State of New York Court of Appeals

Summaries of cases before the Court of Appeals are prepared by the Public Information Office for background purposes only. The summaries are based on briefs filed with the Court. For further information contact Gary Spencer at (518) 455-7711.

To be argued Tuesday, October 20, 2015

No. 166 People v Everett M. Durant

Everett Durant was charged with robbing Emmett Hunter in 2008, when a half-dozen teenagers set upon him as he was walking on North Clinton Avenue in Rochester. Hunter said Durant stole his wallet and put him in a choke hold while the others beat him. Police officers arrested Durant a short distance away and took him to the east side police station, where he waived his Miranda rights. The Police Department had video recording equipment at the city's Public Safety Building, but not at the east side station, where an investigator wrote down Durant's statement and Durant signed it. In the statement, he said he was walking home and watched as "'Little C' and his brothers jumped this guy." Durant admitted that he punched and kicked Hunter, but said, "I did not take any property from this man."

At trial, Durant's attorney asked County Court to give the jury an adverse inference charge to address the failure of the police to videotape his statement when they had the ability to record it. The proposed instruction would have said, in part, "Where there is a failure to electronically record an interrogation and statement, you have not been provided with a complete picture of all the facts surrounding the defendant's interrogation and the precise details of any statement.... Therefore, you should weigh the evidence of the defendant's alleged statement with great caution as you determine whether or not the statement was actually and voluntarily made and, if so, whether it was accurately reported by the State's witnesses." The court denied the request. Durant was convicted of second-degree robbery and sentenced to five years in prison.

The Appellate Division, Fourth Department affirmed. It said County Court "properly denied [defendant's] request for an adverse inference charge concerning the failure of the police to record his interrogation electronically...."

Durant argues, "[W]here the police have the ability to record an interrogation but do not, that defendant is entitled to an instruction ... advising the jury that the failure to record is a factor it may consider in determining whether the statement was actually and voluntarily made" and the police testimony accurate. Saying false confessions "are now recognized as a leading source of wrongful convictions," he argues, "When police fail to record the interrogation, what is put before the fact finder is ... not what transpired during the interrogation, but the police version of what transpired, which is incomplete and subject to bias, faulty recollection, mistake, or perjury. Given the ubiquity and simplicity of recording today, it is 'natural to suppose' that the police would have produced a recording ... if they had so desired," and since they did not, "the inference that logically and naturally flows from that failure is that the recording would not have supported their claims...."

The prosecution argues that use of an adverse inference charge should be limited to cases involving destruction of evidence or failure to call an available witness, and the decision should be left to the trial court's discretion. "[T]he lack of video recording of an interrogation -- especially when, as here, it results from a broad police policy [to take only homicide suspects to the Public Safety Building] rather than from an individual officer's decision -- is unlike the missing-witness and failure-to-preserve-evidence situations. The logic by which the charge is required in those cases does not apply where law enforcement is not already in possession of the evidence...."

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For respondent: Monroe County Assistant District Attorney Geoffrey Kaeuper (585) 753-4674

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No. 167 People v Joseph Conceicao
No. 168 People v Federico Perez
No. 169 People v Javier Sanchez

In these cases, all arising in the Bronx, the defendants pled guilty to low-level offenses in return for sentences with no jail time. The common issue is whether, in entering their pleas, they knowingly and voluntarily waived their constitutional rights to a trial by jury and to confront their accusers and their Fifth Amendment privilege against self-incrimination, as required by Boykin v Alabama (395 US 238). There was no mention of these rights in the records of their plea and sentencing proceedings.

The defendants rely on People v Tyrell (22 NY3d 359 [2013]), which held that, for a plea to be valid, there must be "an affirmative showing on the record" that the defendant understood and waived his Boykin rights. The defendant in Tyrell pled guilty in two separate misdemeanor drug cases, receiving sentences of 10 days in jail and time served. The Court vacated both pleas, finding there was no indication in the records of the plea proceedings that the defendant was informed of the rights he was waiving or discussed with his attorney the constitutional consequences of taking a plea. The Court ruled the claim was reviewable, despite the defendant's failure to move to withdraw his pleas or vacate the convictions, because he was sentenced at the plea proceeding and had no opportunity to do so.

Joseph Conceicao pled guilty in 2009 to a misdemeanor drug possession charge in return for two days of community service and a conditional discharge. Before Tyrell was decided, the Appellate Term, First Department affirmed, ruling his claim was unpreserved.

