New York Court of Appeals Reports

PEOPLE v. CATALANOTTE, 72 N.Y.2d 641 (1988)

536 N.Y.S.2d 16, 532 N.E.2d 1244

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. STEVEN CATALANOTTE, Also Known as STEVEN CATALONOTTE, Appellant.

Court of Appeals of the State of New York.

Argued October 20, 1988

Decided December 15, 1988

Appeal from the Appellate Division of the Supreme Court in the Second Judicial Department, Thaddeus E. Owens, J.

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Joseph R. Giaramita, Jr., for appellant.

Elizabeth Holtzman, District Attorney (Darrell B. Fields, Barbara D. Underwood and *Shulamit Rosenblum* of counsel), for respondent.

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SIMONS, J.

The question presented on this appeal is whether defendant's sentence as a second felony offender may be predicated upon a 1971 conviction which satisfied constitutional standards when obtained and has survived postconviction collateral attack, but was obtained by means which, if the indictment were tried now, would violate defendant's rights under the Sixth Amendment of the United States Constitution as presently applied by the courts. Defendant asserts that the prior conviction may not be used to enhance his sentence because in obtaining it the trial court followed a practice of closing the courtroom which this court subsequently recognized as unconstitutional. We disagree: for purposes of determining whether a prior conviction "was unconstitutionally obtained" (CPL **400.21** [7] [b]) — and thus may not be counted for predicate felony purposes — the proper inquiry is to determine whether the conviction was obtained in violation of the defendant's rights as defined by the law at the time of the conviction or by present law which is properly applied to it under recognized principles of retroactivity.

On March 5, 1971 defendant, then a New York City police officer, sold 50 packets of heroin to an undercover police officer. He was arrested six days later, possessing heroin and methadone, and subsequently convicted of various drug-related felonies arising from the two incidents. During trial, the People called as a witness the undercover officer who made the "buy" from defendant. Before the officer testified, the prosecutor requested that the court take judicial notice of the hazards to which testifying undercover officers are generally subject and requested that spectators be excluded. The trial court summarily

closed the courtroom to the public before the officer testified. Defendant appealed his conviction, contending that it had been obtained in violation of his constitutional right to a public trial. His claim was rejected by both the Appellate Division (**41 A.D.2d 968**) and this court (**36 N.Y.2d 192**).

Four years later we declared for the first time that the summary closing of a courtroom simply because a witness is
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an undercover police officer constitutes reversible error (*People v Jones,* **47 N.Y.2d 409**, *cert denied* 444 U.S. 946). Deviation from the rule is justified, we said, only when preceded by an inquiry "careful enough to assure the court that defendant's right to a public trial is not being sacrificed for less than compelling reasons." (*Id.*, at 414-415.) There had been no such inquiry in defendant's case.

In 1986, defendant was convicted in this case on his guilty plea of attempted robbery in the second degree in satisfaction of an indictment charging him with several crimes for his participation in an armed robbery and subsequent gun battle with the police. He was sentenced as a second felony offender over his objection that the 1971 conviction, used as the predicate, was unconstitutionally obtained under *People v Jones* (**47 N.Y.2d 409**, *supra*). After sentencing, defendant moved pursuant to CPL **440.10** (2) (a) to vacate the 1971 conviction as unconstitutional, urging that the *Jones* rule should be applied retroactively. The court denied the petition and defendant did not appeal that ruling.

On this appeal, defendant pursues a different route to avoid being sentenced as a predicate felon. He now concedes that *Jones* should not be applied retroactively to vacate the 1971 conviction. Instead, he argues that the *Jones* rule should only be applied to prevent the imposition of enhanced punishment for the 1986 conviction. The Appellate Division affirmed the judgment of conviction but, analyzing defendant's claim solely as whether the *Jones* rule should be applied retroactively and required vacatur of the 1971 conviction, did not address defendant's primary argument.

