Criminal Procedure Case Law Update 2021-22

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Instructor(s): Robert G. Bogle, Esq.
MCLE: 1.0 Law Practice Management

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Hon. Robert G. Bogle
Acting New York State Supreme Court Justice

Robert G. Bogle is a Nassau County Court Judge and Acting New York State Supreme Court Justice. He is also the Supervising Judge of the Nassau County Town and Village Courts. He is an Adjunct Professor of Criminal Justice for graduate and undergraduate students at the C.W. Post Campus of Long Island University. He is a member of the New York State Advisory Committee on Judicial Ethics and is a lecturer for the Judicial Education Program for the Office of Court Administration. Judge Bogle has published numerous articles and court decisions in the field of Criminal Court Practice. He is the Co-Author of "Village, Towns and District Courts in New York" by Thomson Reuters. He is the author of "Criminal Procedure in New York" (4 volumes) and is Directing Editor of "McKinney's Forms Criminal Procedure Law"(4 volumes), both published by Thomson Reuters. He served as Valley Stream Village Justice (1986-2016) and Acting Long Beach City Court Judge (1996-2015), as well as President of the New York State Magistrates Association (2004-2005) and President of the Nassau County Magistrates Association (1995-96). In 2006, he received the New York State Magistrate of the Year Award and in 2008 he received the Frank Santagata Bar Association Award for service to the Nassau County Courts.

He has also served as Chief Court Attorney for the Nassau County Court Law Dept. (1999-2015), Law Secretary to the Hon. Ira H. Wexner, Supervising Judge of the Nassau County District and County Courts (1988-1999) and Deputy Nassau County Attorney for the Appeals and Major Litigation Bureaus (1983-1988). He is a graduate of Hofstra University School of Law and Niagara University (BA Cum Laude) and attended Cornell University and George Washington University. He has two sons, James and Robert and is married to his wife Kathleen.

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Past President,
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NYS Magistrates Conference
Fall 2022

Bail Reform Cases
The TOP (and only) 10 Cases

1) People v. Steininger, 66 Misc.3d 693, 117 NYS3d 512 (Sup. Ct. NY Co. 2019). A defendant, on consent of counsel, can waive the statute and have bail imposed for a non-qualifying offense.

2) People ex rel. Sara Molinaro, on behalf of Wei Li v. Warden, Rikers Island, 195 AD3d 885, 150 NYS3d 123 (App. Div. 2nd Dept. 2021). A defendant who is entitled to release under the Bail Reform Law cannot be jailed pending his examination under Article 730, but can remain confined at the hospital where the examination is taking place, and must be released at the conclusion of the examination CPL 730.20 (3).

3) People v. Keitt, 71 Misc.3d 539, 142 Nys3d 328 (Co. Ct. Sullivan Co. 2021), monetary bail can be imposed on a non-qualifying offense if in the facts of the case the "crime that is alleged caused the death of another person" CPL 510.10 (H)(j). Defendant was charged with Criminal Possession of a Controlled Substance in the Third Degree. Here, the victim allegedly died from a drug overdose from illegal drugs provided by the defendant.

4) People v. Johnston, 67 Misc.3d 2167, 121 NYS3d 836 (City Ct., Cohoes 2020) City Court Judge held that the Bail Reform Law (CPL 530.20/CPL 510.10[3]) is a violation of the separation of powers and is unconstitutional as applied to the case at bar, where a non-qualifying offense (VTL 511.[2][a])a Class A misdemeanor) requires bail as the court finds it is the least restriction condition to ensure defendant's return to court.

5) People v. Chensky, 67 Misc.3d 373, 120 NYS3d 621 (Sup. Ct., Nassau Co. 2020), where the defendant failed to appear in court

twice and did not voluntarily respond to an active Bench Warrant, the defendant was classified as "persistently failed to appear" and therefore bail can be imposed on a non-qualifying offense.

6) People v. Browne, 71 Misc.3d 978, 146 NYS3d 480 (Sup. Ct., NY Co. 2021). Where defendant failed to appear, Bench Warrant issued and then involuntarily returned to court three and one half years later, defendant was declared a person who persistently failed to appear and bail could be imposed on a non-qualifying offense.

