State of New York Court of Appeals

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To be argued Tuesday, January 8, 2013

Nos. 16 and 17 People v Trevis D. Baker

This case arose in May 2006, when Trevis D.Baker intervened in a discussion between his girlfriend and a Rochester police officer who was questioning the registration of her grandfather's Cadillac. With his girlfriend videotaping the scene, Baker spoke with the officer through the window of his patrol car and then walked away, saying, "That's harassment, motherfucker," or words to that effect. When the officer asked what he had said, Baker repeated the phrase and concluded, "Fuck that." The officer arrested Baker for disorderly conduct and, in searching him, found 25 bags of crack cocaine in his pocket. Baker was charged with third-degree criminal possession of a controlled substance.

Baker moved to suppress the drug evidence, arguing that his statements to the officer were constitutionally protected speech that did not violate the disorderly conduct statute and, thus, the officer lacked probable cause to arrest him and the search was improper. Monroe County Court denied the motion, ruling the officer had probable cause for the arrest. It said Baker "used abusive or obscene language in a public place.... The defendant was not engaging in a 'private encounter' with the police officers. Rather, those words and the context of their use tend to support the charge of disorderly conduct under Penal Law [§] 240.20(3), and ... provided the police the sufficient probable cause to arrest the defendant... The facts establish that the defendant, by his words, intended to cause public inconvenience, annoyance or alarm." It said the discovery of the cocaine "was the result of a lawful search incident to an arrest."

Baker, who also faced charges of second-degree assault in an unrelated case arising from an altercation with police officers several days prior to his disorderly conduct arrest, accepted an offer to satisfy both indictments by pleading guilty to one count each of third-degree drug possession and second-degree assault in exchange for a promise the court would impose concurrent sentences of six years in prison. The Appellate Division, Fourth Department affirmed both convictions without opinion.

Baker argues that his arrest for disorderly conduct was unlawful, and the resulting search invalid, because the language he used to criticize the officer was constitutionally protected. He says, "[T]he Supreme Court has repeatedly held that in the context of an alleged breach of the peace, speech may only be proscribed if it is 'obscene,' likely to incite others to violence, or constitutes 'fighting words'.... Just as no reasonable person could interpret Mr. Baker's use of the words as erotic, no reasonable person could interpret his criticism as an attempt to incite the small crowd of onlookers to commit an unlawful act.... He made no attempt to rile up the crowd or encourage them to join in his denunciation." Nor were they fighting words, since he "made no attempt to threaten or otherwise instill fear of a physical attack." If his drug conviction is reversed, he argues, the assault conviction must be reversed, too, since both pleas were based on a promise of concurrent sentences.

For appellant Baker: Timothy S. Davis, Rochester (585) 753-4213
For respondent: Monroe County Assistant District Attorney Geoffrey Kaeuper (585) 753-4674

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To be argued Tuesday, January 8, 2013

No. 18 Auqui v Seven Thirty One Limited Partnership

Jose Verdugo was injured in December 2003, while working as a deliveryman for a restaurant, when a sheet of plywood fell from a building under construction at 731 Lexington Avenue in Manhattan and struck him on the head. He was granted Workers' Compensation benefits for treatment of his head, neck and back injuries, as well as post-traumatic stress disorder and depression. Verdugo and his wife brought this personal injury action against the building's owner, Seven Thirty One Limited Partnership; the construction manager, Bovis Lend Lease LMB, Inc.; and the concrete subcontractor, North Side Structures, Inc.

Two years after the accident, the restaurant's insurance carrier sought to discontinue Verdugo's Workers' Compensation benefits on the ground that he was no longer disabled. After a hearing, a Workers' Compensation Law Judge found that Verdugo suffered from "no further causally related disability since January 24, 2006" and terminated his benefits as of that date. On administrative appeal, the Workers' Compensation Board reinstated his claim for post-traumatic stress disorder and otherwise upheld the determination.

