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Summarizing recent significant New York appellate cases

Is making a terroristic threat an offense for which a trial court may set bail, or is it excluded and the defendant must be released on his own recognizance? The Criminal Procedure Law says two contradictory things, so the Court of Appeals tackled the question this week, holding that the disjunctive language of the statute gives the trial courts discretion to set bail. Let's take a look at that opinion and what else has been happening in New York's appellate courts over the past week.

COURT OF APPEALS

CRIMINAL LAW, RESENTENCING, DOMESTIC VIOLENCE SURVIVORS JUSTICE ACT

People v Brenda WW., 2025 NY Slip Op 03643 (Ct App June 17, 2025)

Issue: What is the appellate standard of review of a trial court's resentencing under the Domestic Violence Survivors Justice Act, and may time served in excess of that permitted under the DVSJA be credited toward the mandatory term of post-release supervision?

Facts: "In 2019, the Legislature enacted the Domestic Violence Survivors Justice Act (DVSJA) to give incarcerated domestic violence survivors the opportunity to apply for resentencing to obtain relief from 'long, unfair prison sentences' that overestimate their threat to public safety. In 2020, Brenda WW, a domestic violence survivor incarcerated for killing her partner, applied for resentencing under the DVSJA. County Court denied her application. The Appellate Division found that Brenda satisfied the statutory criteria and that the circumstances warranted granting relief. The Appellate Division reduced Brenda's sentences pursuant to the DVSJA and imposed maximum periods of postrelease supervision. The court noted that Brenda had been incarcerated for over 15 years—seven years more than the DVSJA maximum for her convictions—and it stated that the excess time should be credited toward her five-year postrelease supervision term, leaving her with no postrelease supervision to be served."

Holding: The Court of Appeals modified, rejecting the People's argument that the Appellate Division was bound to abuse of discretion review only, but agreeing with the People that Brenda's time served in excess of that permitted under the DVSJA could not be applied toward her mandatory term of post-release supervision. The Court explained, first on the standard of appellate review, "[t]he Appellate Division has the same factfinding ability as the trial courts, and its factual review is plenary. The Appellate Division has broad, comprehensive power to consider and determine any issue of fact involving any error or defect in the criminal court proceedings which may have adversely affected the appellant. This review power enables the Appellate Division to conduct an independent assessment of the record and make factual findings that may differ from those made by a lower court. The Appellate Division may, under this authority, exercise independent fact-finding powers to review a lower court's findings as to whether the evidence is sufficient to satisfy the DVSJA requirements." Therefore, the Appellate Division's review is *de novo*, and is not bound to review a trial court's DVSJA resentencing determination only for abuse of discretion.

Second, the Court held, "[t]he DVSJA requires that resentenced defendants be given a period of postrelease supervision. Penal Law § 70.45 (2) (f) states that that the period of postrelease supervision for resentences imposed under Penal Law § 60.12 (8) 'shall be' not less than two and one-half years nor more than five years. That requirement is specific to DVSJA resentences." Noting that DOCCS normal practice was to begin postrelease supervision terms upon an incarcerated individual's date of "entitlement" to release, even if they were not actually released, the Court held that "the word 'entitlement' does not appear in [Penal Law] § 70.45(5)(a). Instead, the plain language mandates that postrelease supervision commences upon release, not entitlement, and expressly addresses what happens when a sentence is reduced under the Act: a mandatory term of postrelease supervision attaches." Therefore, the Court held that the Appellate Division erred in crediting Brenda's time served in excess of the maximum sentence under the DVSJA toward her mandatory term of postrelease supervision.

CRIMINAL LAW, INEFFECTIVE ASSISTANCE, SUMMATION

People v T.P., 2025 NY Slip Op 03642 (Ct App June 17, 2025)

Issue: Did the defendant's trial counsel provide ineffective assistance for "failing to object to remarks that the prosecutor made during summation which misrepresented critical evidence and repeatedly denigrated the defendant"?

Facts: Defendant's romantic relationship with the victim was openly abusive. After one episode of abuse during which the victim raped the defendant and strangled her, she was able to break free, run to the kitchen where she grabbed a knife, and stabbed the victim as he lunged at her. The defendant was indicted on one count of manslaughter in the first degree, but pursued a justification defense at trial.

"During summation, the prosecutor sought to undermine the defendant's justification defense by suggesting that the defendant was not credible. In furtherance of that strategy, the prosecutor told the jury, 'You never heard testimony that the defendant was in fear for her life. You never heard testimony that she was in fear of serious injury. Nothing.' As the People concede, this statement was false. The defendant had, in fact, testified that immediately before the stabbing she was 'scared for my life,' and when subsequently asked whether she had testified that she was 'afraid for your life,' the defendant responded 'Yes, I was.'

Additionally, the prosecutor claimed in summation that the defendant had lied on the stand, using the word 'lie' or 'lies' fourteen times in total. Among other comments, the prosecutor claimed that 'the only thing we can get out of the defendant are lies'; that her testimony was 'unsubstantiated wild lies'; and that her testimony was 'meant to distract you from . . . the endless lies she has told you throughout this entire process.' The prosecutor also posed rhetorical questions along similar lines to the jury: 'How could you possibly believe one thing that comes out of her mouth after all the lies she told you?' and 'What wouldn't she lie about?' Following summations, the court excused the jury and expressed concern about '[t]he repeated use of the word lies, which I also was going to limit if not eliminate,' but noted that it did not do so as the word 'had been used throughout the trial without objection and I didn't think it was proper for me to do it at this point.'