7) People v. Brown, 69 Misc.3d 259, 129 NYS3d 298 (Co. Ct. Orange Co. 2020). Defendant was charged with Criminal Possession of a Controlled Substance in the Second and Third Degree and ROR'd on March 23, 2020, only to be arrested on the same charge for a subsequent criminal event on July 15, 2020. To revoke ROR and have bail imposed, the Court took testimony from several police officers on the scene of July 15, 2020 by way of a preliminary hearing. The Court found it had reasonable cause as to both the first underlying felony (Indictment) and the court testimony as to the subsequent felony, and bail can be imposed.

8) People v. Franklin, 72 Misc.3d 537, 149 NYS3d 778 (Crim. Ct. Bronx Co. 2021). No specific evidence is required and needed to determine reasonable cause. The defendant committed both the underlying and subsequent felonies. A complaint by the arresting officer was insufficient, but testimony is not required either. Affirmations, admissions, documents and prior testimony are just a few examples that are satisfactory to allow bail on a non-qualifying offense.

9) People v. Dismile, 71 Misc.3d 331, 142 NYS3d 319 (Co. Ct. Sullivan Co. 2021), reasonable cause was satisfied by the underlying charge (defendant plead guilty) and the subsequent charge (Indictment/ Grand Jury minutes) plus multiple bench warrants.

10) People v. Garcia, 67 Misc.3d 511, 121 NYS3d 565 (Crim. Ct. NY Co. 2020), where a defendant was ROR'd after a guilty plea and therefore arraigned on two separate occasions for two additional sets of crimes, the judge imposed bail where one of the subsequent crimes was a qualifying offense (Forcible Touching) and the court further held there was no requirement for a hearing, only the usual statutory considerations such as the likelihood of not returning to court.

New York Criminal Jurisdiction

In People v. Viviani, 36 NY3d 564—, — NYS3d— (2021), the Court of Appeals noted that as part of the Protection of People with Special Needs Act, the Legislature enacted Executive Law § 552, which created a special prosecutor, appointed by the Governor, empowered to investigate and prosecute crimes of abuse or neglect of vulnerable victims in facilities operated, licensed, or certified by the State. The special prosecutor, a ting pursuant to this statutory authority, obtained indictments against the three defendants in these cases before the court of Appeals. Defendants asserted that the stature was an unconstitutional delegation of core prosecutorial authority away from the County District Attorneys-elected constitutional officers-to an unelected appointee of the Governor. The Attorney General, intervening pursuant to Executive Law § 71, argued for a "saving construction" that would have us read into the law certain conditions on the special prosecutor's authority". "The Courts said we recognize that this well-intentioned legislation was aimed at protecting a particularly vulnerable class of victims. But we cannot rewrite a statute in order to save it." Accordingly, the Court held that the provisions of Executive Law § 552 creating a special prosecutor with authority concurrent with that of the District Attorneys to be unconstitutional and affirm the dismissal of the indictments.

Reasonable Cause

In People v. Balkman, 35 NY3d 556, 134 NYS3d 321 (2020), the Court of Appeals held that the People failed to establish, at the suppression hearing, that police officer had reasonable suspicion to justify stopping vehicle in which defendant was a passenger, based solely on officer's patrol car's mobile data terminal notification that there was a "similarity hit" indicating that something was similar about the registered owner of the vehicle and a person with an outstanding warrant, by not presenting evidence about the content of the "similarity hit," namely what particular data of the registered owner of the vehicle and the person with the warrant matched, and what kinds of data matches, in general, resulted in "similarity hits". Without such evidence, the suppression court could not independently evaluate whether the officer had reasonable suspicion to make the stop.

The Court concluded that while information generated by running a license-plate number through a government database may provide police with reasonable suspicion to stop a vehicle, the information's sufficiency to establish reasonable suspicion is not presumed.