A conviction obtained in violation of one's constitutional rights may not be used to enhance punishment for a later offense (*Burgett v Texas,* **389 U.S. 109**, **115**). CPL **400.21** (7) (b) implements that principle. It provides in relevant part: "A previous conviction in this or any other jurisdiction which *was obtained* in violation of the rights of the defendant under the applicable provisions of the constitution of the United States must not be counted in determining whether the defendant has been subjected to a predicate felony conviction. The defendant may, at any time during the course of the hearing hereunder controvert an allegation with respect to such conviction in the statement on the grounds that the *conviction was unconstitutionally obtained*" (emphasis added).

The clear import of the phrases "was obtained" and "was
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unconstitutionally obtained" indicate that the validity of the conviction shall be determined as of the time it was entered. An unconstitutional conviction is, by definition, a conviction which

was obtained in violation of the defendant's constitutional rights, i.e., his rights as defined by the law existing at the time the conviction was obtained or by subsequent law applicable to the judgment under principles of retroactivity. The conviction does not become unconstitutional merely because the law has changed subsequent to the defendant's direct appeal of that conviction *(Linkletter v Walker,* **381 U.S. 618**, **628-629**; *see also, United States v Johnson,* **457 U.S. 537**, **542**). Since the predicate felony statute operates upon the prior conviction rather than the prior practice, accepted principles of retroactivity must be applied to determine whether a conviction "was unconstitutionally obtained" and thus may not be counted when the People seek to impose an enhanced sentence. Under those rules, a defendant is entitled to the benefit of any change in the law if the change occurs before his conviction becomes final *(see, Griffith v Kentucky,* **479 U.S. 314**, **328**) or, if the right at stake is such that the law has engrafted an exception to the traditional rule to permit collateral attack on judgments of conviction after they have become final *(see, e.g., Robinson v Neil,* **409 U.S. 505** [double jeopardy]; *Ashe v Swenson,* **397 U.S. 436** [same]; *Arsenault v Massachusetts,* **393 U.S. 5** [right to counsel at a preliminary hearing]; *McConnell v Rhay,* **393 U.S. 2** [right to counsel at sentencing]; *Roberts v Russell,* **392 U.S. 293** [right to confrontation]; *Jackson v Denno,* **378 U.S. 368** [right to pretrial determination of the voluntariness of a confession]).

Defendant's 1971 conviction, which serves as the predicate for his present sentence, meets neither of these criteria. It was not "obtained in violation of the rights of * * * defendant" because the closure of the courtroom during his trial complied with the existing legal requirements for a public trial *(see, People v Hinton,* **31 N.Y.2d 71**, *cert denied* 410 U.S. 911; *People v Hagan,* **24 N.Y.2d 395**, *cert denied sub nom. Hayer v New York,* 396 U.S. 886; *People v Jelke,* **308 N.Y. 56**). We so held on defendant's direct appeal *(People v Catalanotte,* **36 N.Y.2d 192**, *affg* **41 A.D.2d 968**). That we subsequently declared a similar procedure unconstitutional in *People v Jones* (**47 N.Y.2d 409**, *supra)* does not, as defendant concedes, make the *Jones* rule retroactive to prior convictions that have survived direct appeal, nor does it, in view of the plain language of the

statute, require a finding that the predicate conviction "was unconstitutionally obtained".

The logic of such an interpretation is manifest when one considers that the proper meaning to be given to broadly stated constitutional commands, such as due process of law and right to a public trial, changes constantly. To apply such changes retroactively when the court has not declared them retroactive, may open to question hundreds of convictions and enhanced sentences based upon them *(see, e.g., Batson v Kentucky,* **476 U.S. 79** [racial bias in jury selection]; *Payton v New York,* **445 U.S. 573** [warrantless felony arrest in home]; *Sandstrom v Montana,* **442 U.S. 510** [improper jury charge]; *Griffin v California,* **380 U.S. 609** [comment by prosecutor or Judge upon defendant's failure to testify]). The dissent assumes such convictions and others like them were unconstitutionally obtained even though they concededly cannot be vacated in postconviction proceedings. It holds that no matter how drastically the law has been modified between the time

