



What happens when absentee ballots are being counted and the canvassers disagree on whether the voter's signature on the envelope matches their signature on the polling record? Under an amendment to the Election Law adopted following the 2020 election, the law says that the vote counts. A group of plaintiffs argued, however, that that violates the equal representation mandate contained in article II, section 8 of the New York Constitution. The Court of Appeals last week, however, held that the equal representation mandate only requires the political parties to have equal representation on the canvassing board. It does not foreclose the Legislature from deciding when a vote should count. Let's take a look at that opinion and what else has been happening in New York's appellate courts over the past week.

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COURT OF APPEALS

ELECTION LAW

Matter of Amedure v State of New York, 2024 NY Slip Op 05425 (Ct App Oct. 31, 2024)

Issue: Is Election Law § 9-209 (2) (g), which, in effect, requires disputes regarding the validity of the signature on a ballot envelope to be resolved in favor of counting the vote, constitutional?

Facts: "During the 2020 election, there was an unusually high volume of absentee ballots due to the COVID-19 pandemic, and the statutorily mandated procedures gave rise to significant delays in the state's election reporting." Following the election in anticipation of future delays, "the Legislature enacted chapter 763, which repealed and replaced Election Law § 9-209 . . . in order to obtain the results of an election in a more expedited manner and to ensure that every valid vote by a qualified voter is counted." In particular, section 9-209 provides that "[t]he local board of elections or a set of poll clerks known as the 'central board of canvassers' is entrusted with" reviewing all absentee, mail-in, and certain other ballots for potential defects. Each Board must be divided equally between the two political parties. If during the review, the clerks disagree regarding whether a signature on a ballot envelope matches the voter's signature on the poll records, section 9-209 (2) (g) provides that the tie should be resolved in favor of counting the vote. Following the adoption of chapter 763, plaintiffs argued that "Election Law § 9-209 (2) (g) violated the equal representation mandate contained in article II, section 8 of the New York Constitution and principles of judicial review." Supreme Court agreed, holding that subdivision (2) (g) violated article II, section 8 of the New York Constitution and improperly restricted judicial review in violation of the New York Constitution, but found that provision severable and declared the remainder of the statute constitutional."

On appeal, the Third Department reversed, rejecting the plaintiff's argument that section 9-209 (2) (g) violated the equal representation constitutional mandate. The Third Department reasoned that "the plain language of article II, section 8 required 'equal representation' of both parties on the Boards, the Election Law § 9-209 (1) satisfied this mandate, and that subdivision (2) (g) did not unconstitutionally constrain the judiciary." Plaintiffs appealed to the Court of Appeals "seeking a declaration that chapter 763 is unconstitutional in its entirety."

Holding: The Court of Appeals affirmed, holding "that the statute does not violate the constitutional principles of separation of powers or of judicial review." "Legislative enactments are entitled to a strong presumption of constitutionality" and plaintiffs failed to meet the 'heavy burden' of proving Election Law § 9-209 (2) (g)'s unconstitutionality." The Court noted that the plain text and history of article II, section 8 establishes that equal representation does not require bipartisan agreement. "[T]he authority that Election Law § 9-209 vests in a two-member Board is equally distributed to each member" to which during both the initial and subsequent review of ballots, either member may declare a ballot valid or invalid, "[t]hus no single Board member has any more authority than any other member over the canvassing process, and neither party carries more sway over the process than the other." That is all that the equal representation mandate contained in article II, section 8 of the New York Constitution requires, the Court held. The Court further held that the statute "comports with the Constitution and contains multiple pathways for judicial review," thus "[i]n the face of these many levers of judicial supervision . . . it is inaccurate—and misleading—to say that Election Law § 9-209 dispenses with the role of the judiciary in ensuring that the people enjoy free and fair elections."

CONSTITUTIONAL LAW, CIVIL CONFINEMENT

People ex rel. Neville v Toulon, 2024 NY Slip Op 05178 (Ct App Oct. 22, 2024)

Issue: Do provisions of Mental Hygiene Law § 10.11 (d) (4) governing the procedure for the temporary pre-hearing confinement of sex offenders adjudicated to have “mental abnormalities” satisfy procedural due process?