In 2009, Seven Thirty One and the other defendants in this case moved for an order precluding Verdugo from litigating the issue of his accident-related injuries beyond January 24, 2006, on the ground that the issue had already been decided in the Workers' Compensation proceeding. Supreme Court granted the defendants' motion to preclude, saying Verdugo "had a full and fair opportunity to address the issue of ongoing causally-related disability" and was collaterally estopped from relitigating it. Shortly thereafter, a different judge appointed Maria Auqui as guardian of Verdugo's property, and Verdugo moved to renew the preclusion motion on the ground the guardianship order raised a triable issue of fact regarding his ongoing disability. Supreme Court adhered to its prior decision.

The Appellate Division, First Department reversed in a 3-2 decision, saying, "The determination that workers' compensation coverage would terminate as of a certain date for plaintiff's injuries ... is not, nor could it be, a definitive determination as to whether plaintiff's documented and continuing injuries were proximately caused by defendants' actions. While factual issues necessarily decided in an administrative proceeding may have collateral estoppel effect, it is well settled that 'an administrative agency's final conclusion, characterized as an ultimate fact or mixed question of law and fact, is not entitled to preclusive effect'" because it "is imbued with policy considerations as well as the agency's expertise." The Appellate Division also concluded the 2009 guardianship order "raises an issue of fact as to the cause of plaintiff's ongoing disability sufficient to warrant denial of defendants' motion."

The dissenters took the position that plaintiff "should be precluded from relitigating the issue of continuing disability" since "the duration of [his] disability was an evidentiary determination fully and fairly litigated by him at the Workers' Compensation proceeding terminating his benefits." Additionally, "the uncontested appointment of a guardian for the plaintiff more than three years later does not raise a triable issue of fact as to when his work-related disability ended."

For appellants Seven Thirty One et al: Matthew W. Naparty, Great Neck (516) 487-5800
For respondents Auqui & Verdugo: Annette G. Hasapidis, South Salem (914) 533-3049

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To be argued Tuesday, January 8, 2013

No. 19 Caldwell v Cablevision Systems Corporation

On a rainy night in October 2006, Bessie Caldwell was injured when she tripped and fell while walking her 100-pound dog on Benefield Boulevard in Peekskill, Westchester County. Communications Specialists, Inc. (CSI) had dug a trench and a series of test pits along the street for installation of a fiber-optic cable, then backfilled the excavations. Caldwell and her husband filed this personal injury action against CSI, among other parties, alleging it created a dangerous condition that caused her accident by failing to properly fill and cover the trench and test pits.

At trial, Caldwell testified that she fell when she tripped on a "dip in the trench" that CSI had dug and filled. To rebut her testimony, CSI subpoenaed Dr. Barry Krosser, one of the emergency room physicians who examined Caldwell after her accident. Dr. Krosser testified that he had no independent recollection of Caldwell, but based on the consultation note he dictated after examining her, she had indicated to him that she "tripped over a dog while walking last night in the rain." On cross-examination, he said CSI was paying him $10,000 to testify.

Caldwell moved to have Dr. Krosser's testimony stricken or for "a curative instruction to the jury ... dealing with monetary influence." Caldwell argued that, as a subpoenaed witness, Dr. Krosser was entitled under CPLR 8001(a) to only $15 per day of testimony and 23 cents per mile traveled and that it was improper to pay a fact witness $10,000 for an hour of testimony on a single day. CSI argued that CPLR 8001 sets the minimum compensation for a fact witness, but does not prohibit it from compensating Dr. Krosser for his time away from his practice "as if he was an expert coming in" to testify. Supreme Court refused to strike his testimony or give a curative instruction, but ruled both attorneys could address his compensation in their summations. The jury found CSI had been negligent, but also found its negligence was not a substantial factor in Caldwell's accident, and the court dismissed the complaint against CSI.

