Touro Law Review

Volume 11 | Number 3 Article 50

1995

Power of Courts

Housing Judges was covered by the New York State Constitution.[26] Therefore, because the section on appointment power in the New York Civil Court Act conflicts with the New York Constitution, the constitutional amendment prevails.[27]

All of the aforementioned common law steps in logic indicate that the Chief Administrator has the power to appoint Housing Judges. Under the New York State Constitution this power is derived from the Chief Judge and is virtually without limit in this area. Furthermore, due to the supremacy of the New York State Constitution over New York statutes, the proper reading of the New York Civil Court Act and the amendments thereto require overriding supplementation by the applicable amendments to the New York Constitution.

People v. Perez[28]
People v. Vasquez
(decided March 17, 1994)

The issue decided on appeal was whether the trial court exceeded its authority by amending a criminal indictment to include a count that had been properly designated by the grand jury but left out of the original indictment as a result of a clerical error.[29] The New York Court of Appeals held that such a measure was not within the constitutional parameters of the trial court, as such alteration in the indictment was an impermissible change of substance, not in form.[30]

The case on appeal was a consolidation of two separate proceedings with the same legal issue.[31] In both cases, the

---

26. *Met Council, Inc.*, 84 N.Y.2d at 335, 642 N.E.2d at 1077, 618 N.Y.S.2d at 621.

27. Durante v. Evans, 94 A.D.2d 141, 144, 464 N.Y.S.2d 264, 266 (3d Dep't 1983) ("[T]he constitutional amendments abrogate the existing statute."), *aff'd*, 62 N.Y.2d 719, 465 N.E.2d 367, 476 N.Y.S.2d 828 (1984)).

28. 83 N.Y.2d 269, 631 N.E.2d 570, 609 N.Y.S.2d 564 (1994).

29. *Id.* at 272, 631 N.E.2d at 570-71, 609 N.Y.S.2d at 564-65.

30. *Id.* at 276, 631 N.E.2d at 573, 609 N.Y.S.2d at 567.

31. *Id.* at 272, 631 N.E.2d at 570, 609 N.Y.S.2d at 564-65.

defendants were charged with a series of serious criminal offenses.[32] The prosecution moved to amend the original indictment to include an additional count that had allegedly been left out by an inadvertent clerical oversight.[33] Upon review of the motion, both trial court judges granted the revision to the indictment. Subsequently, both defendants were convicted on the new count.[34] The Appellate Division, First Department affirmed both decisions, holding that there was no error in allowing for the modification of the indictment.[35] The defendants then sought redress from the New York Court of Appeals on the grounds that they were improperly tried on the charge not included in their original indictment.[36]

The court began its analysis of the appeal by examining the history of the state constitutional guarantee that individuals be indicted by a grand jury before being tried for an infamous crime.[37] The court cited to *People v. Iannone*,[38] which held that "[t]he requirement of indictment by Grand Jury is intended to prevent the people of this State from potentially oppressive excesses by the agents of the government in the exercise of the prosecutorial authority vested in the State."[39] The court also noted that in *Simonson v. Cahn*[40] it was stated that the issue is not one of "'policy, expediency or convenience' - as a district

32. *Id.* at 272-73, 631 N.E.2d at 571, 609 N.Y.S.2d at 565. In *Perez*, the defendant was charged with attempted murder, reckless endangerment and two counts of attempted assault. *Id.* In *Vasquez*, the defendant was charged with intentional murder and four additional counts. *Id.*

33. *Id.* In *Perez*, the People moved to amend the indictment to include one count of criminal possession of a weapon based upon the same indictment. *Id.* at 273, 631 N.E.2d at 571, 609 N.Y.S.2d at 565. In *Vasquez*, the People moved to amend the indictment to include a charge of felony murder based upon the same indictment. *Id.*

34. *Id.*

35. People v. Perez, 191 A.D.2d 285, 595 N.Y.S.2d 33 (1st Dep't 1993); People v. Vasquez, 189 A.D.2d 578, 592 N.Y.S.2d 34 (1st Dep't 1993).

36. *Perez*, 83 N.Y.2d at 275, 631 N.E.2d at 572, 609 N.Y.S.2d at 566.

37. *Id.* at 273, 631 N.E.2d at 571, 609 N.Y.S.2d at 565.

38. 45 N.Y.2d 589, 384 N.E.2d 656, 412 N.Y.S.2d 110 (1978).

39. *Id.* at 594, 384 N.E.2d at 660, 412 N.Y.S.2d at 113.

