No. 160
The People &c.,
Respondent,
v.
Carlos Ventura,
Appellant.

No. 161
The People &c.,
Respondent,
v.
Damian Gardner,
Appellant.

Case No. 160:
Erin R. Collins, for appellant.
Karen Wigle Weiss, for respondent.
Immigrant Defense Project et al., amici curiae.

Case No. 161:

Erica Horwitz, for appellant.
Karen Wigle Weiss, for respondent.
Immigrant Defense Project et al., amici curiae.

JONES, J.:

In these criminal proceedings, the Appellate Division, pursuant to CPL 470.60 (1), dismissed defendants' direct appeals from their judgments of conviction prior to their hearing and disposition. Both defendants filed timely notices of appeal, but were involuntarily deported by the Department of Homeland

Security's Immigration and Customs Enforcement Bureau (ICE) while their appeals were pending. The common issue presented is whether the Appellate Division abused its discretion in dismissing these appeals. We hold it did.

Following a jury trial, defendant Carlos Ventura was convicted of criminal possession of stolen property in the third degree, unauthorized use of a motor vehicle in the third degree, and unlawful operation of a motor vehicle on a public highway. Ventura filed a timely notice of appeal and submitted an appellate brief asserting that the evidence was legally insufficient to establish that he knowingly operated a stolen motor vehicle, and that his conviction was against the weight of the evidence.

On July 23, 2008, Ventura, a citizen of the Dominican Republic and a legal permanent resident of the United States, was paroled to the custody of ICE. He was subsequently deported on September 12, 2008, prior to the resolution of his appeal which was scheduled for oral argument on January 8, 2009. After defense counsel apprised the prosecution and the Appellate Division of the deportation, the People moved to dismiss the appeal on grounds that Ventura was "unavailable to obey [the court's] mandate." The Appellate Division granted the motion to dismiss. A Judge of this Court granted defendant leave to appeal.

Defendant Damian Gardner was convicted of criminal

possession of a controlled substance in the seventh degree. He filed a timely notice of appeal and appellate brief, contending that the evidence was legally insufficient to prove guilt beyond a reasonable doubt. Gardner, a first-time offender, completed a 60-day term of incarceration and was transferred to the custody of ICE. On February 26, 2009, prior to the determination of his appeal, Gardner was deported to Jamaica. The People's motion to dismiss Gardner's pending appeal, on the ground that he was no longer subject to the mandate of the court, was granted. A Judge of this Court granted defendant leave to appeal.

Defendants contend that the dismissal of their appeals was fundamentally unfair because their deportations were not purposeful absences that would disentitle them to appellate review. The prosecution responds that the Appellate Division did not err as it adhered to precedent and well settled principles compelling the dismissal of appeals pursued by physically absent defendants. We find the People's position unavailing as these appeals present circumstances materially distinguishable from our precedent. As such, we reverse in both cases.

Pursuant to CPL 450.10, which codifies a criminal defendant's common-law right to appeal to an intermediate appellate court, Ventura and Gardner had an absolute right to seek appellate review of their convictions (see People v Montgomery, 24 NY2d 130, 132 [1969] ["every defendant has a fundamental right to appeal his conviction"]). By dismissing the

appeals because of the ostensible inability of defendants to obey the mandate of the court, the Appellate Division abused its discretion. Generally, courts have been inclined to dismiss appeals pursued by physically absent defendants because they voluntarily absconded, forfeiting their right to appeal. This Court has previously reasoned that "it [is] essential to any step, on behalf of a person charged with a felony after indictment found, that he should be in custody; either actual . . . or constructive" as "the whole theory of criminal proceedings is based upon the idea of the defendant being in the power, and under the control of the court, in his person" (People v Genet, 59 NY 80, 81 [1874]). Accordingly, dismissals have been predicated primarily on a policy-based rationale that courts should not aid in the deliberate evasion of justice through continued consideration of appeals (Degen v United States, 517 US 820, 824 [1996]; Ortega-Rodriguez v United States, 507 US 234, 242 [1993]; People v Sullivan, 28 NY2d 900 [1971]; People v Hernandez, 266 AD2d 116 [1st Dept 1999]; People v Johnson, 191 AD2d 279 [1st Dept 1993]).*

* "Neither of these appeals implicate the so-called fugitive disentitlement doctrine, which allows appellate courts to dismiss appeals of fugitive defendants who are at large while their appeals are pending, the rationale being that the defendant's escape disentitles the defendant to call upon the resources of the Court for determination of his claims. Considerations underlying the doctrine include, among other things, that the courts should not expend resources hearing an appeal when any judgment they would issue could not be enforced, nor should

Here, this policy concern is not present. Ventura and Gardner were involuntarily removed from the country and their extrication lacked the scornful or contemptuous traits that compel courts to dismiss appeals filed by those who elude criminal proceedings. Rather, they, and other similarly situated defendants, have a greater need to avail themselves of the appellate process in light of the tremendous ramifications of deportation.

