State of New York
Court of Appeals

MEMORANDUM

SSD 44
The People &c.,
Appellant,
v.
Marcelino Allende
Respondent.

Submitted by Brent Ferguson, for appellant.
Submitted by Megan D. Byrne, for respondent.

MEMORANDUM:

The appeal should be dismissed, by the Court sua sponte, upon the ground that the modification by the Appellate Division was not "on the law alone or upon the law and such

facts which, but for the determination of law, would not have led to . . . modification" (CPL 450.90[2][a]).

"[A]n Appellate Division reversal [or modification] based on an unpreserved error is considered an exercise of the Appellate Division's interest of justice power" (People v Riley, 19 NY3d 944, 946 [2012] adhered to on reargument 20 NY3d 980 [2012]). Moreover, the Appellate Division's characterization of its own holding (i.e., "on the law" or "on the facts") is not binding; in determining jurisdiction, we look behind that characterization to discern the basis of the ruling (see People v D'Alessandro, 13 NY3d 216, 218-219 [2009]). For example, in Riley, we dismissed the People's appeal on the ground that the Appellate Division's order of reversal was predicated on an unpreserved challenge to the legal sufficiency of the evidence (Riley, 20 NY3d 980), even though the Appellate Division stated that the verdict was "against the weight of the evidence" (85 AD3d 431, 432 [1st Dept 2011]).

Here, it is undisputed that, in vacating the first-degree robbery count (without disturbing the second-degree robbery convictions [Penal Law §§ 160.10(1), (2)(a)]), the Appellate Division relied upon an unpreserved argument concerning the proper interpretation of and minimum proof required to establish the weapon display element of the first-degree offense (see Penal Law § 160.15[4]). As we have repeatedly recognized, for jurisdictional purposes an unpreserved issue of this nature does not present a question of law. Thus, the Appellate Division determination – the basis of the order of modification -- was not "on the law alone" but was necessarily made as a matter of discretion in the

interest of justice (see Riley, 19 NY3d at 946-947; People v Fava, 58 NY2d 807 [1983]; People v Johnson, 47 NY2d 124 [1979]; People v Williams, 31 NY2d 151 [1972]). The People's reliance on People v Kancharla (23 NY3d 294 [2014]) is misplaced because no threshold preservation concern was presented in that case and, as such, the dispositive legal argument underlying the Appellate Division's interrelated sufficiency and weight of the evidence determinations presented an "issue of law," resulting in an appealable order and permitting review by this Court.

People v Marcelino Allende
SSD 44

RIVERA, J. (dissenting):

The People appeal from the Appellate Division's order which modified the judgment by vacating, as against the weight of the evidence, defendant Marcelino Allende's conviction of robbery in the first degree under Penal Law § 160.15 (4) and

dismissing that count. The People claim this determination was based on the court's erroneous interpretation of section 160.15 (4) that defendant display what appeared to be a firearm to the victim, rather than, as here, to an eyewitness who intervened during the course of the robbery. The statutory interpretation issue is properly before this Court because the Appellate Division order was based on facts "which, but for the determination of law, would not have led to" the modification of the judgment of conviction (see CPL 450.90 [2] [a]). As there is no basis to dismiss this appeal for lack of jurisdiction, and given the significant import of the jurisdictional and statutory interpretation questions raised by the People, there is no justification for the majority's sua sponte disposition. I would retain the appeal, and, therefore, I dissent.

I.

The People presented evidence that defendant and codefendant attacked and robbed the victim during the early morning hours on a New York City street. The victim testified he had no recollection of the incident other than that he woke up in a hospital, injured and without his wallet. An eyewitness testified that he intervened after he saw the codefendant holding the victim and pushing him against a building. Codefendant told the eyewitness to mind his business and the victim freed himself and grabbed the eyewitness, saying he was being robbed. Defendant approached and after warning the eyewitness, defendant pulled up his jacket, showing what the eyewitness claimed was the grip and hammer of a pistol tucked into the waist of defendant's pants.