Federico Perez pled guilty in 2011 to disorderly conduct, a violation, and was fined $100. Javier Sanchez pled guilty in 2012 to misdemeanor driving while intoxicated in return for a conditional discharge and $500 fine. Their attorneys waived further allocution.

The Appellate Division, First Department affirmed Perez's conviction after Tyrell, finding that "the record establishes defendant's understanding and waiver of his constitutional rights..., even though there was no discussion on the record of defendant's rights under Boykin.... 'There are, historically, certain minor transgressions which admit of summary disposition'...." The First Department reversed Sanchez's DWI conviction based on Tyrell, saying the record did not show that he was informed of his rights or discussed them with his attorney. Distinguishing Perez, it said, "Unlike disorderly conduct, [DWI] is not a petty offense. Such a conviction is a misdemeanor..., it affects a defendant's driving privileges, and it can be the basis for elevating a subsequent similar charge to a felony."

The defendants argue their pleas are invalid because their cases are indistinguishable from Tyrell. The prosecution argues the claims of Perez and Sanchez are foreclosed because their attorneys waived allocution, while the defendants say the waiver did nothing to show they understood their rights. The prosecution argues in Perez that Boykin and Tyrell do not apply to "pleas to non-criminal offenses," and argues in Conceicao that Tyrell should not apply retroactively because it "announced two new rules of state law."

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For respondent: Bronx Assistant District Attorney Eric C. Washer (718) 838-7246
No. 168 For appellant Perez: Harold V. Ferguson, Jr., Manhattan (212) 577-3548
For respondent: Bronx Assistant District Attorney Eric C. Washer (718) 838-7246
No. 169 For appellant: Bronx Assistant District Attorney Jordan K. Hummel (718) 838-7322
For respondent Sanchez: Kristina Schwarz, Manhattan (212) 577-3587

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To be argued Tuesday, October 20, 2015

No. 170 People v Abdelouahad Afilal *(some papers sealed)*

Abdelouahad Afilal was charged in a misdemeanor complaint with fifth-degree possession of marijuana in 2011, after a police officer issued him a desk appearance ticket for holding a small bag of marijuana in his hand. In his deposition in support of the complaint, the officer said that, at a location "opposite of 676 Riverside Drive in the County and State of New York," he "observed the defendant holding marijuana in a public place and open to public view." Afilal moved to dismiss the complaint for facial insufficiency, arguing that it failed to allege sufficient facts about the location to establish the public place element of the offence.

After Criminal Count denied the motion, Afilal pled guilty to the charge in return for a sentence of time served. His attorney waived "formal allocution." The court asked if he understood he would be giving up his right to a trial, but did not mention his rights to remain silent and to confront his accusers, and asked "have you had a chance to fully discuss this plea and all the possible consequences with your lawyer...?" Afilal answered "yes" to both questions.

On appeal, Afilal argued that his plea was not knowing and voluntary under People v Tyrell (22 NY3d 359) because the record did not show he understood that he was waiving all three of the rights -- to remain silent and to confrontation, as well as to a trial -- identified in Boykin v Alabama (395 US 238). He also argued the complaint was jurisdictionally defective because its description of the crime scene was insufficient to establish that it was a public place.

The Appellate Term, First Department affirmed, saying the plea was valid under Tyrell. "Under the particular circumstances of this case, we find the record sufficient to establish defendant's understanding and waiver of his Boykin rights..., and of his entry of an otherwise knowing and voluntary guilty plea. In defendant's presence, defense counsel acknowledged that defendant agreed to waive 'formal allocution,' and defendant personally confirmed ... that he was pleading guilty of his own free will and because he was in fact guilty, that he understood that he was giving up his right to a trial, and that he had 'had a chance to fully discuss this plea and all the possible consequences with [his] lawyer.'" It also "rejected defendant's jurisdictional point."

Afilal argues that, because Criminal Court "did nothing more than apprise appellant that he was giving up the right to a trial, without explaining what this meant and without advising him of any of the other fundamental constitutional rights he was waiving as a result of his guilty plea, the record, on its face, fails to demonstrate that appellant waived his rights knowingly, voluntarily and intelligently. The court failed to inform appellant that he was waiving his rights to confrontation and against self-incrimination, and nothing in the record compensates for this deficiency...." He also reasserts his jurisdictional claim.

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For respondent: Manhattan Assistant District Attorney Alan Gadlin (212) 335-9000