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SUPREME COURT OF NEW YORK
NEW YORK COUNTY

People v. Cespedes[1]
(decided June 6, 2005)

Roberto Cespedes and three other co-conspirators were indicted by the Grand Jury of the Special Narcotics Court of the City of New York.[2] The indictment charged the defendants with four counts of criminal possession of a weapon in the second degree, four counts of criminal possession of a weapon in the third degree, and two counts of conspiracy in the fourth degree.[3] Since the indictment did not contain a single narcotics charge, the court questioned subject matter jurisdiction, and found that, even assuming the Special Narcotics Court had subject matter jurisdiction, it nonetheless lacked geographic jurisdiction,[4] as required by both the United States Constitution[5] and the New York State Constitution.[6] The court thus dismissed the indictment and gave the prosecution leave to re-present

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[1] 799 N.Y.S.2d 703 (Sup. Ct. 2005).

[2] *Id.* at 705.

[3] *Id.*

[4] *Id.* at 710.

[5] U.S. CONST. art. III, § 2, cl. 3 states: "The Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed."; U.S. CONST. amend. VI states: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."

[6] N.Y. CONST. art. I, § 1. "The right to trial by jury in *Article I*, § 2 incorporates the common law as it stood at the time of independence, and includes the right to be tried by a jury of the 'vicinage,' the county where the alleged criminal conduct was committed." *Cespedes*, 799 N.Y.S.2d at 707.

the case in front of a different grand jury.[7]

A confidential police informant approached one of the defendants, Pedro Mercado, and offered him an opportunity to rob drug dealers of cash and/or drugs.[8] Mercado accepted the informant's offer and then recruited the three other defendants to aid in the crime.[9] The defendants were told that the robbery location was at an address in the Bronx.[10] On the day of the robbery, the defendants and the informant loaded two vehicles with weapons and drove to the location in the Bronx.[11] The defendants were then arrested and indicted by the Special Narcotics Grand Jury of the City of New York.[12]

At trial, the court requested that the parties submit evidence regarding two jurisdictional questions.[13] The first question was, since the indictments did not contain a single narcotics charge, did the Grand Jury for the Special Narcotics Courts of the City of New York have subject matter jurisdiction over the controversy.[14] Secondly, assuming that the grand jury did have subject matter jurisdiction, the next question was did it also have geographic jurisdiction?[15] The grand jury minutes showed that the informant testified that he had many conversations with Mercado, but made no

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[7] *Cespedes,* 799 N.Y.S.2d at 706.
[8] *Id.* at 705.
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Cespedes*, 799 N.Y.S.2d at 705.
[13] *Id.* at 706.
[14] *Id.*
[15] *Id.*

mention of where those conversations took place.[16] The informant only mentioned Manhattan once, explaining why he was in a certain place at a certain time.[17] Additionally, the minutes of the grand jury testimony made it clear that none of the face-to-face meetings with the informant and the defendants took place in Manhattan.[18] In addition, Agent Scott, a Special Agent with the United States Drug Enforcement Administration, testified before the grand jury.[19] Agent Scott stated that many phone calls had been made from Manhattan by the informant to the defendant.[20] He also testified to the fact that the defendants initially believed that the robbery was to take place in Manhattan.[21]

According to the New York State Constitution article I section 2, in New York a defendant has the right to be prosecuted in the county where the alleged crime took place, unless the legislature places jurisdiction in another location.[22] "The guarantee to a defendant of the right to trial by a jury of the vicinage is historically regarded as 'vital'; the limitation of the right was one of the grievances that led to the American Revolution."[23] The court went on to state that "[t]his Court has long recognized that this right is 'not to be lightly disregarded and that only the most compelling reason

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16 *Id.*
17 *Cespedes,* 799 N.Y.S.2d at 706.
18 *Id.*
19 *Id.*
20 *Id.*
21 *Id.*
22 *Cespedes,* 799 N.Y.S.2d at 707.
23 *Id.*

could justify trial by a jury not drawn from the vicinage.' "[24] Because of the importance of this right, in order to set jurisdiction elsewhere, the legislature must do so in "clear and unmistakable terms."[25]

