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Grappling With Novel Prosecutions

High court: mother's poor housekeeping wasn't criminal, but father's refusal to disclose son's location was

By PROLOY DAS

CRIMINAL LAW

The past 12 months has been full of novel prosecutions. For the Connecticut Supreme Court's criminal law jurisprudence, the past year's term is replete with explanations of what constitutes—and doesn't constitute—a crime.

The year's most national media-grabbing case was *State v. Scruggs*, 279 Conn. 698 (2006), an appeal from a mother's conviction for causing her 12-year old son to commit suicide by maintaining a cluttered and unclean home.

The son hung himself in a bedroom closet. During the ensuing investigation, police observed that the mother's apartment was "extremely cluttered" and had an "unpleasant odor." A jury convicted her of risk of injury to a minor in that she placed her son in a situation likely to injure his mental health. But the Supreme Court reversed. It held the statute was unconstitutionally vague as applied to the defendant's conduct, as she could not have foreseen her poor housekeeping would give rise to criminal liability.

However, in *State v. Gewily*, 280 Conn. 660 (2006), the court affirmed a risk of injury conviction without a showing of actual harm to the child. The victim's mother had custody over the couple's 3-year-old son. During an unsupervised visit, the defendant-father secretly took the victim with him to Ethiopia. A year later, he returned to the U.S. and was arrested when he arrived at the airport, but refused to disclose the location of the boy. He was convicted of risk of injury for depriving his son of the "love and affection" of his mother and custodial parent.

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Other interesting prosecutions made their way up to the high court. In *State v. Aloi*, 280 Conn. 824 (2007), it held that a person's mere refusal to provide identification when requested by a police officer, even without physical force, constitutes the crime of interfering with an officer. Meanwhile the defendant in *State v. Haight*, 279 Conn. 546 (2006), saw his conviction for operating a motor vehicle under the influence of intoxicating liquor upheld even though he was asleep in a parked vehicle. Although the engine was not running, the court determined the presence of the key in the ignition was sufficient to prove operation.

In *State v. Knybel*, 281 Conn. 707 (2007), the Supreme Court held that an all-terrain vehicle (ATV) is a motor vehicle for purposes of the operating while suspended statute. Finally, in *State v. McKenzie-Adams*, 281 Conn. 486 (2007), the court determined that a statute prohibiting a teacher from engaging in sexual relations with a student at the school was not unconstitutional and did not infringe upon privacy rights.

Right To Counsel Expanded

On the subject of constitutional law, the court issued two right-to-counsel decisions of import. In *State v. Casiano*, 282 Conn. 614 (2007), it ruled that an indigent defendant is entitled to the assistance of counsel in "any criminal action," including a motion to correct an illegal sentence and the subsequent appeal from a denial of that motion, unless bringing the motion would be frivolous. In *State v. Stenner*, 281 Conn. 742 (2007), the court held that, just as under the federal constitution, a defendant's right to counsel under the state constitution attaches when he is charged at arraignment and not during the defendant's post-arrest but pre-arraignment statement to police (which is independently safeguarded by *Miranda* warnings).

In another case calling for an interpretation of our state constitution, *State v. Davis*, 283 Conn. 280 (2007), the court rejected the opportunity to apply the rule of automatic standing and held that a defendant may challenge the legality of a search only if he has a reasonable expectation of privacy in the subject of the search. In *Davis*, the apartment owner gave the police permission to search a duffle bag that was in the apartment where the defendant was also staying. The duffel bag turned out to contain evidence of the defendant's involvement in a murder. The trial court denied

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the defendant's motion to suppress on the ground that the defendant did not have standing to object to the consented-to search.

Doctrines Adopted

The court also incorporated recent U. S. Supreme Court doctrines into its jurisprudence.

In *Crawford v. Washington*, 541 U. S. 36 (2004), SCOTUS held that "testimonial" hearsay statements may be admitted only if the declarant is unavailable and the defendant had a prior opportunity to cross-examine. In *Davis v. Washington*, 126 S. Ct. 2266 (2006), the court explained that statements made to police dispatchers in the context of 911 calls are testimonial and, therefore, inadmissible under *Crawford,* when the circumstances objectively indicate that there is no ongoing emergency and the primary purpose of the call is to establish a record for later criminal prosecution.