Defense counsel did not object either to the prosecutor's flat misstatement of the defendant's testimony that she feared for her life or to the repeated use of the word 'lies.' Although defense counsel did make two objections during summation, neither were related to these comments, and both were overruled. The jury found the defendant guilty." The Appellate Division, Fourth Department rejected defendant's argument that her trial counsel was ineffective for failing to object to the People's summation, holding that the remarks during summation "did not deny the defendant a fair trial, 'especially given the court's instructions to the jurors that their recollection of testimony would control.'"

Holding: The Court of Appeals reversed, holding that "trial counsel's failure to object to the conceded misstatement of the defendant's testimony and the repeated use of the word 'lies' amounts to ineffective assistance of counsel" and deprived defendant of a fair trial. The Court reasoned, "[a]lthough we have recognized that during summation, counsel is permitted to comment upon every pertinent matter of fact bearing upon the questions the jury have to decide, summation is not an unbridled debate in which the restraints imposed at trial are cast aside so that counsel may employ all the rhetorical devices at their command. The well-defined limits on comments during summation require that counsel stay within the four corners of the evidence, and not make comments that misrepresent or are contrary to the evidence. A prosecutor may not express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence, and must avoid resorting to name calling, such as stating during the summation that the defendant and their lawyer are liars." The Court held that the People's summation well exceeded those bounds, explaining that "a number of the remarks, including the prosecutor's assertion that the jury could not possibly believe one thing the defendant says, exceeded simply commenting on the defendant's inconsistent statements. Rather, such remarks are more fairly characterized as expressing the prosecutor's personal belief or opinion as to the truth or falsity of the defendant's testimony in its entirety. Under these circumstances, given the numerous and repeated improper statements made by the prosecutor during summation, we hold that trial counsel provided ineffective assistance for failing to object to the prosecutor's summation remarks."

CRIMINAL LAW, BAILABLE OFFENSES

***People ex rel. Ellis v Imperati*, 2025 NY Slip Op 03646 (Ct App June 17, 2025)**

Issue: Is the crime of making a terroristic threat a bailable offense?

Facts: "Michael Cavagnolo was arrested and charged with making a terroristic threat after he repeatedly called the Hyde Park Police Department emergency line threatening to commit violent acts against officers, their families, and Police Department property." "County Court determined that making a terroristic threat constitutes a bail-qualifying offense pursuant to CPL 510.10 (4) (a) and set bail. Petitioner commenced this habeas corpus proceeding, contending that the offense does not qualify for bail because it is explicitly excluded under paragraph (g) of subdivision 510.10 (4). The Appellate Division granted the petition and ordered Mr. Cavagnolo's release. The Court held that even though the crime of making a terroristic threat is defined by statute as a violent felony, the authority conferred by CPL 510.10 (4) (a) to set bail for violent felony offenses does not extend to this particular offense because CPL 510.10 (4) (g) explicitly excludes it. According to the Appellate Division, paragraph (g) is a more specific provision than paragraph (a) and therefore controls, and the contrary reading would render paragraph (g)'s exclusionary language superfluous." One Justice dissented, explaining that the canon of statutory construction favoring the specific over the general did not apply, and "the statute authorizes trial courts to fix bail for the crime of making a terroristic threat."

Holding: The Court of Appeals reversed, over a strenuous dissent, holding that although the two paragraphs of the statute were "difficult to reconcile, the text and disjunctive structure of CPL 510.10 (4) indicate that paragraph (g) was not intended to narrow the independent authorization provided in paragraph (a) to set monetary bail for all violent felony offenses listed therein." The Court explained, as part of the comprehensive bail reforms adopted in 2019, the Legislature "eliminated cash bail for all but a set of specified crimes. For those crimes, termed 'qualifying offenses,' the court has the discretion to 'fix bail, or order non-monetary conditions in conjunction with fixing bail' (CPL 510.10 [4]). For all other crimes, the court must release the defendant on their own recognizance, or, if the court finds that will not reasonably ensure the defendant's return to court, release the defendant under non-monetary conditions."

Making a terroristic threat is a violent felony offense, which paragraph (a) of CPLR 510.10(4) makes bail-eligible. Paragraph (g) of CPL 510.10 (4) also makes many terrorism-related crimes qualifying offenses, but specifically exempts making a terroristic threat. These seemingly contradictory provisions, the Court held, could be reconciled because each subdivision was phrased in the disjunctive. "[T]his disjunctive structure confirms that the legislature intended each paragraph in CPL 510.10 (4), including (a) and (g), to set forth a separate and distinct category of offenses identified as 'qualifying' for purposes of monetary bail. One paragraph does not modify another." Moreover, "[h]ad the legislature intended to exempt making a terroristic threat from the violent felonies covered by paragraph (a), it could have said so explicitly in that paragraph, as it did by carving out the exceptions for second-degree robbery and certain second-degree burglary offenses. Alternatively, the legislature could have expressly instructed that paragraph (g)'s exclusion of the crime applies throughout CPL 510.10 (4), notwithstanding conflict with another paragraph. But the legislature did neither. Given those drafting choices, it seems unlikely that the legislature intended to implicitly import paragraph (g)'s exclusion into paragraph (a)." Therefore, the Court held, "CPL 510.10 (4) (a) authorizes a court to set monetary bail for a person charged with making a terroristic threat under Penal Law § 490.20."

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