Simplified Information

In People v. Epakchi, 37NY3d 39, 146NYS3d 561 2021(2021), the Court of Appeals held that reprosecution on "superseding" simplified traffic information charging defendant with failure to stop at stop sign was not barred due to People's failure to demonstrate special circumstances following dismissal of original simplified information which charged the same offense which has facially insufficient for People's failure to timely serve the defendant's requested supporting deposition of police officer who issued ticket. The Court held that the procedural rule crafted by Appellate Term barring reprosecution in such cases erects an extra-statutory barrier to reprosecution that contravened Criminal Procedure Law §§ 100.25 (2); 100.40; 170.30.

The Court concluded that the Appellate Term lacked authority to create a procedural rule requiring special circumstances for renewed prosecution of traffic offense after previous dismissal for failure to provide a requested supporting deposition. CPL §§ 100.40, 170.30.

Defective Accusatory Instrument

In People v. Hardy, 35 NY3d 466, 132 NYS3d 394 (2020), the Court of Appeals held the trial court lacked the authority to amend a date listed in misdemeanor information. The Criminal Procedure Law (C.P.L.) expressly stated which amendments to complaints and information were permissible under certain situations, but, it authorized date, time and place amendments for only a select subset of accusatory instruments, and the C.P.L. did not permit factual amendments for time, place or names for complaints and information, as it had for prosecutor's and superior court informations. C.P.L. § 200.70.

The Court added that in evaluating the sufficiency of an accusatory instrument the Court of Appeals does not look beyond its four corners. And the court concluded that the defendant's challenge to the validity of the amendment to an erroneous fact contained in the misdemeanor information presented a nonwaivable jurisdictional issue reviewable by the Court of Appeals on appeal, and thus the issue was not waived when defendant entered a guilty plea to criminal contempt.

Criteria to be Applied - Bail

In People v. Chensky, 67 Misc3d 373, 120 NYS3d 621 (Nassau Co., Sup. 2020), the trial court grappled with the status of bail under the Bail Reform Law of 2019,

when the defendant was charged with a non-qualifying bail offense. Here, the Court held that in determining whether a defendant charged with non-qualifying offenses persistently and willfully failed to appear before court, as is required for court to set bail, an appropriate definition for "willfully" is construed as a conscious disregard.

Defendant was charged with Grand Larceny in the Fourth Degree, which was non-qualifying offense, and willfully failed to appear in court, as such required the trial court to set bail, where defendant, even after being advised on the seriousness of his legal responsibility to appear in court and notified by defense counsel, missed his court date on three separate occasions.

Failure of defendant to appear in court, after being charged with non-qualifying offense of Grand Larceny in the Fourth Degree, was persistent, as was required for court to set bail, where defendant failed to appear for three scheduled court dates, even after issuance of bench warrant for his arrest. C.P.L. § 530.60 (2)(b)(1).

Duty of the Court - Guilty Pleas

In People v. Bisono, (et. al.), 36 NY3d 1013, 140 NYS3d 433 (2020), the Court of Appeals held that defendants in ten separate cases did not comprehend the nature and consequences of their waiver of appellate rights, and thus waivers were invalid and unenforceable. The rights encompassed by waivers were mischaracterized during oral colloquy and in written forms executed by defendants, which indicated waiver was absolute bar to direct appeal, failed to signal that any issues survived the waiver, and, in certain cases, advised that waiver encompassed collateral relief on certain nonwaivable issues in both state and federal courts.

The court concluded that a waiver of the right to appeal is not an absolute bar to the taking of a first-tier direct appeal.

Bench Warrant

In People v. Duval, 36 NY3d 384, 141 NYS3d 439 (2021), the Court of Appeals held that a search warrant's description of place to be searched satisfied particularity requirement of the Fourth Amendment, and, thus, the search warrant was valid when issued, where description of targeted premises, as a single residence and not a multi-unit building, at marked street address matched facts available to detective who provided affidavit in support of search warrant, as well as facts

presented to the warrant court. Defendant, alleged that the building identified as target premises in warrant actually comprised multiple residences, but failed to show that the building's outward appearance indicated that it was not a single-family residence, given that it had one street address, one front door, and one side door.