More significantly, the complete lack of intermediate appellate review materially distinguishes the instant appeals from prior cases. The People allude to this Court's precedent in Genet, People v Del Rio (14 NY2d 165 [1964]), People v Parmaklidis (38 NY2d 1005 [1976]), and People v Diaz (7 NY3d 831 [2006]), as plainly dispositive of the instant appeals. However, in those cases, the dismissed appeals were pending before this Court and the defendants had already received considered intermediate appellate review, in satisfaction of their statutory right. While it was within this Court's discretion, as a court of permissive appellate jurisdiction, to dismiss those appeals, the Appellate Divisions do not enjoy such unencumbered latitude.

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courts be required to adjudicate the merits of a criminal case after the convicted defendant who has sought review escapes from the restraints placed upon him pursuant to the conviction" (People v Taveras, 10 NY3d 227, 232 [2008] [internal citations and quotation marks omitted]).

The invariable importance of the fundamental right to an appeal, as well as the distinct role assumed by the Appellate Divisions within New York's hierarchy of appellate review (see NY Const Art. 6, § 5; see e.g., CPLR 5501 [c]), makes access to intermediate appellate courts imperative.

As we have previously recognized:

> "Unlike this court which, with few exceptions, passes on only questions of law, intermediate appellate courts are empowered to review questions of law and questions of fact. They do so in both civil cases and criminal cases. Indeed, this unique factual review power is the linchpin of our constitutional and statutory design intended to afford each litigant at least one appellate review of the facts" (People v Bleakley, 69 NY2d 490, 493-494 [1987] [internal citations omitted]).

While the avenues of appeal to this Court are limited and its purview strictly prescribed, the intermediate appellate courts possess expansive power given their fact-finding function as well as their ability to reach unpreserved issues pursuant to their "interest of justice" authority (see CPL 470.15 [6]). As such, these broad review abilities empower the Appellate Divisions to play a uniquely critical role in the fair administration of justice, especially when a defendant's path of appeal is often foreclosed after a final determination by the intermediate appellate court (see Karger, Powers of the New York Court of Appeals, § 1:1 [rev 3d ed 2005]).

The People direct us to an apparent point of tension stemming from the discretionary authority of the Appellate

Divisions to dismiss appeals prior to their disposition. CPL 470.60 (1) provides that:

> "At any time after an appeal has been taken and before determination thereof, the appellate court in which such appeal is pending may, upon motion of the respondent or upon its own motion, dismiss such appeal upon the ground of mootness, lack of jurisdiction to determine it, failure of timely prosecution or perfection thereof, or other substantial defect, irregularity or failure of action by the appellant with respect to the prosecution or perfection of such appeal."

While we acknowledge the broad authority of the intermediate appellate courts to dismiss pending appeals (see Taveras, 10 NY3d at 233), this discretionary power cannot be accorded such an expansive view as to curtail defendants' basic entitlement to appellate consideration. As a matter of fundamental fairness, all criminal defendants shall be permitted to avail themselves of intermediate appellate courts as "the State has provided an absolute right to seek review in criminal proceedings" (Montgomery, 24 NY2d at 132).

Finally, in our view, the perceived inability to obey the mandate of the court is not implicated here. In other jurisdictions, defendants who continue prosecution of their appeals through representation of counsel are not deemed unavailable to obey the mandate of the court (see People v Puluc-Sique, 182 Cal App 4th 894, 899 [Ct App 2010]). Moreover, disposition of the discrete appellate issues would result in either an affirmance or outright dismissal of the convictions;

neither outcome would require the continued legal participation of defendants.

Accordingly, the orders should be reversed and the cases remitted to the Appellate Division for consideration of the merits of the appeal to that court.

