APL 2018-00182

Court of Appeals of the State of New York

The People of the State of New York,

Respondent,

v.

Nicole Green,

Appellant.

Brief of Amicus Curiae
New York County Lawyers Association Committee on Appellate Courts in Support of Appellant

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TABLE OF CONTENTS

Summary of Amicus' Position 1

Statement of the Case 3

Argument 4

Article VI § 4(k) guarantees defendants the right to appeal to the intermediate appellate court. Accordingly, this Court should analyze appeal waivers under heightened scrutiny. 4

Conclusion 13

TABLE OF AUTHORITIES

Cases

Adams v. United States ex rel. McCann, 317 U.S. 269 (1942)............5, 13

Brookhart v. Janis, 384 U.S. 1 (1967)..........4

Halbert v Michigan, 545 U.S. 605 (2005)..........8

Johnson v. Zerbst, 304 U.S. 458 (1938)..........4

Jones v. Barnes, 463 U.S. 745 n. 1 (1983)..........5

Matter of People v. Juarez, 31 N.Y.3d 1186 (2018)..........7, 10

McKane v. Durston, 153 U.S. 684 (1894)..........5, 8

People v. Andrews, 23 N.Y.3d 605 (2014)..........8

People v. Callahan, 80 N.Y.2d 273 (1992)..........7

People v. Catu, 4 N.Y.3d 242 (2005)..........12

People v. Fricchione, 43 A.D.3d 410 (2d Dept. 2007)..........11

People v. Green, 160 A.D.3d 1422 (2018)..........1, 4

People v. Grimes, 32 N.Y.3d 302 (2018)..........2, 8, 10, 11

People v. Howard, 50 N.Y.2d 583 (1980)..........2, 4, 12

People v. Johnson, 14 N.Y.3d 483 (2010)..........12

People v. Lopez, 6 N.Y.3d 248 (2006)..........7

People v. Nieves, 2 N.Y.3d 310 (2004)..........8, 9

People v. Pollenz, 67 N.Y.2d 264 (1986).......... passim

People v. Rodriguez, 158 A.D.3d 143 (1st Dept. 2018)..........12

People v. Rosario, 151 A.D.3d 450 (1st Dept. 2017)..........11

People v. Smith, 27 N.Y.3d 643 (2016)..........8, 9

People v. Smith, 32 A.D.3d 553 (3d Dept. 2006)..........11

People v. Stevens, 91 N.Y.2d 270 (1998)..........8, 9, 10

People v. Swen, 164 A.D.3d 926 (2d Dept. 2018)..........11

People v. Vargas, 88 N.Y.2d 363 (1996)..........1, 2, 4, 12

People v. West, 100 N.Y.2d 23 (2003)..........8

People v. Whalen, 49 A.D.3d 916 (3d Dept. 2008) 11
United States v. Wenger, 58 F.3d 280 (7th Cir. 1995) 8

Statutes

C.P.L. § 450.10 6
L.1984, c. 671 6

SUMMARY OF AMICUS' POSITION

The New York County Lawyers Association ("NYCLA") is a not-for-profit organization founded in 1908 and one of the first major bar associations in the country to admit members without regard to race, ethnicity, religion, or gender. Since its inception, it has pioneered some of the most far-reaching and tangible reforms in American jurisprudence and has continuously played an active role in legal developments and public policy. NYCLA's Committee on Appellate Courts is committed to promoting access to appellate review, and to furthering the efficiency and effectiveness of New York's appellate courts.[1]

People v. Green (APL 2018-00182) is a case about access to appellate justice. The appeal presents the question of whether an appeal waiver is valid when entered under a mistaken understanding of the maximum sentence. As this Court has repeatedly acknowledged, the waiver of constitutional rights is subject to heightened scrutiny. *See, e.g.*, *People v. Vargas*, 88 N.Y.2d 363, 376 (1996) ("With respect to statutory rights, as

[1] This brief has been approved by NYCLA's Appellate Courts Committee and approved for filing by NYCLA's President; it has not been reviewed by NYCLA's Executive Committee and does not necessarily represent the views of its Board.

contrasted to constitutional rights, this Court has been more flexible regarding the acceptable form of voluntary waivers by defendants and their lawyers.") (citations omitted); *People v. Howard*, 50 N.Y.2d 583, 593 (1980) (the government bears the burden of overcoming the presumption against the waiver of constitutional rights). Thus, an important threshold issue is whether the right to appeal to the intermediate appellate court is constitutional or statutory.