The Court added that the trial court was within its discretion in denying defendant's motion to suppress evidence without holding an evidentiary hearing, although defendant argued that the search warrant was invalid under the Fourth Amendment's particularity requirement because building identified as target premises actually comprised multiple residences. Defendant's allegations and factual showing were insufficient to require a hearing, since they did not show that identified building was divided into three separate residential units or that defendant lacked access to certain portions of building. [See, C.P.L. §§ 710.60(1), 710.60(3)].

Traffic Offense Arrest and Search

In People v. Hinshaw, 35 NY3d 427, 132 NYS3d 90(2020), the Court of Appeals reversed a divided fourth department ruling [170 AD3d 16890 (4th Dept. 2019)] on the conclusion that the police lacked an objectively reasonable suspicion to stop the defendant's car for traffic infraction based upon a radio inquiry undertaken with no proof of any traffic infraction or criminality but merely because the vehicle in which defendant was traveling was indicated as having been in an impound yard. Thus, a trooper in Buffalo "observed no traffic violations and saw that the inspection sticker was valid, both of the occupants were wearing their seatbelts and "everything looked good," but the trooper thereafter ran a check of the car that resulted in a response, "THE FOLLOWING HS BEEN REPORTED AS AN IMPOUND VEHICLE - IT SHOULD NOT BE TREATED AS A STOLEN VEHICLE HIT - NO FURTHER ACTION SHOULD BE TAKEN BASED SOLELY UPON THIS IMPOUNDED NOTICE." The trooper then directed the operator to stop in order to "investigate further and find out what the problem was" and as he later testified at the suppression hearing, on his consideration of the notice as "indicating the car may have been stolen".

The driver-defendant provided his license and registration and both were in order. When the trooper asked about the impound notification, the defendant stated that the car had been stolen previously. The trooper detected an odor of marijuana and observed a "roach" in the center console. The trooper then searched the driver and the passenger of the vehicle and found additional marijuana on the floor of the passenger side and the defendant's waistband. The

trooper eventually found a loaded gun under the driver's seat. The majority of the court held that there was insufficient reasonable suspicion, as required. To stop the car for investigative purposes, while also noting that has been held by all four appellate divisions, probable cause is required to stop a car for a traffic infraction with traffic stops sobriety checks permitted without suspicion. In so ruling the majority noted that notwithstanding all other facts present, the trooper candidly conceded at the suppression hearing he had not reason to stop defendant, "quoting People v. Ingle, 36 NY2d 413,412 (1975) and that the trooper's subjective belief that the impound was based on some illegality, even honestly held, was insufficient.

Good Faith Exception to Exclusiory Rule

In People v. Pena, 36 NY3d 978, 139 NYS3d 70 (2020), a police officer stopped defendant's car because of a non-functioning center brake light. Defendant, who exhibited signs of intoxication, was given - and - failed a field sobriety test. Defendant was arrested and charged with operating a motor vehicle while impaired (Vehicle and Traffic Law § 1192 [1])and two counts of operating a motor vehicle while intoxicated (Vehicle and Traffic Law § 1192[2],[3]).

Defendant moved to suppress the evidence obtained as a result of the stop, asserting that the officer lacked probable cause to justify the seizure because, the defendant argued, "operat[ing] a vehicle that has a non-illuminated middle brake light" is not a violation of the Vehicle and Traffic Law. At the suppression hearing, relying on the United States Supreme Court's opinion in Heien v. North Carolina, 574 U.S. 54, 135 S. Ct. 530,190 L.Ed.2d 475 (2014), the People argued that the officer's belief that defendant was violating the law was "a reasonable mistake in this situation," rendering the stop permissible under the Fourth Amendment. The Judicial Hearing Officer determined that there was no ambiguity in the Vehicle and Traffic Law, and concluded that it was not "objectively reasonable for the officer in this case to mistakenly believe that a non-functioning middle brake light is a violation of the vehicle and traffic law." The suppression court adopted the Judicial Hearing Officer's finding of fact and legal conclusions in full and granted defendant's motion, and the Appellate Term affirmed.