40. 27 N.Y.2d 1, 261 N.E.2d 246, 313 N.Y.S.2d 97 (1970).

attorney or judges may see it - 'but with public fundamental rights fixed by the Constitution.'"[41]

Accordingly, the court in *Perez* established that "[a]t common law, the significance of an indictment was so great that trial courts lacked the authority to amend it in any way."[42] Evidence of the stringent nature of this rule is found in *People v. Jackson*,[43] where it was noted that "[i]ndeed, prior to the adoption of the Code of Criminal Procedure in 1881 by the Legislature, indictments could not be amended and were commonly dismissed on purely technical grounds."[44]

In an effort to stem the tide of criminal dismissals based upon "technicalities", the rigidity of the common law rule was amended in limited degree with the passage of section 293 of the Code of Criminal Procedure to permit "a court to vary an indictment in matters relating to times, names or descriptions, provided that the accused was not prejudiced."[45]

The alteration in the rule, however, was quite restrictive.[46] The basic guiding principle of the cases that followed the enactment of the new statute was clearly enunciated in *People v. Geyer*.[47] In *Geyer*, the court found that "[it] was not the purpose of the legislature to attempt to authorize the trial court by amendment to change the substantial elements and nature of the crime charged and in effect substitute a new indictment in the place of the one found by the grand jury."[48] For instance, in *People v. Van Every*,[49] a clerical error in the indictment mistakenly charged the defendant with a crime allegedly committed some eight months

41. *Id.* at 3, 261 N.E.2d at 247, 313 N.Y.S.2d at 99 (quoting People *ex rel.* Battista v. Christian, 249 N.Y. 314, 317-18, 164 N.E. 111, 111 (1928).

42. *Perez*, 83 N.Y.2d at 273, 631 N.E.2d at 571, 609 N.Y.S.2d at 565.

43. 153 Misc. 2d 270, 582 N.Y.S.2d 336 (Sup. Ct. Bronx County 1991).

44. *Id.* at 271, 582 N.Y.S.2d at 337.

45. *Perez*, 83 N.Y.2d at 273, 631 N.E.2d at 571, 609 N.Y.S.2d at 565.

46. *Id.* at 274, 631 N.E.2d at 571-72, 609 N.Y.S.2d at 565-66.

47. 196 N.Y. 364, 90 N.E. 48 (1909).

48. *Id.* at 367, 90 N.E. at 49.

49. 222 N.Y. 74, 118 N.E. 244 (1917).

after the finding of the indictment.[50] Although this may have obviously been a simple clerical oversight, the court nonetheless found the error to be one of substance and not of form.[51] Therefore, the court discharged the defendant.[52] Furthermore, in *People v. Ercole*,[53] the court barred the use of an additional alleged theory of why or how the defendant committed the purported crime that was not stated in the original indictment, even though the actual counts of the indictment remained unchanged.[54] Moreover, in *People v. Miles*,[55] the court found that the indictment provision was not waiveable, holding that a new count could not be added to an indictment even with the consent of the defendant through their attorney.[56]

The court then noted that although the current Criminal Procedure Law section 200.70 superseded section 293 of the Code of Criminal Procedure with different language, "the drafters stated that no substantive change in the law was intended."[57] The court then stated that it was very significant that subdivision two of the new provision specifically "prohibits amendment of an indictment for the purpose of curing a . . . failure thereof to charge or state an offense."[58] It was the defendants' position that such express language in the statute should bar any amendment that adds an offense to the indictment.[59] Conversely, the state argued that the statute was "specifically designed to avoid dismissals premised solely on technical errors and assert[ed] that to require dismissal here

50. *Id.* at 78, 118 N.E. at 245. The grand jury handed down an indictment on February 8, 1915 charging the defendant with a crime which supposedly occurred on October 17, 1915. *Id.* at 76, 118 N.E. at 245.

51. *Id.*

52. *Id.* at 79, 118 N.E. at 245.

53. 308 N.Y. 425, 126 N.E.2d 543 (1955).

54. *Id.* at 439, 126 N.E.2d at 550.

55. 289 N.Y. 360, 45 N.E.2d 910 (1942).

56. *Id.* at 363-64, 45 N.E.2d at 912.

57. *Perez*, 83 N.Y.2d at 274, 631 N.E.2d at 572, 609 N.Y.S.2d at 566.

58. *Id.* at 274-75, 631 N.E.2d at 572, 609 N.Y.S.2d at 566.