Defense counsel mounted a misidentification defense and challenged the credibility of the eyewitness, including arguing in summation that the jury should reject the eyewitness account of the attack and defendant's display of a gun because the eyewitness was tired, the area lighting was poor, and the eyewitness was biased against defendant whom the eyewitness disparaged on the stand as looking like a "pimp." For his part, in summation the prosecutor urged the jury to find the victim and eyewitness credible, and asserted, inter alia, that the display element was established beyond a reasonable doubt based on the eyewitness' lack of motive to lie, his familiarity with firearms, and his express testimony that defendant showed him a gun.

Without objection, the judge charged the jury on the first-degree robbery count, tracking New York Model Jury Instruction, Robbery in the First Degree (CJI2d[NY] Penal Law § 160.15 [4]), as follows:

> "[A] person is guilty of Robbery in the First Degree when that person forcibly steals property; and when in the course of the commission of the crime, that person or another participant in the crime displays what appears to a be a pistol, revolver, rifle, shotgun, machine gun or other firearm. . . .
>
> "In order for you to find the defendant guilty of this crime, the People are required to prove from all the evidence in the case beyond a reasonable doubt both of the following two elements: One, that on or about April 11, 2015 in the County of New York, the defendant, Marcelino Allende, personally or by acting in concert with another person, forcibly stole property from [the victim]; and two, that in the course of the commission of the crime, the defendant displayed what appeared to be a pistol, revolver, rifle shotgun, machine gun or other firearm."

The jury returned a guilty verdict against defendant on the count of robbery in the first degree and on two counts of robbery in the second degree.[1] The court sentenced defendant to concurrent terms of eight years' incarceration.

On appeal, defendant challenged the verdict as against the weight of the evidence because the People failed to prove, beyond a reasonable doubt, that defendant acted with the requisite guilty intent, acted in concert with the person who stole the wallet, and displayed what appeared to be a firearm to the victim as required by section 160.15 (4). Defendant also requested that the sentence be reduced in the interest of justice.

The Appellate Division rejected all but one basis for defendant's weight of the evidence challenge, concluding: "the evidence did not establish the element of display of what appeared to be a firearm. The robbery was accomplished by assaulting the victim and taking his wallet. Although an eyewitness saw the display of what appeared to be a firearm, there was no evidence that the victim ever saw it" (People v Allende, 168 AD3d 464, 464 [1st Dept 2019] [internal citations omitted]).[2]

[1] Codefendant pleaded guilty to one count of second-degree robbery and was sentenced to five years of incarceration.

[2] Two justices dissented, in part on the ground that defendant's eight-year prison sentence did not further societal objectives of protection, rehabilitation, and deterrence. As the dissent explained, defendant was 21 years old when he committed the crime, it was his first felony, his "mother died when he was 16 and he struggled with untreated depression and bipolar disorder" (Allende, 168 AD3d at 464 [Renwick, J., dissenting]). The dissent concluded that "[u]nder the circumstances," five years' incarceration would have been "sufficient to impress upon defendant the seriousness of his actions, and to ensure that he receives the medical treatment and counseling which he needs" (id. at 465). Moreover, given that the codefendant was the person "who violently punched the victim" and received a five-year sentence upon his guilty plea, defendant's eight-year sentence "appears to be an unnecessarily harsh response to defendant's exercise of his right to go to trial" (id.).

A Judge of this Court granted the People leave to appeal (see People v Allende, 33 NY3d 974 [2019]).[3] Thereafter, by Clerk's letter the Court requested that the parties comment in letter format "justifying the retention of subject matter jurisdiction." Now, upon consideration of the responses to the Clerk's inquiry, the majority sua sponte dismisses the appeal, concluding "the Appellate Division determination – the basis of the order of modification – was not 'on the law alone' but was necessarily made as a matter of discretion in the interest of justice" (majority op at 2-3). The majority determination is not supported by the facts or law because, as the People argue, the Appellate Division determined that the guilty verdict on the first-degree robbery count is against the weight of the evidence, a decision which, according to the People, was based on a determinative error of law and thus reviewable by this Court.

II.