> **IN STATE V. FAUCI, the state Supreme Court replaced the term 'prosecutorial misconduct' with 'prosecutorial impro-priety' as a more accurate characterization of a claim of error premised upon a prosecutor's conduct during the course of a trial.**

These holdings were applied in a case with dramatic facts, *State v. Kirby*, 280 Conn. 361 (2006), where the defendant appealed from his kidnapping conviction for the abduction of a 59-year-old second-grade teacher. While the victim was in the car with her assailant, she managed to get herself untied, escape from the defendant, drive-off leaving him on a highway, and return home. Once home, she reported the incident to a 911 dispatcher. However, two days after the incident, she mysteriously died as a result of a fall down a flight of stairs at her home, rendering her unavailable at trial.

Applying *Davis v. Washington* to these facts, the state Supreme Court held the 911 call should have been excluded at the defendant's kidnapping trial because it was made after the emergency. The primary purpose of the call, the court reasoned, was to apprehend a suspect from a prior crime rather than to solve an ongoing emergency or crime in progress at the time of the call.

In *Apprendi v. United States*, 530 U. S. 466 (2000) and *Blakely v. Washington*, 542 U.S. 296 (2004), SCOTUS held that a defendant who is subject to an enhanced penalty has a right to a jury finding as to facts that enhance a sentence, other than the issue of whether he has a previous conviction. In *State v. Fagan*, 280 Conn. 69 (2006), the state Supreme Court held that, just like a prior conviction, the question of whether a defendant was lawfully on release at the time he committed an offence is a question of law that does not require a jury determination. However, in *State v. Bell*, 283 Conn. 748 (2007), the court held that a statute that calls for a sentence enhancement based on a determination of whether extended incarceration will serve the "public interest" requires that factual finding to be made by a jury rather than a trial court.

New Guidance For Trial Courts

In *State v. Jackson*, 283 Conn. 111 (2007), the court noted that there is no mandatory talismanic phraseology that is required for a valid reasonable doubt instruction, and commended the trial judge for attempting to improve upon the standard charge that had been routinely issued in criminal cases. (*Disclaimer: the author was counsel in this matter.*) The instruction, based on the Federal Judicial Center's model instruction, uses the phrase "firmly convinced" to explain the concept of reasonable doubt to the jury.

In *State v. Edman*, 281 Conn. 444 (2007), the court found that a trial judge was not "neutral and detached" when he had a personal relationship with the defendant who was threatening to sue him in an unrelated matter and, therefore, should not have signed the search warrant. However, in *State v. Canales*, 281 Conn. 572 (2007), the court determined that no due process violation existed when a trial judge who signed a warrant in a case later presided at the defendant's probable cause hearing.

The Supreme Court reversed sexual assault convictions in two cases based on its interpretation of the rape-shield law. In *State v. Ritrovato*, 280 Conn. 36 (2006), it held the defendant was improperly denied the opportunity to introduce evidence, under the credibility prong of the rape-shield statute, to contradict the victim's testimony that she was a virgin at the time of the first sexual assault. In *State v. Smith*, 280 Conn. 285 (2006), the court determined the defendant had been improperly denied the opportunity to introduce evidence that a third-party's semen was found on the victim under the source of semen exception to the rape-shield law. (*Disclaimer: The author was counsel in this matter.*)

In *State v. George J.*, 280 Conn. 551 (2006), the court held the statute of limitations period for sexual offences against minors, which is two years from the date of majority or five years from the date the victim notifies a law enforcement, begins only when the actual victim notifies the authorities. In *George J.*, a counselor reported suspected abuse to police on June 6, 1996, while the actual victim was not interviewed by police until four days later. The warrant was issued on June 7, 2001.

Finally, of note, is *State v. Fauci*, 282 Conn. 23 (2007), where the court replaced the term "prosecutorial misconduct" with "prosecutorial impropriety" as a more accurate characterization of a claim of error premised upon a prosecutor's conduct during the course of a trial.

Indeed, the 2006-07 year in criminal justice was a memorable one—both for its interesting prosecutions and its advancement of constitutional principles. ■