Facts: In 2010, prior to petitioner’s release from confinement for first-degree sexual abuse, the Attorney General filed a civil management petition pursuant to Mental Hygiene Law article 10. After trial, a jury determined that petitioner had a “mental abnormality.” Supreme Court found that petitioner was a “dangerous sex offender” ordering his confinement. In 2016, after a determination that confinement was no longer required, petitioner was transferred to strict and intensive supervision and treatment (SIST), with required SIST conditions being set. In December 2019, after petitioner’s parole officer believed he tampered with his alcohol monitoring bracelet, petitioner was taken into custody. Within two days a psychological evaluation was conducted and based on the psychologist’s report, petitioner was deemed a dangerous sex offender requiring confinement. Five days after petitioner’s confinement began, “the Attorney General filed a petition to revoke Ralph S’s SIST regiment and transfer him to secure confinement.” Supreme Court found probable cause to believe petitioner was a “dangerous sex offender requiring confinement” ordering petitioner be detained pending a final SIST-revocation hearing.

Petitioner filed a habeas corpus proceeding against OMH and DOCCS arguing that Mental Hygiene Law § 10.11 (d) (4) violated procedural due process because he was not given notice and an opportunity to be heard on if there was probable cause to believe he was a dangerous sex offender requiring confinement. Supreme Court denied the petition and petitioner appealed. The Second Department “converted the proceeding to a declaratory judgment action and declared that the relevant statutory provision did not violate petitioner’s right to due process.” Rejecting petitioner’s facial challenge, the Second Department held that “at least in some circumstances, the statute sufficiently protects respondents’ liberty interests from erroneous deprivation and provides them procedural due process.”

Holding: The Court of Appeals affirmed, holding that “it is settled that a state may use civil process to confine a sex offender for treatment of a “mental abnormality” . . . that makes it difficult, if not impossible, for the person to control [their] dangerous behavior’ after ‘every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible.” The Court applied the *Mathews v Eldridge* (424 US 319, 335 [1976]) factors—“(1) the private interest of the litigant, (2) the risk of erroneous deprivation in the absence of substitute procedures; and (3) the State’s interest in avoiding additional procedures”—to govern the scope of procedural due process necessary in the context of civil confinement of sex offenders.

Under the first factor, the Court held that a court’s probable cause determination for SIST revocation creates a “diminished and temporary physical liberty interest.” Considering the second factor, the Court held that “the degree to which an adversarial probable cause proceeding would provide additional protection against erroneous probable cause determinations is minimal.” Further, by “allowing a respondent’s full participation in an initial hearing [it] could undermine the statute’s requirement of an expeditious probable cause determination.” Considering the final factor, the Court found that “[r]equiring adversarial proceedings prior to confinement, even after a psychiatric professional has determined that a respondent is a dangerous sex offender requiring confinement, could pose a serious risk to the public.” Balancing the *Mathews* factors, the Court held that the petitioner failed to sustain the burden required to declare a statute facially unconstitutional. The party making the facial challenge “bear[s] the burden to demonstrate that in any degree and in every conceivable application, the law suffers wholesale constitutional impairment.” The Court held that the “procedures outlined in article 10 appropriately balance the need to safeguard respondents’ due process rights by prioritizing an expeditious probable cause determination with the need to protect the public from those deemed ‘likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility.’” Thus, they did not violate his due process rights.

CRIMINAL LAW, CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE

People v Dixon, 2024 NY Slip Op 05176 (Ct App Oct. 22, 2024)

Issue: Was a pro se defendant denied his constitutional right to present a defense by the People’s monitoring of the telephone calls that he made from jail to his trial witnesses?

Facts: After Defendant was indicted for a number of sex crimes, he called his daughter as a witness during trial to try to “introduce in evidence a recorded conversation between his daughter and [one of the victims], in which [the victim] allegedly recanted her accusations.” Despite the fact that the conversation was recorded two years prior, the defendant never previously disclosed the recording, claiming that he had just become aware of it. “On cross-examination, the People asked the daughter about a phone conversation she had with the incarcerated defendant the week before.” Defendant objected that the People listening to his phone calls while incarcerated inhibited his constitutional right to prepare a defense. The trial court overruled the objection, and the jury found Defendant guilty of one of the felony sexual assault counts, and 634 child pornography counts. The Second Department affirmed the conviction.

Holding: The Court of Appeals affirmed, holding that “there was no violation of defendant’s right to present a defense” under these circumstances. At the outset, the Court explained, “[t]he opportunity for a lawyer to communicate confidentially with potential witnesses is essential to preparation of a defense, and the same is true for an incarcerated defendant exercising the right to self-representation.” However, the Court held that “[u]nder the particular facts of this case, . . . defendant’s right to present a defense was not impaired by the monitoring of his jail phone calls.”