The Appellate Division, Second Department affirmed, saying even if the $10,000 payment was unreasonable, the exclusion of Dr. Krosser's testimony was not required. Rather, the remedy, "where one might reasonably infer that a fact witness has been paid a fee for testifying, is to permit opposing counsel to fully explore the matter of compensation on cross-examination and summation, and to leave it for a properly instructed jury to consider whether the payment made to the witness was, in fact, disproportionate to the reasonable value of the witness's lost time and, if so, what effect, if any, that payment had on the witness's credibility." The Appellate Division concluded the trial court erred in failing to instruct the jury on witness compensation, since "more than the general credibility charge is ... warranted where, as here, a reasonable inference can be drawn that a fact witness has been paid an amount disproportionate to the reasonable value of his or her lost time," but that this error "was not so prejudicial as to warrant reversal" because Dr. Krosser's testimony "was based only on what was written in his note."

Caldwell argues that "[t]he agreement by defendant's attorneys to pay $10,000 to a fact witness for one hour of testimony was unethical and constituted a bribe, and the testimony of that witness should have been stricken." She also claims the failure to instruct the jury on the payment was not harmless because "the issue of causation heavily depended on the testimony of the doctor who had received the $10,000 payment.... [T]he error in failing to remedy the ethical transgression was central to this case and highly prejudicial."

For appellant Caldwell: Fred R. Profeta, Jr., Manhattan (212) 577-6500
For respondent CSI: Christopher Simone, Lake Success (516) 488-3300

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No. 20 Matter of Beck-Nichols v Bianco
No. 21 Matter of Adrian v Board of Education of City School District of Niagara Falls
No. 27 Matter of Luchey v Board of Education of City School District of Niagara Falls

The three petitioners in these cases were among 20 employees of the Niagara Falls City School District who were terminated in September 2009 for violating the District's residency policy, which "requires that employees ... be residents of the City of Niagara Falls and maintain their residency during their term of employment." The policy defines residency as "an individual's actual principal domicile at which he or she maintains usual personal and household effects." The District used a Westlaw database to check the addresses of employees and hired a surveillance company to investigate some who had multiple addresses. At affirmation meetings with District officials, the employees were permitted to present documents supporting their claims of city residency, including rent and utility receipts, driver's license, and voter registration. Relying on other evidence, including surveillance reports, the District determined the employees were no longer city residents and fired them. Karri Beck-Nichols, a production control manager for the Information Systems unit, English teacher Roxanne Adrian, and counselor Keli-Koran Luchey commenced these article 78 proceedings to challenge their terminations.

Beck-Nichols' suit was transferred to the Appellate Division, Fourth Department, which annulled the District's determination as arbitrary and capricious. According to the court, a party alleging a change in domicile must prove the change by clear and convincing evidence; and under that standard, the district "failed to establish that petitioner evinced 'a present, definite and honest purpose to give up the old and take up the new place as [her] domicile.'"

The District argues that the Appellate Division applied the wrong standard of review in requiring clear and convincing evidence and, in doing so, "improperly shifted the burden of proof" to the School District and "usurped the [District's] authority to weigh the evidence ... and assess credibility." In an article 78 proceeding, the District says, the burden is on the petitioner to prove an agency's decision was irrational.

In Adrian and Luchey, Supreme Court ordered both petitioners reinstated with back pay because the policy's definition of residency was "vague and ambiguous," which, coupled with the superintendent's failure to develop procedures and guidelines to enforce the residency rule as required by the policy, "has resulted in varied and subjective interpretations leading to disparate results." The court ruled the policy was "unenforceable, incomplete and any action taken" to terminate the petitioners' employment was "arbitrary and capricious." The Appellate Division affirmed in Luchey without opinion, but reversed in Adrian, finding sufficient evidence to support her termination.

The School District argues in Luchey that its residency policy is enforceable as written, since it "simply requires an employee reside in the City," and the lower courts erred in finding the policy vague and ambiguous. Adrian contends the policy is vague, produces disparate results, and is unenforceable, as found by Supreme Court and affirmed by the Appellate Division as to Luchey, but not her. She also claims she was entitled to a hearing based on the Education Law and her "constitutionally protected property interest" in her tenured position.

For School District (appellant in nos. 20 & 27, respondent in no. 21):
Michael F. Perley, Buffalo (716) 849-8900
For respondent Beck-Nichols: Terry M. Sugrue, Buffalo (716) 856-0277
For appellant Adrian & respondent Luchey: Anthony J. Brock, Latham (518) 213-6000