

NEW YORK COURT OF APPEALS ROUNDUP

COURT REVERSES SENTENCE IMPROPERLY BASED ON UNRELATED ACTION

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In a recent four-to-three decision in *People v. Anonymous*, a narrow majority of the Court of Appeals reversed a trial court's sentencing determination that had been based on information from an unrelated criminal action in which the same defendant had been acquitted of all charges. The majority found that the trial court had improperly unsealed the records of the unrelated action pursuant to CPL 160.50. The philosophical underpinning for the majority's decision is the concept that a defendant who is charged but not convicted of a crime should not suffer any stigma as a result. The dissenting judges do not appear to dispute this general concept, but would not apply it here where the sentencing court relied on the defendant's own sworn admissions in the unrelated action rather than the conduct with which the defendant was charged but not convicted.

The defendant pleaded guilty to criminal possession of a controlled substance in the fourth degree. He faced a maximum sentence of nine years but, as part of his negotiated plea deal, he was given a promise of four years' imprisonment followed by three years of postrelease supervision. The trial court adjourned sentencing for several months and warned defendant he needed to "stay out of trouble" and could not be arrested for a new offense or else he would be in violation of his plea agreement and would face the maximum nine-year prison term.

While defendant was awaiting sentencing, he was arrested and indicted on unrelated robbery charges. The trial court overseeing the drug proceeding rejected the People's request to vacate the plea agreement based on this new criminal activity and adjourned sentencing until the conclusion of the robbery prosecution. The defendant testified in his own defense at the trial of the robbery action and, while he denied the factual allegations of the robbery indictment, he admitted under oath that he had engaged in new drug activity after his guilty plea in the drug case. He was acquitted of the robbery charges and the following day he appeared before the trial judge presiding over his drug case. The People informed the court that defendant had testified under oath that he had engaged in drug crimes post-plea and stated their intention to seek the maximum nine year prison term in light of the defendant's violation of his plea agreement. Because the defendant had been acquitted of all charges in the robbery case, the record of those proceedings had been sealed pursuant to CPL 160.50. The People accordingly moved to unseal the record. The court granted the motion, and the People submitted the defendant's unsealed trial testimony in support of their argument for the maximum nine year sentence. The court found, based on the trial testimony, that the defendant had violated the terms of his plea agreement and sentenced him to an eight year prison term.

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The defendant appealed. A divided Appellate Term, First Department, found that it was error to unseal the records of the robbery proceeding but a unanimous court held that the violation of the sealing statute did not require resentencing or a reduced sentence. The Court of Appeals granted leave to appeal.

In a decision written by Judge Jenny Rivera and joined by Judges Stein, Fahey and Wilson, the Court of Appeals agreed with the First Department that the trial court erred in unsealing the records pursuant to CPL 160.50, but disagreed with the First Department's conclusion that resentencing was not required. The majority held, instead, that the appropriate remedy is resentencing without consideration of the sealed material. The case is remanded to the trial court for further proceedings.

CPL 160.50(1) provides:

Upon the termination of a criminal action or proceeding against a person in favor of such person ... unless the district attorney upon motion with not less than five days notice to such person ... demonstrates to the satisfaction of the court that the interests of justice require otherwise ... the record of such proceedings shall be sealed ...

The People did not file a motion opposing the sealing of the record of the robbery proceeding. Rather, they filed a post-sealing motion pursuant to one of the six statutory exceptions to CPL 160.50's prohibition on access to sealed records. Specifically, the People relied on CPL 160.50(1)(d)(ii) which permits access to "a law enforcement agency upon ex parte motion in any superior court, or in any district court, city court or the criminal court of the city of New York provided that such court sealed the record, if such agency demonstrates to the satisfaction of the court that justice requires that such records be made available to it."

In finding that it was error to unseal the trial transcript, the majority pointed to the legislative goals behind the sealing statute of ensuring the presumption of innocence and lessening the adverse consequences of unsustainable allegations. The majority also noted that in *Matter of Katherine B. v. Cataldo*, 5 N.Y.3d 196 (2005), the court had previously held that CPL 160.50(1)(d)(ii) does not authorize a court to grant a prosecutor's request to unseal records for purposes of making sentencing recommendations.

The majority then explained that the First Department had erred in concluding that the defendant was not entitled to a remedy for the trial court's violation of the sealing statute. The majority rejected the People's and the dissent's reliance on *People v. Patterson*, 78 N.Y.2d 711 (1991), in which a police department used a defendant's photograph from an unrelated dismissed criminal matter that the police had failed to return to the file before it was sealed. The police used the photo in a pre-trial photo array to identify the defendant in connection with a new criminal matter and the defendant moved to suppress subsequent in-court identification testimony based on the pre-trial use of the unsealed photograph. The Court of Appeals ruled that suppression was not required because CPL 160.50 did not create a constitutionally derived "substantial right." *Patterson*, 78 N.Y.2d at 716. The majority in *Anonymous* distinguished *Patterson* on the grounds that the defendant in that case did not assert that the failure to seal the photograph affected his conviction, whereas the sentence imposed on the *Anonymous* defendant was directly based on the unsealed testimony.

Chief Judge Janet DiFiore, joined by Judges Michael Garcia and Paul Feinman, issued a lengthy dissent in which she argued that the holding in *Katherine B.* does not control here because the prosecution in that case sought to use the actual conduct underlying the dismissed charges in connection with the subsequent sentencing proceeding. In contrast, the People here sought to use the defendant's own sworn admission to different criminal activity rather than the conduct supporting the dismissed robbery charges. Accordingly, in the eyes of the dissent, it was not error for the trial court to unseal the transcripts from the robbery proceeding. The

dissent also rejected the majority's efforts to distinguish *Patterson* as insufficient to overcome its holding that CPL 160.50 does not create a constitutionally derived substantial right justifying application of the exclusionary rule that, in this instance, would require resentencing without consideration of the suppressed evidence.

The majority based its reversal and remand on a broad application of *Katherine B.* and a narrow reading of *Patterson*, while the dissent construed *Katherine B.* more narrowly and applied a broader reading of *Patterson*. In any event, both the majority and dissent seem to concede that there may be nothing preventing the People from presenting evidence of the defendant's subsequent criminal activity through a means other than the introduction of the sealed testimony. Accordingly, the *Anonymous* defendant still may end up with a sentence in excess of his original four years in prison and three years of supervised release.

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