59. *Id.* at 275, 631 N.E.2d at 572, 609 N.Y.S.2d at 566.

where the errors were patently technical - clerical mistakes - would be contrary to the intent of the statute."[60]

The court in reaching its conclusion established that "the subdivision makes clear that only certain kinds of errors - even if they effect no change in the prosecution's theory - may be subject to amendment: those 'relating to matters of form, time, place, names of persons and the like.'"[61] The court further reasoned that "[w]hatever flexibility is built into the open-ended term 'and the like', it certainly does not extend the category so far as to allow the addition of an entirely new count."[62] The court then held that "the amendment in each of these cases was designed to cure a failure to charge or state an offense and is not authorized by CPL section 200.70. Such an amendment is a change in substance, not in form."[63] The court noted that such "omission must be cured by superseding indictment or re-presentment."[64] Therefore, in both cases the court vacated the conviction of the amended criminal charge and dismissed the defendants on that count of the indictment.[65]

The federal courts take a very similar, if not identical, approach to the issue as the New York Court of Appeals. The longstanding precedent on the issue in the federal jurisdiction was established by the Supreme Court in *Ex Parte Bain*.[66] In *Bain*, the Court held that "no person should be called to answer any capital or otherwise infamous crime, except upon an indictment or presentment of a grand jury, in the full sense of its necessity and of its value."[67] The Court reasoned that:

---

60. *Id.*

61. *Id.* at 276, 631 N.E.2d at 573, 609 N.Y.S.2d at 567.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 276-77, 631 N.E.2d at 573, 609 N.Y.S.2d at 567.

66. 121 U.S. 1 (1886).

67. *Id.* at 12. *See* United States v. Cook, 745 F.2d 1311 (10th Cir. 1984) (holding that amendments of substance must be sent back to the grand jury); United States v. Muelbl, 739 F.2d 1175 (7th Cir. 1984); United States v. Young, 730 F.2d 221 (5th Cir. 1984).

> If it lies within the province of the court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury . . . may be frittered away until its value is almost destroyed.[68]

Nearly three quarters of a century later, the Supreme Court reaffirmed the *Bain* decision. In *Sitrone v. United States*,[69] the Court held that "[t]he Bain case, which has never been disapproved, stands for the rule that a court cannot permit a defendant to be tried on charges that are not made in the indictment against him."[70] The Court explained the rule to be "that after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself."[71]

The rigidity of this rule, however, has given way in a limited degree to allow some flexibility in recent times. For instance, in *United States v. Kegler*,[72] the court held that:

> The modern rule is that an indictment may be amended by the court, provided that the amendment is not substantial, it is sufficiently definite and certain, the accused is not taken by surprise, and any evidence the defendant had before the amendment would be equally available to him after the amendment.[73]

Furthermore, the court noted that "the settled rule in federal courts prohibits substantive amendments, but permits changes in indictments that are merely 'a matter of form' or which correct

---

68. *Bain*, 121 U.S. at 10.

69. 361 U.S. 212 (1960).

70. *Id.* at 217. *See* United States v. Winter, 663 F.2d 1120 (1st Cir. 1981) (holding that an indictment cannot be amended unless it is a matter of form).

71. *Id.* at 215-16. *See* United States v. Gonzalez, 661 F.2d 488 (5th Cir. 1981) (holding that charges may not be broadened except by the grand jury).

72. 724 F.2d 190 (D.C. Cir. 1984).

73. *Id.* at 195.

insignificant clerical errors."[74] This interpretation is in complete accord with the status of New York law.

The development of the issue of amending an indictment by a grand jury has been the same in both the federal and New York jurisdictions. The common law principle was very strict, in that amendments were not at all permitted. In modern times, the rule has evolved to allow for some modification of an indictment, but only to the extent that such alteration relates only to the most basic elements of form.

SUPREME COURT

KINGS COUNTY

People v. Williams[75]
(decided December 9, 1994)

In *Williams*, the constitutional issue raised was whether the supreme court could retain jurisdiction over a suppression motion stemming from a weapons charge, involving a juvenile, after it had been severed from other charges.[76] After examining article VI, sections 7(a) and (b) of the New York State Constitution,[77]

---

74. *Id.* at 194. *See* United States v. Field, 875 F.2d 130 (7th Cir. 1989) (quoting United States v. Field, 659 F.2d 163, 167 (D.C. Cir. 1981) (stating that amendments were permitted regarding matters of form); United States v. Nabors, 762 F.2d 642 (8th Cir. 1985) (eliminating mere surplusage is allowable).

75. 1994 WL 744862, at *1 (Sup. Ct. Kings County Dec. 9, 1994). This case, pending publication, will be reported at 622 N.Y.S.2d 654.

76. *Id.* at *2. The court's decision to sever the weapons counts from the robbery counts was based on the fact that "[t]he evidence of one offense would not have been admissible at the trial of the other, since there was no indication that the same weapon was involved." *Id.* at *3.

77. N.Y. CONST. art. VI, § 7. Article VI, section 7 provides:

> a. The supreme court shall have general original jurisdiction in law and equity and the appellate jurisdiction herein provided. In the city of New York, it shall have exclusive jurisdiction over crimes prosecuted by indictment, provided, however, that the legislature may grant to the