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READ, J. (dissenting in Ventura and concurring in Gardner):

Criminal Procedure Law § 470.60 vests the Appellate Division with discretion to dismiss a pending appeal, subject to our review for legal error or abuse of discretion only. The majority now holds that it is always an abuse of discretion for the Appellate Division to dismiss the criminal appeal of an involuntarily deported noncitizen on the sole basis of unavailability. I respectfully dissent. While I concur in the result in Gardner on abuse-of-discretion grounds, I would affirm in Ventura.

I.

The majority offers three rationales for its holding: (1) involuntarily deported noncitizen defendants have a "great[] need" for their appeals to be heard because of the "tremendous ramifications of deportation" (majority op at 5); (2) every criminal defendant possesses a statutory right to intermediate appellate review (id. at 3-4); and (3) in other jurisdictions, involuntarily deported noncitizens "who continue prosecution of their appeals through representation of counsel are not deemed unavailable to obey the mandate of the court" (id. at 7). These suggested rationales do not furnish a basis for us to replace the

Appellate Division's statutorily conferred discretion to dismiss a pending criminal appeal with a categorical rule that strips the court of this discretion when the defendant happens to be an involuntarily deported noncitizen.[**]

First, deportation indisputably entails "tremendous ramifications." By definition, someone who is involuntarily deported would have preferred to continue to reside in this country, presumably because of the unwelcome "ramifications" of removal. But that is not a reason for a criminal appeal to go forward in those cases where the appeal's outcome would have no bearing on the defendant's immigration status -- i.e., cases in which the conviction being appealed did not cause the defendant's deportation[***] or prevent or complicate his potential return to

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[**]Defendants did not advocate for the categorical rule fashioned by the majority. They instead argued only that "a defendant who has a pending direct appeal prior to deportation and raises only dismissal issues is entitled to have that appeal decided on the merits by the Appellate Division" (emphasis added). As a result, the People had no notice that the Court was considering the unqualified rule it has now adopted, and consequently no opportunity to brief us about any practical problems or infelicitous effects of such a rule.

[***]There would seem to be little chance for this to happen, though, because the Second Circuit has traditionally followed the finality rule whereby an alien has the right to exhaust all direct appeals before the underlying criminal conviction can serve as the basis for removal (see Walcott v Chertoff, 517 F3d 149, 155 [2d Cir 2008] ["[t]he decision to appeal a conviction . . . suspends an alien's deportability . . . until the conviction becomes final"]). Amicus curiae contend, however, that the caselaw in the Second Circuit is less settled than Walcott seems to indicate, and that United States immigration authorities may be expected to continue to seek to remove defendants whose

the United States. Where the Appellate Division has information indicating that such a casual connection exists, I agree that it would be an abuse of discretion to dismiss the appeal on the sole basis of the defendant's unavailability. But absent such information, the Appellate Division may, if it so chooses, dismiss the appeal of a defendant who is involuntarily physically absent from the jurisdiction, and we are not authorized to second-guess this discretionary decision.

Second, no one disputes that all defendants have "an absolute right to seek appellate review of their convictions" at the Appellate Division (majority op at 3). But this right is qualified by the Appellate Division's "broad discretion" to dismiss a criminal appeal, "whether on a party's motion or sua sponte, for any reason that will cause or has caused substantial interference with the appellate process" (Preiser, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 470.60 at 352), as already noted.

In People v Diaz (7 NY3d 831 [2006]), we ourselves exercised the discretion afforded "the appellate court" by Criminal Procedure Law § 470.60 (1) to dismiss the appeal of an involuntarily deported noncitizen on the ground that he was not presently available to obey the court's mandate. As was also the case with defendants Ventura and Gardner, the dismissal in Diaz

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appeals are pending in the Appellate Division and, in any event, often transfer such defendants to other jurisdictions where the finality rule has been eliminated.

was without prejudice to a subsequent motion to reinstate the appeal in the event the defendant was permitted to reenter the country and returned to New York.

Apparently unwilling to overrule a recent precedent, the majority observes that we are "a court of permissive appellate jurisdiction" while the Appellate Division "do[es] not enjoy such unencumbered latitude" and assumes a "distinct role . . . within New York's hierarchy of appellate review" because of its "fact-finding function [and] ability to reach unpreserved issues" (majority op at 6). But Criminal Procedure Law § 470.60 (1) makes no distinction on any basis (much less differences in appellate review powers) between our discretionary authority to dismiss a pending criminal appeal and the Appellate Division's.