In the 1970's, the legislature did just that by creating the Special Narcotics Courts and the Special Narcotics Grand Jury in response to the inability to "contain narcotics traffic" and "cope with the enormous volume of narcotics cases."[26] This Special Narcotics Grand Jury has jurisdiction "only to those offenses involving the 'sale or possession of a narcotic drug and any other offense that could be properly joined therewith in an indictment.' "[27] In the instant case, the court held that because this indictment did not contain a single narcotics charge, the expanded jurisdiction created by the legislature did not apply.[28]

The geographic jurisdiction of the conspiracy counts is determined by the county in which the conspiracy was entered into by the defendants or in any county where "one or more of the overt acts in furtherance of the conspiracy were committed by the defendant or one of the co-conspirators."[29] "[A]n oral or written statement made by a person in one jurisdiction to a person in another jurisdiction by means of a telecommunication . . . is deemed to be

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[24] *Id.* (quoting Matter of Murphy v. Supreme Court, 63 N.E.2d 49, 56 (N.Y. 1945)).
[25] *Id.* (quoting *Murphy*, 63 N.E.2d at 51).
[26] *Id.* at 708. (quoting N.Y. JUD. LAW §177-a (McKinney 2005)).
[27] *Cespedes,* 799 N.Y.S.2d at 708 (quoting N.Y. JUD LAW § 177-d(iii) (McKinney 2005)).
[28] *Id.* at 709.
[29] *Id.* (quoting People v. Ribowsky, 568 N.E.2d 1197, 1202 (N.Y. 1991)).

made in each jurisdiction."[30] Therefore, the court had to determine if the phone calls made to the defendants were from New York County, and if so, whether they were in furtherance of the conspiracy.[31] The evidence required to make this showing has to be competent evidence, which excluded hearsay.[32] The court found that the evidence presented on the issue of geographic jurisdiction was inadequate to create geographic jurisdiction in any grand jury in New York County.[33]

In reaching its conclusion, the court noted that Agent Scott's testimony "was utterly devoid of any non-hearsay facts establishing that either party to any conversation was actually present in Manhattan, or that the subject matter of the phone calls was in furtherance of a criminal conspiracy."[34] In addition, the informant's testimony provided no additional information as to where the phone calls between him and the defendant took place.[35] As for the evidence that the defendants initially believed that the robbery was to occur in Manhattan, the court stated that " '[m]ere thought [sic] or plans' do not meet the 'conduct' requirement for jurisdiction."[36]

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[30] *Id.* (quoting N.Y. CRIM. PROC. LAW § 20.60(1) (McKinney 2005)).

[31] *Id.*

[32] *Cespedes,* 799 N.Y.S.2d at 709.

[33] *Id.* at 710.

[34] *Id.*

[35] *Id.* The People made the argument that because the informant and Mercado were using cell phones during their conversations in and around the Bronx/Manhattan area, it could be inferred that at least one of them ventured into the Manhattan area during some of these conversations. The court flatly rejected this logic and stated that it was "flabbergasted that the People consider these proposed inferences 'reasonable.' " *Id.*

[36] *Id.* at 711. (quoting People v. Kassebaum, 744 N.E.2d 694, 698 (N.Y. 2001)). Working with the People's theory, the court created an analogy in which the prosecution could prove that a defendant had at some point contemplated robbing a bank in Kansas, but in the end robbed a bank in Utah; the mere fact that he had considered robbing a bank in Kansas could

In *United States v. Cabrales*, the defendant moved to dismiss an indictment returned in the United States District Court for the Western District of Missouri charging the defendant with money laundering for conduct which allegedly occurred entirely within the state of Florida.[37] The United States Supreme Court affirmed the judgment of the Eighth Circuit which dismissed the indictment.[38] In *Cabrales*, the defendant deposited, and later withdrew, $40,000 from a bank in Florida.[39] This money was the product of illegal sales of cocaine which occurred in Missouri, of which Cabrales played no part.[40]

In affirming the decision to dismiss the indictment for improper venue, the Court noted that the issue of venue had been a matter of concern for the founding fathers of this nation.[41] "Their complaints against the King of Great Britain, listed in the Declaration of Independence, included his transportation of colonists 'beyond Seas to be tried.' "[42] This concern over venue led to the creation of two safeguards in the United States Constitution.[43] The first is found in Article III, Section 2 which states that "[t]rial of all Crimes . . . shall be held in the State where the said Crimes shall have been

provide jurisdiction to try the case in Kansas instead of Utah. This theory was thought so absurd that the court stated "[m]erely to state this premise is to refute it." *Id.* at 711-12.