of the first conviction and the second, any change renders the first conviction unconstitutional for the purpose of enhanced sentencing. Its rule would invalidate the conviction for such purpose even if the infirmity was not challenged at the time of the first conviction because under current law, if the predicate conviction "was unconstitutionally obtained", the defendant does not have to raise the constitutional deprivation on direct appeal from the first conviction *(see, People v Harris,* **61 N.Y.2d 9**, **16**; *People v Wright,* **119 A.D.2d 973**). A defendant would not be required to anticipate a future change in the law as did the defendant in this case. For example, and using the illustrations cited above, under the dissent's view, past convictions obtained by a jury selected along racial lines would be open to question, at least for enhanced sentencing purposes, even though constitutional rules in effect at the time were followed by the trial court *(compare, Swain v Alabama,* **380 U.S. 202**; and *People v McCray,* **57 N.Y.2d 542**, *with Batson v Kentucky,* **476 U.S. 79**, *supra)*. Similarly, convictions obtained through the use of confessions or real evidence properly obtained under existing law, but now open to question in view of *Payton (supra),* and convictions obtained after trials in which *Sandstrom* charges were given would be nullified for enhanced sentencing purposes, regardless of whether defendant objected at trial. The statute does not require this result, nothing indicates the Legislature intended it and there are no policy reasons for ordering it.

Finally, we note that *People v Love* (**71 N.Y.2d 711**), relied upon by the defendant and the dissent, is clearly distinguishable. In that case the defendant's prior conviction was vacated because it was obtained in violation of his constitutional rights under the law that existed at the time of the conviction. Here, defendant's constitutional rights, as then defined, were respected in full.

Accordingly, the order of the Appellate Division, insofar as appealed from, should be affirmed.

KAYE, J. (dissenting).

CPL **400.21** (7) (b) declares that a previous conviction obtained in violation of a defendant's Federal constitutional rights "must not be counted" in determining second felony offender status. To that end, the statute gives a defendant the right to first challenge the unconstitutionality of a prior conviction at any time during the course of the second felony hearing. The statute bespeaks a legislative intention that — while a prior unconstitutional conviction may not be undone, indeed a defendant may already have served a lengthy term of imprisonment — that flawed conviction should not, in fairness, be used anew as the basis for another period of incarceration. (For those found to be second felony offenders, the minimum and maximum sentences are materially increased. *[See,* Penal Law § **70.06**.])

This case fits the statute in letter and spirit. In 1971, defendant was convicted of various drug offenses under circumstances the majority concedes would compel reversal as a matter of Federal constitutional law were he tried today. Despite his diligent efforts to litigate the constitutional issue, the

courts recognized the merit of his claim only four years later in an unrelated case, after defendant had exhausted his avenues of appeal. Now the People seek to make new use of the 1971 conviction to add to defendant's term of imprisonment for a 1986 robbery conviction. To my mind, CPL **400.21** (7) (b) proscribes this use of the earlier conviction, and I therefore respectfully dissent.

In concluding that defendant may be subjected to increased imprisonment based on the 1971 conviction, the majority reads restrictions into the plain language of the statute that are simply not there.

The court holds that the statute's use of the past tense — prohibiting use of a conviction that "was obtained" or "was unconstitutionally obtained" — signals a legislative direction that the validity of the conviction is to be determined "as of

the time it was entered." (Majority opn, at 644, 645.) In that the statute deals with past convictions, use of the past tense is inevitable. Nothing in the statute limits its application to convictions that were obtained in violation of defendant's rights as courts were willing to recognize them at the moment of conviction, nor does the statute call for application of retroactivity principles. Had the Legislature intended to so confine the statute, it could have and undoubtedly would have said so.

The court's analysis, like that of the Appellate Division, proceeds on the premise that the issue is solely a question of retroactivity. But it should be immediately apparent that this case is strikingly different from the retroactivity cases *(see,* majority opn, at 645). Defendant is not seeking to apply *People v Jones* (**47 N.Y.2d 409**) retroactively to nullify his 1971 conviction. Vacatur of that conviction was denied in his separate postsentencing proceeding pursuant to CPL **440.10**. He took no appeal from that decision, served his sentence, and concedes that the constitutional deprivation cannot be remedied retroactively by overturning the conviction. His point is different: he seeks only to avoid new use of the 1971 conviction — that would be unconstitutional now — to enlarge the term of imprisonment that will be imposed on him now. None of the cited cases deal with this situation. And none of them deal with a statute that on its face provides that the constitutionality of prior convictions — final judgments for all other purposes — can be challenged today, even when the constitutional point had never been raised during the prior litigation. Thus, the cited retroactivity cases are not precedents for the court's decision under CPL **400.21** (7) (b).