This Court has held that the right to appeal is guaranteed by Article VI § 4(k) of the New York Constitution. *People v. Pollenz*, 67 N.Y.2d 264, 269 (1986). Thus, appeal waivers must be subject to strict scrutiny. *Vargas*, 88 N.Y.2d at 376; *Howard*, 50 N.Y.2d at 593. Nevertheless, several decisions from the last two decades have mistakenly suggested, without analysis (or any discussion of Article VI § 4(k)), that the right to appeal is statutory only. *E.g.*, *People v. Grimes*, 32 N.Y.3d 302, 309-10 (2018).

To ensure clarity regarding this important issue of fundamental rights, this Court should reaffirm once again that Article VI § 4(k) "render[s] inapplicable the general rule that the right to appellate review is purely statutory." *Pollenz*, 67 N.Y.2d at 269. Having done so, this Court

should further hold that appellate courts must apply heightened scrutiny when determining the validity of a waiver of the constitutional right to appeal to the Appellate Division in a criminal case.

STATEMENT OF THE CASE

In 2015, Ms. Green pled guilty to attempted second-degree burglary. She waived her right to appeal after the court informed her that her sentence would be 6 years in prison (the maximum prison sentence for a first violent felony offender is 7 years) and up to 3 years of post-release supervision ("PRS"). As it turned out, though, Ms. Green was a second-violent felony offender, thus triggering a mandatory PRS sentence of 5 years (not 3). Although the court later confirmed that Ms. Green still wanted to plead guilty after advising her of the correct sentencing range, the court did not secure a new appeal waiver after correcting the sentencing range.

The court imposed a prison sentence of 6 years in prison and 5 years of PRS—a total sentence that is 730 days (and more than 22%) longer than the total sentence promised at the time of the appeal waiver.

On appeal to the Appellate Division, Ms. Green sought to challenge her sentence as excessive, seeking a reduction of the sentence from 6 years in prison to the minimum of 5 years in prison. In a two-sentence

memorandum decision, and without analysis, the Appellate Division held that the appeal waiver precluded review of this claim. 160 A.D.3d 1422 (4th Dept. 2018). This Court, per Judge Wilson, granted leave to appeal.

ARGUMENT

Article VI § 4(k) guarantees defendants the right to appeal to the intermediate appellate court. Accordingly, this Court should analyze appeal waivers under heightened scrutiny.

Under this Court's precedent, the waiver of a constitutional right is subject to stricter scrutiny than the waiver of a statutory right. This Court has confirmed: "[w]ith respect to statutory rights, as contrasted to constitutional rights, this Court has been more flexible regarding the acceptable form of voluntary waivers by defendants and their lawyers." *People v. Vargas*, 88 N.Y.2d 363, 376 (1996) (citations omitted). Indeed, there is a "presumption against the waiver of constitutional rights," and therefore, "[i]t is the People's burden to overcome that presumption by evidence of 'an intentional relinquishment or abandonment of a known right or privilege.'" *People v. Howard*, 50 N.Y.2d 583, 593 (1980) (quoting *Brookhart v. Janis,* 384 U.S. 1, 4 (1966) and citing *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938)). To satisfy that burden, the record must

confirm that the accused "knows what [he/she] is doing and [that the] choice is made with eyes open." *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942).

Thus, in analyzing whether a defendant has waived a particular right (including the right to appeal), the nature of the right—constitutional or statutory—matters. And in New York, the right to appeal is a state constitutional right.

Although the federal constitution may not guarantee the right to appeal, *McKane v. Durston*, 153 U.S. 684, 687 (1894),[2] Article VI § 4(k) of our State Constitution does. Article VI § 4(k) provides that:

> The appellate divisions of the supreme court *shall have all the jurisdiction possessed by them on the effective date of this article* [September 1, 1962] and such additional jurisdiction as may be prescribed by law, provided, however, that the right to appeal to the appellate divisions from a judgment or order which does not finally determine an action or special proceeding may be limited or conditioned by law. N.Y. Const. Article VI § 4(k). (emphasis provided)

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[2] Notably, *McKane*'s 125-year-old *federal* constitutional analysis has been called into doubt. *Jones v. Barnes*, 463 U.S. 745, 756 n. 1 (1983) (Brennan, J., dissenting).

Under Article VI § 4(k)'s plain text, a defendant has the right to appeal a final criminal judgment if a defendant had the right to bring the particular appeal as of September 1, 1962. *Id.*

Consistent with Article VI § 4(k)'s plain text, this Court held, in *People v. Pollenz*, that Article VI § 4(k) establishes a constitutional right to appeal to the intermediate appellate court. 67 N.Y.2d 264, 268-70 (1986). As this Court explained, Article VI § 4(k) "render[s] inapplicable the general rule that the right to appellate review is *purely statutory*. . . . [T]he Legislature [can] expand the jurisdiction of the Appellate Division but not contract it, except with regard to appeals from nonfinal orders." *Id.* (emphasis added). Having held that Article VI § 4(k) means what it says, *Pollenz* invalidated a provision of C.P.L. § 450.10(1) (L.1984, c. 671) that barred the right to appeal, following a negotiated plea, on the grounds that the sentence was excessive. 67 N.Y.2d at 268 (holding this statute unconstitutional because, on Article VI § 4(k)'s "effective date, the Appellate Division was obliged to entertain all appeals from final judgments in criminal cases, including those rendered upon guilty pleas imposing negotiated sentences.").

