State of New York Court of Appeals

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To be argued Thursday, October 23, 2014

No. 204 People v Kelvin Spears *(papers sealed)*

Kelvin Spears was charged with first-degree sexual abuse, a class D felony, for allegedly subjecting a girl under the age of eleven to sexual contact at his home in Rochester in December 2008. At his arraignment on February 6, 2009, bail was set at $10,000 and he remained in jail for more than three months. On May 19, 2009, when the prosecutor failed to appear for a suppression hearing, Supreme Court adjourned it and the hearing was never held. At his third appearance, on May 22, the prosecutor offered a plea bargain in which Spears would plead guilty to a misdemeanor charge of second-degree sexual abuse in return for his immediate release and a sentence of six years of probation. Spears accepted the offer after discussing it with his attorney and his girlfriend. In the plea colloquy, he admitted that he touched the girl's vagina through her clothing, but did not say whether it was accidental or for the purpose of sexual gratification.

At his sentencing on July 31, 2009, defense counsel sought an adjournment to discuss a potential motion to vacate the plea. The court denied the motion, then asked if there was any reason sentence should not be imposed. Spears replied, "Um -- yes. I want an adjournment so I can look at my legal options. This is a very big decision at this point in time. I was unable to contact [defense counsel] here to address some of these things." The court said, "Based on what you've said and the statement that you made when you pled guilty, your request is denied." When defense counsel again sought an adjournment, the court said counsel and Spears "had an opportunity to tell me the basis for the request. Nothing has been said except that it was a big decision. Not enough." The court imposed the promised sentence.

The Appellate Division, Fourth Department affirmed. It said Supreme Court's "single reference to the right to appeal is insufficient to establish that the court engaged the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice...," but it found "the court did not abuse its discretion in denying his request for an adjournment at sentencing.... Additionally, defendant failed to preserve for our review his contention that the plea colloquy was factually insufficient inasmuch as he failed to move to withdraw his plea of guilty or to vacate the judgment of conviction on that ground...."

Spears argues, "[T]he basic fundamental right to the assistance of counsel was at stake and a brief adjournment -- even one or two days -- would have served to protect that right and allow Mr. Spears to proceed with a motion to withdraw his guilty plea with the guidance and assistance of counsel. Because there was no overriding competing interest at stake, nor prejudice to the People, the court's refusal to grant the adjournment was an abuse of discretion as a matter of law (see People v Spears, 64 NY2d 698)."

For appellant Spears: Janet C. Somes, Rochester (585) 753-4329
For respondent: Monroe County Assistant District Attorney Erin Tubbs (585) 753-4535

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To be argued Thursday, October 23, 2014

No. 206 People v Terrell Allen (*papers sealed)*

Terrell Allen, convicted of murder and attempted murder, argues the attempted murder charge was duplicitous because it encompassed two separate offenses, or the murder and attempted murder counts were multiplicitous because they were based on a single continuing course of conduct.

Allen and an accomplice were charged with fatally shooting Kevin Macklin in front of his Queens home in June 2008. Witnesses testified that Allen fired a shot at Macklin, but missed, then fired again and struck him in the head. The prosecution also presented evidence that Allen, during an encounter on the street ten minutes earlier, tried to shoot Macklin from behind, but the gun jammed and did not fire. The first count of the indictment charged both defendants with second-degree murder, alleging they "caused the death of Kevin Macklin, by luring him off the front steps of his home and shooting him." The second count charged Allen alone with second-degree attempted murder, alleging he "attempted to cause the death of Kevin Macklin by discharging a loaded firearm at and in his direction" on the same date, but it did not specify the time or place where the incident occurred.

Before trial, Allen moved to dismiss the murder and attempted murder counts as multiplicitous, arguing that both were based on the two shots fired at Macklin's home and, therefore, the counts "encompass either the same conduct or a single continuing offense." Supreme Court denied the motion. Allen was convicted of all counts and was sentenced to consecutive terms of 25 years to life for murder and 25 years for attempted murder.

The Appellate Division, Second Department modified by directing that the sentences run concurrently, and otherwise affirmed. "'An indictment is duplicitous when a single count charges more than one offense'.... In contrast, an indictment is multiplicitous 'when a single offense is charged in more than one count'...," the court said. "Here, the murder and attempted murder counts of the indictment were not multiplicitous.... Furthermore, the defendant's contention that the evidence at trial impermissibly resulted in his conviction on duplicitous counts is unpreserved for appellate review...." It said the trial court erred in denying Allen's motion to suppress a lineup identification, but found the error harmless.

Allen argues the attempted murder count was duplicitous because neither the prosecutor nor the trial court made clear whether it was based on the first encounter with Macklin, when the gun failed to discharge, or on the second encounter at Macklin's house, when the gunman fired and missed, then fired the fatal shot. "Because some jurors may have convicted based upon the first encounter and some the second, the verdict is duplicitous...." He says, "Where duplicity of a count is not apparent on the face of the indictment, but only develops at trial, the error implicates the mode of proceedings and does not need to be preserved for appellate review. In such a situation, the defendant is not given any pre-trial notice of a second theory, and hence cannot adequately prepare his defense."