Nor are the retroactivity cases — even if applicable — in theory dispositive of the issues before us. While the Supreme Court's jurisprudence on retroactivity has evolved considerably over time, it is plain that the doctrine is founded on nothing more than fairness and practicality *(see generally, Griffith v Kentucky,* **479 U.S. 314**; *Linkletter v Walker,* **381 U.S. 618**). The decision to give a newly announced constitutional rule only prospective effect is distinctly not founded on any perception that previous failures were not also deprivations of a Federal constitutional right. If the law in effect at the time of a conviction were dispositive on constitutionality, as suggested by

the majority (majority opn, at 645), there would be no reason to apply a newly announced decision to convictions in
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other cases pending on appeal. Thus, whether or not *People v Jones (supra)* is retroactive, it is true today that defendant's 1971 conviction was actually obtained in violation of his rights under the Federal Constitution, and the case falls squarely within the prohibition of CPL **400.21** (7) (b) against renewed use of such convictions.

Accordingly, our recent decision in *People v Love* (**71 N.Y.2d 711**) is not "clearly distinguishable", as the majority claims (majority opn, at 647). While it is true that the constitutional violation suffered by the defendant in that case was a denial of the right to counsel — a violation recognized even under the law in effect at the time of the conviction — that happenstance was not critical to our decision. Rather, the decision was based on our interpretation of CPL **400.21** (7) (b) as intending a broad mandate that a "person convicted of a crime should not be treated as a repeat offender * * * simply because in the last 10 years he was unconstitutionally convicted and deprived of his liberty." *(Id.,* at 717.)**[fn*]**

It is clear that, in engrafting the new restrictions onto CPL **400.21** (7) (b), the court's real concern is simply the perceived practical impact of enforcing the statute as written. Without the restrictions now imposed by the court, the majority fears that "hundreds of convictions and enhanced sentences based upon them" may be "open to question" (majority opn, at 646). Such a concern begs the question of what the Legislature intended; if the costs of the statutory prohibition are high, that is a determination for the Legislature to make, not the court. But it is also a misplaced concern. Since CPL **400.21** (7) (b) applies only to second felony offender determinations, a proper and fair reading of the statute does not open any convictions to question. And since the statute itself provides that claims of unconstitutionality with respect to prior convictions are waived if not asserted at the predicate felony hearing,
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it is equally clear that enhanced sentences would not now be generally thrown open to question.

The vast majority of convictions are obtained under circumstances that are accepted as constitutional both at the time of conviction and at subsequent predicate felony proceedings. In those instances where a defendant is able to overcome the considerable burden of proof and succeed in establishing that the prosecution had actually exercised its peremptory challenges in a racially discriminatory fashion *(Batson v Kentucky,* **476 U.S. 79**) — to use the majority's own example (majority opn, at 646) — such a conviction should not now be given new vitality as the basis for additional punishment. CPL **400.21**(7)(b) so provides.

[fn*] Significantly, the use sought to be made of the unconstitutionally obtained conviction in *Love* was indirect: the People sought to use not the unconstitutional conviction itself, but the time period during which Love was incarcerated pursuant to that conviction to toll the running of a 10-year

limitation period under Penal Law § **70.06**(1)(b)(iv) so that an earlier, concededly constitutional conviction might be counted as a predicate felony. Notwithstanding the People's claim that there was no constitutional impediment to such a use of the unconstitutional conviction, we held that CPL **400.21**(7)(b) prohibited even that indirect use. The majority's decision today — which, under the same statutory language, countenances a direct use of an unconstitutionally obtained conviction to increase defendant's punishment — is completely at odds with *Love*.

Chief Judge WACHTLER and Judges ALEXANDER and BELLACOSA concur with Judge SIMONS; Judge KAYE dissents and votes to reverse in a separate opinion in which Judges TITONE and HANCOCK, JR., concur.

Order, insofar as appealed from, affirmed.