Post-*Pollenz*, this Court has (in no fewer than four cases) reaffirmed that Article VI § 4(k) creates a constitutional right to appeal that cannot be curtailed by legislative action. *See People v. Lopez*, 6 N.Y.3d 248, 255 (2006) (the Appellate Division can only "be divested" of its jurisdiction by "constitutional amendment"); *id.* at 260 & n. 3 (Smith, G.B., J., concurring) ("With the adoption of article VI, § 4(k) of the New York State Constitution, the Appellate Division's power to review and reduce sentences was deemed 'constitutionalized.'") (citing *Pollenz*, 67 N.Y.2d at 269); *Matter of People v. Juarez*, 31 N.Y.3d 1186, 1188 n. 1 (2018) (acknowledging that right to appeal from final orders and judgments cannot be curtailed by statute); *People v. Farrell*, 85 N.Y.2d 60, 65-66 (1995) ("Article VI, § 4 (k) of the New York Constitution fixed the floor of the jurisdiction of the Appellate Division as it existed on September 1, 1962"); *People v. Callahan*, 80 N.Y.2d 273, 284 (1992) (acknowledging that "the duty of the Appellate Division 'to entertain all appeals from final judgments in criminal cases' is of constitutional dimension") (citation omitted).

Yet, in recent years, this Court has also—without mentioning Article VI § 4(k) or its prior decision in *Pollenz*—repeatedly stated that the right

to appeal is statutory only. *People v. Grimes*, 32 N.Y.3d 302, 310 (2018) ("There is no . . . state constitutional right to appellate review in a criminal case . . . ") (citing *McKane*, 153 U.S. at 687-88 (holding that the *federal* constitution does not guarantee the right to appeal).[3] Under this Court's decision in *Pollenz*, and the text of Article VI § 4(k), this dictum is incorrect.

Two of this Court's recent decisions (*Grimes* and *Andrews*) cite federal constitutional precedent (*McKane* and *Halbert*) in support of the suggestion that the right to appeal is not constitutionally protected. But of course, federal constitutional precedent is irrelevant to the question of whether Article VI § 4(k) guarantees a *state constitutional* right to appeal. And this Court has already answered that state constitutional

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[3] *See also People v. Smith*, 27 N.Y.3d 643, 647 (2016) ("'A defendant's right to appeal within the criminal procedure universe is purely statutory.'") (quoting *People v. Stevens*, 91 N.Y.2d 270, 278 (1998); *People v. Andrews*, 23 N.Y.3d 605, 610 (2014) ("[T]here is no constitutional entitlement to an appeal . . . ") (citing federal constitutional analyses); *People v. Nieves*, 2 N.Y.3d 310, 314 (2004) ("Appealability of determinations adverse to a defendant cannot be presumed because 'a defendant's right to appeal within the criminal procedure universe is purely statutory'") (quoting *Stevens*, 91 N.Y.2d at 278); *People v. West*, 100 N.Y.2d 23, 26 (2003) ("The right to appeal is a statutory right that must be affirmatively exercised and timely asserted.") (citing *United States v. Wenger*, 58 F.3d 280, 282 (7th Cir. 1995)).

question in *Pollenz*, holding that Article VI § 4(k) guarantees a right to appeal.

Nieves and *Smith* (which also contain the erroneous dictum) cite language from this Court's decision in *Stevens*, which, if read out of context, suggests that the right to appeal is merely statutory. *See Stevens*, 91 N.Y.2d at 278 ("A defendant's right to appeal within the criminal procedure universe is purely statutory.").

Stevens considered whether a defendant has a statutory right, and alternatively a state constitutional right, to appeal a "sexually violent predator" determination (made under the Sex Offender Registration Act ["SORA"]). *Id.* at 275-78. In doing so, this Court expressly *reaffirmed* that, under *Pollenz*, Article VI § 4(k) constitutionalizes the right to appeal. *Id.* at 277-78 (the Appellate Division's constitutionally-protected jurisdiction "includes all appeals from final judgments of conviction in criminal cases, including those rendered upon guilty pleas") (citing *Pollenz* 67 N.Y.2d at 268). *Stevens* then held that Article VI § 4(k) did not guarantee the right to appeal this SORA determination because that appellate right did not exist when Article VI § 4(k) was adopted in September 1962. *Id.* at 278. It was only after rejecting the constitutional

claim on those grounds that this Court stated—citing *Pollenz*—that "a defendant's right to appeal within the criminal procedure universe is purely statutory." *Id.*

Read in context, this Court used the phrase "purely statutory" simply to convey that when Article VI § 4(k) does *not* guarantee the right to appeal (as in *Stevens*), any further right to appeal is "purely statutory."