The sole issue before the Court of Appeals is whether the officer's belief that the defendant violated the Vehicle and Traffic Law by operating a vehicle with a non-functioning center stop light was objectively reasonable (see People v. Guthrie, 25 NY3d 130,136, 8 NYS3d 237, 30 N.E.3d 880 [2015] ["the relevant question before us is... whether (the officer's) belief that a traffic violation had occurred was objectively reasonable"]; see also Heien, 574 U.S. At 59,61 135, S. Ct. 530) The "ultimate touchstone of the Fourth Amendment is reasonableness" (Riley v. California, 573 U.S. 373,381,134 S. Ct. 2473, 189 L.Ed.2d 430 [2014]. As the Supreme

Court explained in Heien, "[t]o be reasonable is not to be perfect, and so the Fourth Amendment allows for some mistakes on the part of government officials, giving them 'fair leeway for enforcing the law in the community's protection'" (574 U.S. at 60-61, 135 S. Ct. 530, quoting Brinegar v. United States, 338 U.S. 160,176,69 S. Ct. 1302,93 L.Ed. 1879[1949]). Accordingly, even assuming that a stop is premised upon a mistake of law, the stop may nonetheless be lawful where the officer's purported mistake was objectively reasonable (id. At 61,135 S. Ct. 530; People v. Guthrie, 25 NY3d 130,136, 8 NYS3d 237, 30 N.E.3d 880 [2015]).

The Court of Appeals held that the officer's interpretation of the Vehicle and Traffic Law was objectively reasonable. Vehicle and Traffic Law § 375(40)(b) mandates that motor vehicles manufactured after a certain date be "equipped with at least two stop lamps, one on each side, each of which shall display a read to amber light visible at least five hundred feet from the rear of the vehicle when the brake of such vehicle is applied."

Vehicle and Traffic Law § 375(19), in turn, prohibits the operation of a motor vehicle on highways or streets if the vehicle "is defectively equipped and lighted." Taken together, these provision could reasonably be read to require that all lamps and signaling devices be in good working condition, and that all equipment and lighting be non-defective, regardless of whether a vehicle is actually required to be equipped with those lamps, signaling devices, equipment, or lights. Even assuming the officer was in fact mistaken on the law, it was nevertheless objectively reasonable to conclude that defendant's non-functioning center brake light violated the Vehicle and Traffic Law. Because any error of law by the officer was reasonable, there was probable cause justifying the stop. The Court of Appeals revised the trial and the Appellate Term accordingly.

Property Subject to Search and Seizure - Search Warrant

In People v. Gordon, 36 NY3d 420, 142 NYS3d 440 (2021), the Court of Appeals held that a search warrant application failed to establish probable cause for police officers to search two vehicles located outside surveilled residence and, thus, suppression of physical evidence seized from vehicle was appropriate. The search warrant application and its supporting affidavits sought a warrant to search suspect and "the entire premises" from which he was seen emerging, but contained no mention of existence of vehicles ultimately searched, much less evidence connecting the vehicles to any criminality. The Court reiterated the long standing constitutional rule that the permissible scope of a search warrant is carefully limited by the requirement for probable cause and a particular description of the subjects to be searched. U.S. const. Amend. 4; N.Y. Const. Art. 1 § 12; C.P.L. § 690.15(1).

Speedy Trial - General Interpretation

In People v. Ramlall, 34 NY3d 1154, 119 NYS 769 (2020), the Court of Appeals affirmed the Appellate Term, noting that the "Defendant argues that the lengthy delay of his prosecution for the traffic infraction of driving while ability impaired (Vehicle and Traffic Law § 1192[1]) violated his constitutional right to a speedy trial (see People v. Taranovich, 37 NY2d 442, 373 NYS2d 79, 335 N.Ed.2d 303 [1975]; C.P.L. 30:20). Though a close case, the Court concluded that, after balancing the relevant factors, defendant's claims do not rise to the level of a constitutional violation" said the Court.

