of consent. This was not, as the majority opines, merely a "credibility contest." Consent in the context of sexual violence is often a complicated concept, at times involving previous flirtation and intimacy between the parties. Consent is not something to be negotiated, bargained or coerced. Despite the expert testimony on sex crime victims and consent presented in support of the prosecution, the majority's decision, according to the dissent, will allow "predators to escape accountability." Moreover, the trial court "winnowed" down the prosecutor's proposed five *Molineux* witnesses to just three. And limiting instructions were provided to the jury.

More commentary: While dissenting Judge Singas complains that under the circumstances of this case, the jury was permitted to "look for objective signs of non-consent," that is exactly what a criminal jury in a sex crime prosecution is supposed to do: afford every reasonable benefit of the doubt to the defendant. What Judge Singas condemns as a created "presumption of consent" to sexual intercourse is actually the presumption of innocence at work.

More commentary: Judges Troutman and Halligan both recused themselves from this case. As it turned out, the four-judge *majority of the Court* included two visiting AD justices. This practice of vouching in AD justices (usually the presiding justices) is not new, but its recent frequency is not without its critics.

People v. Baez

This is a 5 to 2 affirmance of a controlled substance conviction, authored by Judge Cannataro. Judge Rivera authored the dissent, joined by the Chief Judge. The Court rejected the defendant's chain of custody argument. The Second Department is affirmed.

The defendant was pulled over for using his cell phone while driving. An envelope containing a white substance (cocaine) was found in the defendant's possession. Inside the envelope was a plastic glove and a smaller bag containing 45 smaller Ziploc packets.

Before admitting an item into evidence that is seized at a crime scene, the People must establish the item is indeed the object recovered and is substantially unchanged. A fungible item like cocaine requires that all who handled the item identify it and testify to its custody and unchanged condition. Gaps in the chain of custody may be excused where the circumstances provide reasonable assurances of the identity of the item and its unchanged condition. Such gaps go to the weight of the evidence, not its admissibility. These gaps, however, will not be excused where there are clear and material discrepancies regarding the condition, appearance or handling of the contraband -- leaving no reasonable assurance that the evidence was not altered during the gap in custody. But brief and logical explanations may be provided or reasonably inferred from the circumstances. Such discrepancies, such as those that occurred at bar, merely raise weight and credibility issues to be resolved by the jury.

At bar, the People called every witness who handled the evidence from seizure to trial, except those who merely transported the sealed evidence between locations. The People provided reasonable assurances of the identity and unchanged nature of the evidence. With that said, the majority provides some warning in *dictum* that it does not condone "the seemingly careless manner in which the items [in question] were described." "Imprecision and inaccuracy in police paperwork not only impede the prosecution of crime, they erode public confidence in law enforcement and lend credence to allegations of incompetence and misconduct."

As Judge Rivera observed in **dissent**, the bag of drugs in question recovered was torn and *pouring out* at the scene. Yet somehow this transformed into an unripped bag. The majority makes up for the missing links in custody through speculation. It is the judiciary's role to be the gatekeeper of this issue. To be admissible, fungible evidence must be identical to that involved in the crime and, of course, not be tampered with. At bar, there was discrepancy in the grand jury and trial testimony regarding the condition of this evidence. No explanation was offered for how the ripped bag reached the crime lab undamaged. Then there is the latex glove that disappeared and was not photographed. Even the weight of the drugs was not consistent in the paperwork. All of this casts suspicion on the integrity of the evidence. The People failed to establish by clear and convincing evidence that the condition of the evidence was substantially unchanged. The

chain of custody case law safeguards against wrongful convictions. Moreover, the primary officer in this case, who has had an adverse credibility finding in the past, provided different versions regarding how the item was packaged and how much the item weighed. It also didn't help that the defendant represented himself at trial.

People v. Franklin

This is a 5 to 2 successful People's appeal, authored by Judge Halligan. Visiting judge, Justice Aarons of the Third Department, authored the dissent. The criminal justice agency ("CJA") interview report was not testimonial and subject to the Sixth Amendment Confrontation Clause and *Crawford v. Washington*, 541 US 36, 51 (2004) protections for cross-examination. The document was not created for the purpose of serving as trial testimony. The Second Department, which reversed the defendant's weapon possession conviction, is reversed.

A gun was discovered in the basement of the defendant's Queens home. Prior to being arraigned, the defendant was interviewed by a CJA employee, a standard practice in New York City. The CJA is funded by NYC and collects info and provides pretrial services -- analogous to a probation department. Its purpose is to make pretrial release and bail recommendations for the court. In the interview report was the defendant's pedigree info, including his 168th Street address. This form is filled out regardless of the facts of the case.

There was no physical evidence (i.e., DNA or fingerprints) connecting the defendant to the gun. Though no CJA employee testified at trial, the People were permitted to move the interview form into evidence, thus connecting the defendant to the location where the gun was recovered. There was no opportunity for cross-examination. The Court of Appeals abandoned the "essential element" *Crawford* test (i.e., *People v. Pacer*, 6 NY3d 504 (2006)) in favor of the US Supreme Court's "primary purpose" test. See, *Melendez-Diaz v. Massachusetts*, 557 US 305, 307-308 (2009); *Bullcoming v. New Mexico*, 564 US 647, 651 (2011). If the primary purpose was to establish past events relevant to a later prosecution (an out of court testimonial substitute), the item is testimonial. Where an objective witness would reasonably believe the document would be available for use at a later trial, it is testimonial. Despite its consequences for a defendant's liberty and its relevance to this particular trial, the administrative CJA document does not qualify.

The **dissent** disagreed, as the report indicated that the defendant's mother verified where the defendant resided. This report, a fact-finding tool for the trial court, was testimonial and the People's only witness statement. Not participating in the CJA interview process would threaten the defendant's liberty.