An appeal to this Court "from an order of an intermediate appellate court reversing or modifying a judgment, a sentence or order of a criminal court may be taken only if" such order "was on the law alone or upon the law and such facts which, but for the determination of law, would not have led to reversal or modification" (CPL 450.90 [2] [a]). While we have recognized that generally "the Court is without authority to review the Appellate Division's weight of the evidence determination" (People v Danielson, 9 NY3d 342, 349 [2007]), in People v Kancharla (23 NY3d 294 [2014]), we explained that where it is evident the Appellate Division's analysis is "infected by [an] error of law" that court's

[3] Defendant's leave application was denied (People v Allende, 33 NY3d 974 [2019]).

determination "satisfies the requisites of CPL 450.90 (2) (a)", and we reverse and remit so that the court may "reconsider its determination under the appropriate legal standards" (Kancharla, 23 NY3d at 306 and n 5); see also Danielson, 9 NY3d at 349 ["When the Appellate Division has not properly conducted (its weight of evidence) review, we reverse and remit to that court" (citation omitted)]).

Defendant unpersuasively argues that we lack jurisdiction to review the Appellate Division's determination because it is fact-bound. According to defendant, in making its "weight of the evidence determination" on "the facts," the Appellate Division found that the People did not satisfy the element of display of what appeared to be a firearm and noted that the robbery was accomplished by assaulting the victim and taking the victim's wallet. The People rightly counter that the Court has jurisdiction to review the Appellate Division's decision because but for that court's incorrect interpretation of CPL 450.90 (2) (a), the Appellate Division would not have used the trial evidence retrospectively in its weight of the evidence analysis (see Kancharla, 23 NY3d at 303).

Of course, we are not constrained to adopt the Appellate Division's characterization of its determination as "on the facts" (see People v D'Alessandro, 13 NY3d 216, 219 [2009]). Here, it is clear that but for the Appellate Division's interpretation of Penal Law § 160.15 (4), the court would not have concluded that the first-degree robbery verdict is against the weight of the evidence and, accordingly, would not have modified the judgment by vacating the conviction and dismissing that count. Thus, contrary to the defendant's view, the Appellate Division decision is not solely fact-bound. In other words, this is not

the case where the Appellate Division made factual determinations based on the evidence and stopped there. Instead, the court reviewed and weighed the probative strength of the evidence by reference to its interpretation of section 160.15 (4) and then modified Supreme Court's judgment—the prototypical decision "upon the law and such facts, which, but for the determination of law, would not have led to . . . modification" (CPL 450.90 [2] [a]). The People challenge that interpretation, and so under CPL 450.90 (2) (a) and this Court's holding in Kancharla, we are authorized to determine whether the Appellate Division properly construed the statute. If the court's interpretation is erroneous, then we reverse and remit to the Appellate Division to apply the proper legal standard in conducting its weight of the evidence analysis (see Kancharla, 23 NY3d at 303).

Defendant's alternative argument is similarly unpersuasive. In reliance on People v Caban (14 NY3d 369 [2010]), defendant maintains that, if the Appellate Division's determination was made solely on the legal principle disputed on appeal by the People, it would be an unpreserved "question of law" only reachable by the Appellate Division's discretionary "'interest of justice' jurisdiction" and thus unreviewable by our Court. The majority adopts this erroneous view that the Appellate Division acted in the interest of justice to conclude the evidence was insufficient. This recharacterization of the Appellate Division's decision is belied by the record and the opinion's text and is legally unsupportable. Defendant's sole ground for reversal of his conviction was a weight of the evidence challenge and both his main and reply briefs propounded legal arguments on this basis alone. Defendant expressly featured his claim that section 160.15 (4) required display

to the victim as part of the weight of the evidence argument. The People's opposition brief responded in kind with arguments confined to the strength of the evidence in favor of the jury's verdict and the caselaw discussing the Appellate Division's proper role in assessing the facts. In its decision, the Appellate Division stated that it rejected defendant's argument "except as indicated," then explained how the guilty verdict is against the weight of the evidence as related to the display element. Were it otherwise, and if that court exercised its discretion in the interest of justice to address an alleged, unpreserved legal error—without defendant having so requested—it would have made clear its intent by simply using those familiar words. It did not. Indeed, if the Appellate Division had reached the issue in the interest of justice, it would also have reduced the conviction on the subject count to a lesser included offense (see CPL 470.15 [2] [a]).[4]