Confusion about this issue has led the Court to issue conflicting pronouncements within the same year. Recently, in *Matter of People v. Juarez*, a dissenting opinion argued that a limitation on the right to appeal the denial of a motion to quash a subpoena violated Article VI § 4(k). 31 N.Y.3d 1186, 1191-1206 (2018). And although the *Juarez* majority found Article VI § 4(k) inapplicable because the quash-denial order was not a "final order," (Article VI § 4(k) does not guarantee the right to appeal non-final orders), the majority nevertheless agreed with the undebatable proposition that Article VI § 4(k) protects a baseline right to appeal *final* orders in criminal cases. *Id.* at 1188 n.1.

A few months later, though, in *Grimes* (which considered whether a defendant has the right to counsel on appeal to this Court), the majority reverted to the alternative view, stating that there is "no state

constitutional right to appellate review in a criminal case." *Grimes*, 32 N.Y.3d at 310. A dissenting opinion disagreed with the majority's holding on the right to counsel issue, but nevertheless embraced the erroneous notion that right to appeal is statutory only. *Id.* at 325 ("New York could . . . choose not to provide for appeals at all—the New York Constitution requires none of those.").

Predictably, the confusion wrought by this conflicting dictum has also seeped into Appellate Division decisions. Thus, several Appellate Division decisions state that the right to appeal is "purely statutory." *E.g.*, *People v. Rosario*, 151 A.D.3d 450, 450-51 (1st Dept. 2017); *People v. Whalen*, 49 A.D.3d 916, 916 (3d Dept. 2008); *People v. Fricchione*, 43 A.D.3d 410, 411 (2d Dept. 2007). Some Appellate Division decisions have correctly stated the alternative view. *See, e.g.*, *People v. Swen*, 164 A.D.3d 926, 926-27 (2d Dept. 2018) (correctly finding that Article VI § 4(k) creates a constitutional right to appeal); *People v. Smith*, 32 A.D.3d 553, 554 (3d Dept. 2006) (same).

We respectfully submit that this Court should clarify this apparent confusion and reaffirm that the right to appeal is guaranteed by Article VI § 4(k). Doing so would lend clarity to an important area of law in which

members of Amicus' committee regularly practice, and assist the intermediate appellate courts in applying clear and consistent law concerning the scope (and nature) of their powers, including the validity of appeal waivers.

Under the heightened scrutiny that applies to the waiver of a constitutional right, *see Vargas*, 88 N.Y.2d at 376; *Howard*, 50 N.Y.2d at 593, the purported waiver here fails. The State cannot carry its heavy burden of showing an informed and intentional abandonment of the right to appeal if, as here, the accused lacks understanding of her maximum sentencing exposure at the time of the waiver. *People v. Johnson*, 14 N.Y.3d 483, 487 (2010) (defendant's misunderstanding of sentencing exposure "vitiated [a] knowing and intelligent entry of the waiver of appeal. Consequently, once the decision to impose the more severe sentence was announced, it was incumbent on the court to elicit defendant's continuing consent to waive his right to appeal."); *see also People v. Rodriguez*, 158 A.D.3d 143, 153 (1st Dept. 2018) ("The court's failure to ensure that defendant was aware of his sentencing exposure mandates the conclusion that defendant's waiver of the right to counsel was invalid."); *People v. Catu*, 4 N.Y.3d 242, 245 (2005) (PRS entails a

significant deprivation of liberty). When a defendant misunderstands her sentencing exposure at the time of the purported waiver, she does not meaningfully "know[ ] what [s]he is doing" and cannot execute the waiver "with eyes open." *Adams*, 317 U.S. at 279. That simple rule properly recognizes that the right at issue—the right to appeal—is a basic constitutional right requiring significant procedural protection.

CONCLUSION

This Court should confirm that the right to appeal is guaranteed by Article VI § 4(k) of the State Constitution and hold that this waiver fails to satisfy the requisite constitutional scrutiny.

Respectfully Submitted,

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PRINTING STATEMENT

1. The following statement is made in accordance with Court of Appeals Rule 500.13(c).

2. Amicus' brief was prepared in the processing system Microsoft Word 2016, with Century Schoolbook typeface, 14-point font.

3. The text of the body brief, omitting the cover page and tables, has a word count of 2599, as calculated by the processing system, and is 13 pages in length.

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