Also, the Court added, "The People's argument that the constitutional right to a speedy trial does not apply to traffic and infractions is unpreserved for our review."

Conduct of Trial Court

In People v. Battick, 35 NY3d 561, 135 NYS3d 34 (2020), the Court of Appeals held that the trial court's measured response to a sworn juror's outburst in open court, when defense counsel's repeated use of a racial slur in an attempt to provoke the state witness caused juror to exclaim that she found the slur extremely offensive, in not conducting a *Buford* inquiry, 514 NYS2d 191, but instead admonishing the juror for her disruptive outburst and instructing the jurors as a group that they should report to the court if they could not remain fair and impartial, was not abuse of discretion. The Court added that there was no indication that juror's ability to maintain her sworn oath to render an impartial verdict was hampered by exposure to any facts outside the four corners of the evidence, and thus no probing *Buford* inquiry was required.

In People v. J.L., 36 NY3d 112, 139 NYS3d 103 (2020), the Court of Appeals ruled that evidence required the trial court to instruct jury on voluntary possession, in defendant's trial for third-degree criminal possession of a weapon, even though defendant's primary defense was that he lacked constructive possession of a gun found in a bedroom that he rented in someone else's house. The evidence could have supported a finding that the defendant had constructive possession and that the possession of a gun was knowing once he saw a gun while looking for towel in frantic moments after being shot in neck inside home, but that his possession was not voluntary, given that it lasted for only the brief period between when he ran into the bedroom and saw the gun in the dresser and when he left the bedroom. NY Penal Law § 265.02.

The Court further noted that if, on any reasonable view of the evidence, the fact finder might have decided in defendant's favor had it heard the requested jury instruction, the failure to charge constitutes reversible error. C.P.L. § 300.10 (2).

Jury Conduct

In People v. Williams, 36 NY3d 156, 139 NYS3d 594 (2020), the trial court's credibility determinations as to juror's claim that she had been threatened prior to deliberations found support in record and thus the Court of Appeals would uphold the denial of motion to set aside verdict finding defendant guilty of criminal possession of a weapon. The trial court had the opportunity to evaluate juror's demeanor and credibility, and court thoroughly explained its basis for discrediting the juror's allegations, including location at which threat was purportedly made, nature of threat, manner in which allegations were reported, and juror's refusal to cooperate with authorities attempting to investigate alleged threat. C.P.L. § 330.30(2).

The Court of Appeals further noted that, trial courts are vested with discretion in deciding motions to set aside verdicts based on improper conduct by or in relation to a juror, and an Appellate Court will uphold a trial court's undisturbed findings of fact if they are supported by evidence in the record. C.P.L. § 330.30(2).

Departure from Presumptive Risk Level - SORA

In People v. Del Rosario, 36 NY3d 964, 137 NYS3d 288 (2020), the Court of Appeals held that it was not an abuse of discretion for the Appellate Division to sustain the upward departure based on the People's proof that defendant raped the victim in order to take revenge upon someone other than the victim- a risk factor not adequately captured by the Sex Offender Registration Act: Risk Assessment Guidelines and Commentary.

Prosecutor's Failure to Disclose Brady Materials

In People v. McGhee, 36 NY3d 1063, 142 NYS3d 863 (2021), the Court of Appeals held that the State's failure to disclose a witness statement at issue in trial for murder and criminal possession of a weapon did not undermine fairness of defendant's trial or impact the jury's verdict. The undisclosed witness's description of shooter and his flight path did not differ in any material respect from that of eyewitness who identified defendant in court as perpetrator. The jury's verdict was supported by considerable other evidence, including testimony of cooperating

witness who planned crime with defendant, testimony by spouse of cooperating witness confirming defendant's involvement, and testimony of additional witnesses who described perpetrator's clothing and his movement following the shooting.

The Court concluded that the defendant failed to show that prejudice arose, as element of a Brady claim. Also, there was no reasonable possibility that witness's statement supported an alternative theory of defense, and defendant failed to demonstrate any likelihood that statement would have led to additional admissible evidence.