Even if the Appellate Division had not characterized its analysis as such, the court's determination is based on the weight of the evidence. Pursuant to this type of judicial authority, the intermediate appellate court "sits as a thirteenth juror and decides which facts were proven at trial" (Danielson, 9 NY3d at 348). As our Court has explained, "[n]ecessarily, in conducting its weight of the evidence review, a court must consider the elements of the crime, for even if the prosecution's witnesses were credible their testimony must prove the elements of the crime beyond a reasonable doubt" (id. at 349). Here, the Appellate Division, in the interest of justice, reviewed the record and determined that there

[4] If this were not enough to make plain the basis of the Appellate Division's decision, the fact that the majority and dissent split on defendant's request to reduce his sentence in the interest of justice demonstrates the court resolved these issues on separate analytic tracks.

was evidence of a display to the eyewitness, but the jury's reliance on this evidence could not support a guilty verdict (Allende, 168 AD3d at 464). That determination was based on the Appellate Division's interpretation of section 160.15 (4) such that the display must be to the victim (id. at 464).

The majority's citations to Riley, Fava, Johnson, and Williams are inapt as they predate Kancharla. Moreover, these cases merely restate the rule—not controverted by the People or defendant—that we may not review the Appellate Division's exercise of its interest of justice jurisdiction to reach an unpreserved claim.

The cases do not resolve whether the People's challenge that the Appellate Division's weight of the evidence determination is erroneous due to legal error is reviewable in this Court under to the second clause of CPL 450.90 (2) (a). The fact that Riley involved a purported weight of the evidence analysis does not render it dispositive here. As the majority recognizes (majority op at 2), the Court in Riley dismissed the appeal, treating it as a modification based on an unpreserved legal sufficiency argument. To the point, Riley did not expressly analyze the application of the second clause of CPL 450.90 (2) (a), explore our authority to review whether the Appellate Division properly conducted its weight of the evidence analysis as acknowledged in Danielson, or explore the distinctions between the Appellate Division's exercise of discretion in the interest of justice and a weight of evidence analysis, which is not a discretionary exercise of power. Instead, Riley cited to Caban's holding that an Appellate Division decision "based on an unpreserved error is considered an exercise of the Appellate Division's interest of justice

power, not reviewable in our Court" (accord majority op at 2, quoting Riley, 19 NY3d at 946). Notably, two members of the Court dissented in Riley, including the author of Caban, arguing that it was not the legislature's intent that the "Appellate Division decides a legal issue for the State, yet we are powerless to reach it" (Riley, 19 NY3d at 949), where "nothing in CPL 470.05 [ ] prohibits this Court from reviewing a legal issue, and the modification in Riley was upon he law (id. at 948). In contrast to Riley, Kancharla makes clear that the second clause of 450.90 (2) (a) applies to weight of evidence analysis infected by an erroneous interpretation of law—a nondiscretionary exercise of appellate review. Thus, unlike the "interest of justice" line of cases, Kancharla controls here. The majority's effort to distinguish Kancharla on the ground that "no threshold preservation concern was presented" (majority op at 3) is unpersuasive. The Court in Kancharla made no such distinction, and we should not read by implication a determination which is at odds with the Kancharla Court's express assertion of jurisdiction pursuant to the second clause of CPL 450.90 (2) (a).