For appellant Allen: Angie Louie, Manhattan (212) 577-3415
For respondent: Queens Assistant District Attorney Nancy Fitzpatrick Talcott (718) 286-6696

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To be argued Thursday, October 23, 2014

No. 207 D.T. v Rich (*papers sealed)*

The Ulster County Department of Social Services placed D.T., a neglected 13-year-old girl, at a residential facility operated by Saint Cabrini Home, Inc., in the Town of Esopus. In January 2007, D.T. left her cottage at the facility without permission at about 10 p.m. and walked to nearby Route 9W. A staff member saw her leave and tried to follow her while notifying others. Several staff members and the on-duty administrator found D.T. on the shoulder of Route 9W, but she refused their requests to return with them and moved away when they approached her. After staff members tried and failed to block her path, they watched as D.T. crossed the road twice and then walked to the middle of the road, where she stayed for one to five minutes before she was struck by a vehicle driven by Irwin Rich.

D.T. brought this personal injury action against Saint Cabrini as well as the driver, alleging the facility failed to provide proper supervision. Supreme Court granted Saint Cabrini's motion for summary judgment dismissing the complaint against it.

The Appellate Division, Third Department affirmed on a 3-2 vote. "In a group home such as defendant's where the institution is essentially stepping into the shoes of the missing parent, the institution has a duty to provide the degree of care and supervision that a reasonable parent would provide...," the court said. "Plaintiff had previously made unauthorized exits, but she had willingly returned without incident or injury.... Defendant presented proof that its staff followed established protocols by monitoring plaintiff's movements and calmly talking to her so as to minimize the possibility of the situation escalating.... In her brief, plaintiff speculates that defendant's employees should have physically removed her from the road but, shortly thereafter, indicates that the employees should have stayed farther away from her. However, our review of the record reveals no proof that defendant's protocols were deficient or that defendant acted improperly."

The dissenters argued that D.T. was entitled to a trial. "The question of reasonableness is almost always one for the jury..., and we find no basis to depart from that general rule here.... [W]e are of the opinion that there is a factual issue as to whether the actions of defendant's employees were reasonable and whether a parent of ordinary prudence in similar circumstances would have employed more aggressive or different means to protect plaintiff. It is simply not enough for defendant to demonstrate that its staff followed established protocols in the absence of any evidence that such protocols were reasonable and appropriate under the circumstances. For example, defendant has offered no evidence to show how its protocols were developed or the basis for adopting them. In the absence of any independent criterion against which to assess the reasonableness of defendant's protocols, we disagree with the majority's conclusion that the burden ever shifted to plaintiff to prove otherwise."

For appellant D.T.: Derek J. Spada, Kingston (845) 338-8884
For respondent Saint Cabrini Home: Barbara D. Goldberg, Manhattan (212) 697-3122

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To be argued Thursday, October 23, 2014

No. 208 People v Julian Silva
No. 209 People v Pamela Hanson

These defendants -- in otherwise unrelated cases -- argue they were deprived of a fair trial by Supreme Court's failure to disclose and respond to jury notes requesting read-backs during deliberations. In both cases, the notes were marked as court exhibits about an hour before the jury announced it had reached a verdict, but the notes are not mentioned in the trial transcripts.

Julian Silva was charged with selling a kilogram of cocaine to a drug ring operating at the Dyckman Houses in Manhattan in 2008. At trial, the jury sent a note, marked "Court Exhibit No. 2" at 10:30 a.m., which said, "We the jury request the wire transcript mentioning the gun. And judge['s] instructions on count #3 -- weapon possession." The jury's next note, at 11:40 a.m., said, "We have reached a verdict on all counts." This was the only note mentioned on the record, when the trial court read it aloud. Silva was convicted of first-degree criminal sale of a controlled substance and lesser charges and was sentenced to 24 years in prison.

Pamela Hanson was charged with fatally stabbing David Diaz in a Brooklyn hotel room in 2007 and stealing his wallet. The jury sent a note, marked Court Exhibit No. 3 at 1:04 p.m., which said, "Crime Scene Pictures and Lineup." Another note, marked Court Exhibit No. 4 at 1:05 p.m., said, "First Det. Statement." A third note, marked Court Exhibit No. 5 at 1:21 p.m., said, "To clear up the first note, we would like to hear Det. Moss direct examination." At 2:12 p.m., a final note informed the court, "We reached a verdict." The judge announced that the jury had reached a verdict, but made no mention of the prior notes on the record. Hanson was convicted of second-degree murder and larceny and was sentenced to 23 years to life.

The Appellate Division affirmed, the First Department in Silva and the Second Department in Hanson, rejecting defense claims that the trial courts violated People v O'Rama (78 NY2d 270 [1991] and CPL 310.30 by failing to read the notes into the record, discuss their contents with counsel, or respond to the jurors' requests. Both panels said the claim was not reviewable because there was no evidence the trial judges actually received the notes. The First Department said, "The record is insufficient to establish any basis for reversal regarding a jury note that was marked as an exhibit, because the note did not result in a response by the court or any other mention in the transcript. Indeed, on this record, it is impossible to determine if the note was presented to the judge or if the jury reached a verdict without the judge being aware they had submitted the note."

The defendants argue the trial judges committed mode of proceedings errors under O'Rama by failing to notify counsel of the requested read-backs and failing to respond in any way to the requests, and they say the Appellate Division's analysis is illogical. Silva says "it was the trial court's very failure to address the note ... that *caused* the lack of mention of the note in the record. In other words, the 'lack of an adequate record' *is itself* the error; it was the court's responsibility to *make* that record, and it failed to do so." They also argue that defense counsel cannot make a record of a note they do not know exists.

No. 208 For appellant Silva: John R. Lewis, Sleepy Hollow (914) 332-8629
For respondent: Manhattan Assistant District Attorney Susan Axelrod (212) 335-9000
No. 209 For appellant Hanson: Steven R. Bernhard, Manhattan (212) 693-0085
For respondent: Brooklyn Assistant District Attorney Rhea A. Grob (718) 250-2480