Specifically, the Court emphasized that the “[d]efendant was out on bail for nearly the entire two years between indictment and his mid-trial remand, including more than six months while representing himself, giving him ample time to prepare his witnesses.” The Court further noted that “[e]ven after remand, there [wa]s no dispute that defendant had means other than the recorded phone lines to prepare his witnesses. Indeed, the record establishe[d] that defendant’s daughter visited him in jail at his request before he called her to testify so that they could continue their trial preparations in person. The court was proactive in protecting defendant’s rights, permitting him time in the courtroom to speak to each of his witnesses in private before their testimony.” Additionally, the Court noted that “when defendant asked to adjourn for the weekend to prepare his witnesses, the [trial] court stated that it would take the matter up in the morning, at which time it was agreed that defendant would testify for most of the remainder of the week. The [trial] court also noted that defendant had been assigned a legal advisor and an investigator, both of whom had the expertise and wherewithal to assist in the preparation of the defense.”

Thus, the Court concluded that “[a]lthough the People’s monitoring of an incarcerated pro se defendant’s jail phone calls may have a chilling effect on the defendant’s trial preparation that threatens the right to present a defense—particularly if the People are able to make use of the information in the calls in the pending trial—the facts here [we]re otherwise,” especially given the fact that the “[d]efendant became aware that the People were listening to his phone conversations only after he had presented the direct testimony of his daughter and an expert” and “[a]side from himself, the only remaining defense witnesses provided character testimony and little else that could be considered relevant to the case.” As such, “any chilling effect here was negligible.”

CRIMINAL LAW, WAIVER OF RIGHT TO COUNSEL

People v Blue, 2024 NY Slip Op 05175 (Ct App Oct. 22, 2024)

Issue: Did the defendant knowingly, voluntarily, and intelligently waive his right to counsel despite trial judge’s failure to specifically apprise defendant of his maximum sentencing exposure in years?

Facts: After the defendant was indicted on six counts of second-degree burglary, arising from a string of burglaries in Washington Heights, he appeared before Supreme Court for arraignment with court-appointed counsel. Six months later, he began to ask the court to proceed with his defense pro se. The court told the defendant “that waiving his right to counsel would be ‘a big mistake’ because he ‘face[d] a lot of jail time.’” But the defendant persisted in his request. The court held off deciding the request to give the defendant a longer chance to think about his decision. When the defendant appeared again one month later, he reiterated his request to proceed pro se. “The trial court engaged [the defendant] in a colloquy to determine whether his waiver was knowing, voluntary, and intelligent. It explained, among other things, the nature of the charges against [him] and the dangers and disadvantages of representing oneself in a criminal proceeding. [The defendant] stated that he understood the consequences of his decision. Specifically, he confirmed that he understood that ‘many pro se representations are not successful’; that he would ‘be held to the same legal standards’ as an attorney; that he would be ‘foregoing the benefits of courtroom experience and legal training possessed’ by his court-appointed attorney; and that he believed he was ‘capable of representing [himself] in this case.’” Following the colloquy, the trial court determined that the defendant’s “request [was] unequivocal” and that his decision “to give up [his] right to be represented by a lawyer [was] knowingly and intelligently made.” The Court thus granted the defendant’s request to proceed pro se. After the defendant was convicted, arguing, among other things, that he did not make a knowing, voluntary, and intelligent waiver of his right to counsel because the judge did not apprise him of his maximum sentencing exposure in years. The First Department affirmed the conviction.

Holding: The Court of Appeals affirmed. As to the validity of the defendant’s waiver of his constitutional right to counsel, the Court held that it was “clear that [the defendant] had an understanding of the extent of his potential sentencing exposure by the time the trial court conducted its waiver inquiry on February 3, 2014.” The Court explained that in determining the validity of a defendant’s waiver on appeal, “a reviewing court may look to the whole record, not simply to the questions asked and answers given during a waiver colloquy” and that “[i]n reviewing the record, the critical consideration is defendant’s knowledge at the point in time when he first waived his right to counsel.” In addressing the defendant’s argument, that his waiver was deficient because the trial court failed to apprise him of the range of the maximum number of years of potential imprisonment during the waiver colloquy, the Court emphasized that “neither this Court nor the U.S. Supreme Court have required a specific recitation of maximum potential years of imprisonment as part of a valid waiver colloquy.” Rather, the Court explained, “[t]o the contrary, we have declined to impose particularized requirements of this sort upon a trial court, instead instructing that the inquiry is flexible and should be aimed at achieving the goals outlined above.” The Court concluded that the defendant “was adequately warned of the dangers of proceeding pro se” in light of the several exchanges during pre-colloquy and colloquy proceedings, during which time the defendant, among other things, “explicitly stated that he understood he might serve a significant sentence” and “indicat[ed] that he understood he faced an even longer sentence than the twelve years of imprisonment and five years of post-release supervision that the People sought.”

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