Fundamentally, defendant's jurisdictional argument—and the majority's apparent view of the decision below—proceeds from an incorrect premise, namely that if the legal error here could be reached through a legal sufficiency analysis, the Appellate Division could not have engaged in weight of the evidence review. This constriction of intermediate court review is at odds with the CPL and our precedent (see CPL 470.15). "[L]egal sufficiency and weight of the evidence [ ] are related" (Bleakley, 69 NY2d at 495), and "[a] legally sufficient verdict can be against the weight of the evidence" (Danielson, 9

NY3d at 349). Both types of intermediate appellate review may proceed simultaneously, and the fact that a legal error may have multiple impacts on the analysis does not foreclose this Court from considering the legal issue under CPL 450.90. Any doubt as to the Appellate Division's authority to proceed on multiple axes, and our ability to review a determinative legal error embedded in a weight of evidence analysis, was put to rest in Kancharla. The court therein invoked its jurisdiction under CPL 450.90 (2) (a) and remitted to the Appellate Division because that "court's weight of the evidence analysis was infected by the same error of law that led it to vacate the [] convictions on sufficiency grounds" (Kancharla, 23 NY3d at 306 and n 5).

Apart from the error claimed by the People, the Appellate Division did not review the display element as charged to the jury, which was never directed to determine whether there was a display to the victim. The charge was in no way erroneous, and it followed the language of the Penal Law and the model instructions. In essence, the Appellate Division weighed the evidence based on the law not as charged but as construed by the Appellate Division, an error unto itself and sufficient grounds to reverse and remit to that court to decide the issue under the proper legal standard (see Danielson, 9 NY3d at 349 ["(T)he reviewing court must weigh the evidence in light of the elements of the crime as charged to the other jurors. . . ."]).

The New York Court of Appeals is the High Court "with supreme power to authoritatively declare and settle the law uniformly throughout the state" (Reed v McCord, 160 NY 330, 335 [1899]; see also Anheuser-Busch, Inc. v Abrams, 71 NY2d 327, 334

[1988]; Town of Massena v Niagara Mohawk Power Corp., 45 NY2d 482, 491 [1978]; People v Patterson, 39 NY2d 288, 294 [1976]). Interpretation of Penal Law § 160.15 (4) is undoubtedly within our authority. The majority's decision is contrary to the legislative mandate that we review appellate orders on the facts and law that are determined by such court's legal analysis.

III.

As a final point, the purposes of the preservation rule served in this case. "[T]he preservation rule allows trial courts to correct errors in a timely fashion and prevent[s] unnecessary surprise after the conduct of a complete trial" (People v Mack, 27 NY3d 534, 540 [2016] [internal quotation marks and citations omitted]). "[P]reservation is [ ] essential to the exercise of this Court's jurisdiction, which is limited to the review of questions of law" (People v Kelly, 5 NY3d 116, 119 [2005] [citation omitted]). The purpose of demanding notice through objection or motion in a trial court is to "advance[ ] the truth-seeking purpose of the trial," and "advance[ ] the goal of swift and final determinations of the guilt or nonguilt of a defendant" (People v Gray, 86 NY2d 10, 20-21 [1995]). None of those goals are addressed by foreclosing review of a claim of intermediate appellate court error.

To the extent the rule incentivizes counsel to present issues for consideration at the earliest possible moment or potentially lose an opportunity for review and risk an ineffective assistance of counsel claim, there is no dispute that the People's appeal to this Court is the first opportunity to challenge an error that occurred at the Appellate Division.

As the People argue, since trial courts do not possess weight of the evidence review power, their contention could not have been preserved at trial and thus the preservation requirement does not apply (see People v Carter, 63 NY2d 530, 536 [1984]). Under the circumstances, there is no basis to apply the preservation rule to the People here.

To make express what is implicit, this appeal is a particularly poor candidate to incentivize defendants. Here, defense trial counsel did not object to the jury charge or argue to the court or the jury that the People had to establish that the gun display was perceived by the victim. That is because no one—not defense counsel, the prosecutor, or the judge—saw the case otherwise, as manifest from the mutually agreed upon jury charge and counsels' respective summations.[5] There is no incentivizing a lawyer to preserve a legal issue that is not in dispute, and because the Appellate Division may decide not to reach an unpreserved issue in the interest of justice, counsel for defense already have sufficient reason to preserve those issues of which counsel is aware. Significantly, appellate defense counsel never requested that the Appellate Division invoke its interest of justice review authority—which that court may decline to exercise as a purely discretionary matter—to reach an unpreserved issue. Instead, appellate counsel recognized that the Appellate Division must reach the issue through its weight of the evidence review and argued exactly so to that court. As we have explained, "[u]pon defendant's request, the