Finally, the majority cites only one decision of an intermediate appellate court in a sister state -- People v Puluc-Sique (182 Cal App 4th 894 [2010]) -- as evidence that other jurisdictions adhere to the new rule it has fashioned, and even this case is not on point. In Puluc-Sique, the People argued that the court was required to dismiss the defendant's appeal because deportation placed him beyond the jurisdiction of California's courts (id. at 899). The court rejected this proposition, but did not adopt the majority's position -- i.e., that a court may never dismiss the criminal appeal of an involuntarily deported noncitizen on the sole basis of unavailability. Instead, the court concluded that "[a]ppellate

disentitlement is a discretionary doctrine that must be applied in a manner that takes into account the equities of the individual case," and that the equities present in this particular individual case did not favor dismissal of the defendant's appeal (id. at 901 [emphasis added]).

Indeed, although the arguably relevant out-of-state cases are few in number, not one of our sister states takes the approach adopted by the majority. Instead, these decisions appear to turn on whether the conviction being appealed caused the defendant's deportation or prevented or complicated his potential return to the United States. For example, over 20 years ago the Supreme Court of Washington in State v Ortiz (113 Wn 2d 32 [1989]) reversed the intermediate appellate court's judgment dismissing an involuntarily deported noncitizen's criminal appeal, but on the basis that the conviction sought to be appealed precluded the defendant's return to this country (see also Cuellar v State, 13 SW3d 449, 451 [Tex App 2000] [appeal of narcotics conviction is not moot where conviction prevents individual from reentering United States or obtaining visa]; State v Garcia, 89 P3d 519, 520 [Colo App 2004] [appeal dismissed as moot "because defendant is no longer in the United States and is subject to a permanent bar on attempted reentry into this country, he will not serve his sentence here, and thus, the outcome of the appeal has no practical effect upon him"]).

Here, defendant Damian Gardner was deported for

overstaying his visa. The People informed the Appellate Division, however, that defendant's wife, an American citizen, had "filed an I-485 petition [with the United States Immigration and Customs Enforcement] requesting that defendant's immigration status be adjusted, but that the petition was denied because of defendant's criminal record"; and that "defendant's conviction did affect his immigration status in that his wife's petition may have been granted had he not been convicted of the crime in this case" (emphasis added). In light of these circumstances, I conclude that the Appellate Division abused its discretion when it dismissed Gardner's appeal on the sole basis of his unavailability to obey the court's mandate. Conversely, there is nothing in the record to suggest that the conviction for which defendant Carlos Ventura sought review -- as opposed to his unrelated, and unappealed, judgment of conviction and sentence for burglary -- caused his deportation or would prevent or complicate his return to the United States. Nor is there any other information in the record that would support a determination on our part that the Appellate Division abused its discretion when it dismissed Ventura's appeal on the ground that he was unavailable to obey the court's mandate.

II.

The majority's decision seems to be motivated, at least in part, by a suspicion that the Appellate Divisions have interpreted Diaz to endorse the dismissal of the criminal appeals

of involuntarily deported noncitizen defendants on unavailability grounds in all cases, without exception. To the extent this is so (and I do not see evidence of it), the proper corrective for blanket dismissals is not a rule requiring the blanket denial of dismissals, which is what the majority has created. Criminal Procedure Law § 470.60 sets the standard: the Appellate Division possesses discretion to consider dismissal motions on their individual merits, subject to our review for legal error or abuse of discretion. Even assuming that we may properly curb the Appellate Division's discretion in a way that section 470.60 does not, this would seem to be very poor policy: especially in an era of increasing caseloads and fiscal constraints, the Appellate Division should be able to decide not to spend its time on an appeal whose outcome would have no practical effect because the defendant has been deported from this country and enjoys no discernible prospects for reentry.

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For Case No. 160: Order reversed and case remitted to the Appellate Division, Second Department, for consideration of the merits of the appeal taken to that court. Opinion by Judge Jones. Chief Judge Lippman and Judges Ciparick and Smith concur. Judge Read dissents and votes to affirm in an opinion in which Judges Graffeo and Pigott concur.

For Case No. 161: Order reversed and case remitted to the Appellate Division, Second Department, for consideration of the merits of the appeal taken to that court. Opinion by Judge Jones. Chief Judge Lippman and Judges Ciparick and Smith concur. Judge Read concurs in result in an opinion in which Judges Graffeo and Pigott concur.

Decided October 25, 2011