[37] 524 U.S. 1, 3 (1998).

[38] *Id.* at 10.

[39] *Id.* at 4.

[40] *Id.*

[41] *Id.* at 6.

[42] *Cabrales*, 524 U.S. at 6 (quoting THE DECLARATION OF INDEPENDENCE para. 21 (U.S. 1776)).

[43] *Id.*

committed."[44] The Sixth Amendment protects a defendant's venue right when it allows for trial "by an impartial jury of the State and district wherein the crime shall have been committed."[45] Relying on these safeguards, the Court concluded that venue in Missouri was improper because the transactions "began, continued, and were completed only in Florida."[46]

In *Taub v. Altman*, the defendant, charged with filing false tax returns to the state and city of New York, challenged New York County's jurisdiction over him.[47] The evidence before the grand jury showed that the tax returns were neither mailed from, nor received, in Manhattan.[48] In addition, the evidence showed that the defendants did not commit "any other act in Manhattan establishing an element of the relevant offenses."[49] In arguing that New York County had geographic jurisdiction over the case, the prosecution relied on the "particular effect" theory which "permits a criminal court of a particular county to exercise geographic jurisdiction, or venue, over an offense when – even though none of the conduct constituting the offense occurred within that county – 'such conduct had, or was likely to have, a particular effect upon such county.' "[50] The court found that "[t]he evidence proffered [was] insufficient to establish that the harm suffered by the City was in any meaningful way

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[44] *Id.* (quoting U.S. CONST. art. III, § 2, cl. 3).
[45] *Id.* (quoting U.S. CONST. amend. VI).
[46] *Id.* at 8.
[47] Taub v. Altman, 814 N.E.2d 799, 800 (N.Y. 2004).
[48] *Id.*
[49] *Id.*
[50] *Id.* (quoting N.Y. CRIM. PROC. LAW § 20.40(2)(C) (McKinney 2005)).

peculiar to New York County."[51] The court reasoned that all five boroughs were equally affected by the conduct at issue in this case, and therefore New York County did not have geographic jurisdiction over the case.[52]

Additionally, the Grand Jury of Kings County indicted the defendant in *People v. R* for insurance fraud.[53] The defendant brought forth a motion to dismiss the indictment claiming that the grand jury lacked geographic jurisdiction.[54] The grand jury heard evidence that an accomplice had telephoned the defendant from Kings County to the defendant's office in Manhattan, and during these phone conversations the defendant solicited him to engage in insurance fraud.[55] However, the evidence also showed that the phony bills were created in Nassau County, submitted from Nassau County or Manhattan to the insurance office in Nassau County, and all correspondence from the defendant concerning the insurance fraud conspiracy was sent from Manhattan to Nassau County.[56] The court dismissed the indictment after finding that the evidence showed that

> [T]here was no actual criminal conduct or intent in Kings County, no effect in Kings County of the defendant's conduct in Manhattan, no intent to have an effect in Kings County, not even evidence of knowledge by the defendant that [the accomplice] was in Kings County when he solicited [him].[57]

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[51] *Id.* at 804.
[52] *Taub,* 814 N.E.2d at 805.
[53] 607 N.Y.S.2d 887, 888 (Sup. Ct. 1994).
[54] *Id.*
[55] *Id.* at 888-89.
[56] *Id.* at 889.
[57] *Id.*

Similar to *Cespedes*, the court relied on the right to be tried by a jury drawn from the vicinage as a vital right that should not be easily disregarded, and which is protected by the New York State Constitution.[58]

In sum, both the United States and New York State Constitutions protect a defendant's right to be tried by a jury drawn from the vicinage. This right was incorporated into the New York State Constitution from the common law. In addition, the founding fathers of this nation thought it so important that two provisions concerning venue were placed in the Federal Constitution. Moreover, cases interpreting both the Federal and New York State Constitutions stress the importance of a defendant's right to be tried by a jury from the vicinage. This right is thought of as fundamental, and it is not to be disregarded lightly.

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[58] *R*, 607 N.Y.S.2d at 890.

SEARCH & SEIZURE

United States Constitution Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

New York Constitution article I, section 12:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.