[5] By way of example, defendant asserted that the eyewitness "rushed to judgment that the Hispanic man flashed a gun." The prosecutor's rhetoric similarly focused on the eyewitness' view of the gun: "I want to talk to you about what [the eyewitness] said, to prove to you that it was a gun. . . . [The eyewitness] told you that [he] truly believes—and [ ] said it multiple times—that what [the eyewitness saw] was a weapon."

Appellate Division must conduct a weight of the evidence review" which ensures "defendant will be given one appellate review of adverse factual findings" (Danielson, 9 NY3d at 348 [internal citation omitted]).[6] Defendant's position here would allow him to secure review at the intermediate appellate level while arguing to us that, notwithstanding his trial counsel's strategy and understanding of the law, and regardless of the Appellate Division's clear statement that it had reached the issue based on a weight of the evidence analysis, we have no authority to review that determination for possible legal error.

We should not let stand a possible legal error that could not have been brought to the attention of the trial court because it occurred at the intermediate appellate level. The majority's conclusion that the decision below does not fall within CPL 450.90 (2) (a) is wrong on the law and leaves open a legal question that the People contend has divided the Appellate Division.[7] By so doing, the majority's decision imposes an unnecessary and undeserved harsh consequence on the People, with no discernible benefit to our system of justice.

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[6] As I have explained, the majority similarly misconstrues the Appellative Division decision as an exercise of its discretion in the interest of justice, ignoring appellate counsel's strategic advocacy which ensured review of the issue by that court rather than leaving it to the Appellate Division's discretion whether to reach the issue at all (see Danielson, 9 NY3d at 349).

[7] Compare People v Turner (96 AD3d 1392, 1393 [4th Dept 2012] ["(T)he statute merely provides that the display need only be made at some point 'in the course of the commission of the crime or of immediate flight therefrom' and does not specify who must view the display . . ." (quoting Penal Law §160.15)]), and People v Colon (116 AD3d 1234, 1236 [3d Dept 2014] ["(T)he statute does not mention to whom the apparent weapon must be displayed."]), with People v Moon (205 AD2d 372, 372 [1st Dept 1994] [The People failed to establish an essential element of robbery in the first degree, i.e., that defendant '(d)isplays what appears to be a . . . firearm' to the victim'" (internal citation omitted)]).

IV.

Given the unusual procedural posture of this appeal, the People and defendant have not briefed the Penal Law statutory interpretation issue. To the extent addressed by their response to the Court's jurisdictional inquiry, the People argue that the Appellate Division erred in holding that the defendant could not be convicted of first degree robbery under Penal Law § 160.15 (4), because, contrary to that decision, it is sufficient under the statute that the person who saw defendant display a firearm was an eyewitness who intervened during the course of the robbery. Irrespective of the compelling logic of what can be discerned of the People's argument, it would be inappropriate to consider their challenge without full briefing. Thus, not only is the majority's erroneous determination of the threshold question upon consideration of the letter correspondence wrong as a matter of law and an example of a missed opportunity to provide appropriate guidance on the knotty jurisdictional matters raised, but the approach here has prevented full airing of all the issues for this Court's consideration—despite the opinion of three members of the Court that the appeal should be retained as there is no bar to our review of the People's claim.

For the reasons I have explained, I dissent from the treatment and the resolution of this appeal adopted by the majority.

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Appeal dismissed, by the Court sua sponte, upon the ground that the modification by the Appellate Division was not "on the law alone or upon the law and such facts which, but for the determination of law, would not have led to . . . modification" (CPL 450.90[2][a]), in a memorandum. Chief Judge DiFiore and Judges Stein, Garcia and Feinman concur. Judge Rivera dissents in an opinion in which Judge Wilson concurs. Judge Fahey dissents and votes to retain the appeal.

Decided October 22, 2019