State of New York Court of Appeals

Summaries of cases before the Court of Appeals are prepared by the Public Information Office for background purposes only. The summaries are based on briefs filed with the Court. For further information contact Gary Spencer at (518) 455-7711.

To be argued Tuesday, April 29, 2014

No. 120 People v Vinod Patel
No. 93 People v Churchill Andrews *(papers sealed)*
No. 94 People v Kevin Kruger

The question raised in these appeals is when may an appellate court allow a criminal defendant to appeal a conviction after the statutory period for taking an appeal has expired due to ineffective assistance of counsel. Defendants generally have 30 days to file a notice of appeal or application for leave to appeal, and CPL 460.30 provides a grace period of one year for defendants to seek permission from an intermediate appellate court or the Court of Appeals to file a late appeal. All three defendants here rely on People v Syville (15 NY3d 391 [2010]), which permits appellate courts to grant coram nobis relief after the CPL 460.30 grace period has expired, in certain circumstances. "Where an attorney has failed to comply with a timely request for the filing of a notice of appeal and the defendant alleges that the omission could not reasonably have been discovered within the one-year period, the time limit imposed in CPL 460.30 should not categorically bar an appellate court from considering that defendant's application to pursue an untimely appeal," this Court said in Syville.

Vinod Patel pled guilty in Queens to two counts of possessing a sexual performance by a child and was sentenced to consecutive terms of 1⅓ to 4 years in prison in February 2007. His attorney failed to file a notice of appeal. Before the grace period expired, Patel made a pro se motion for permission to file a late notice of appeal under CPL 460.30, which the Appellate Division, Second Department denied. After Syville was decided, he sought a writ of error coram nobis, arguing his attorney had been ineffective in failing to file the notice of appeal. The Second Department granted the petition and deemed his notice of appeal timely. The prosecution argues here that Patel is not entitled to coram nobis relief because he "had already sought and obtained review of the merits of his claim" with his pro se motion under CPL 460.30.

Churchill Andrews pled guilty in Brooklyn to criminal sale of a controlled substance in the fifth degree and was sentenced to a six-month jail term in September 2008. Neither he nor his attorney filed a notice of appeal at the Appellate Division before the grace period expired. Andrews, a lawful permanent resident from Guyana, was taken into federal custody for deportation proceedings in 2010. In March 2013, he filed this coram nobis petition, which the Second Department denied. He argues he is entitled to coram nobis relief because he was denied his right to effective assistance of counsel and, consequently, of his only chance to avoid deportation by direct appeal of his conviction.

Kevin Kruger pled guilty to first-degree burglary in Orange County in 2006, but withdrew the plea when County Court refused to honor its promise to cap his sentence at 10 years. Months later, he again pled guilty to the charge and waived his right to appeal in return for a sentence of 12½ years. The Second Department affirmed his conviction in December 2009, and Kruger asked his attorney to seek leave to appeal to the Court of Appeals. In 2012, when he discovered no application for leave was ever filed, he sought a writ of error coram nobis from the Second Department, which denied his petition to file a late application at this Court. He argues Syville, which addressed the failure of defense counsel to file an appeal as of right at the Appellate Division, applies equally to counsel's failure to file a discretionary application for leave at the Court of Appeals.

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No. 93 For appellant Andrews: Lisa Napoli, Manhattan (212) 693-0085
For respondent: Brooklyn Assistant District Attorney Joyce Slevin (718) 250-2531
No. 94 For appellant Kruger: Benjamin Ostrer, Chester (845) 469-7577
For respondent: Orange County Asst. District Attorney Andrew R. Kass (845) 615-3640

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No. 95 Matter of Town of Islip v New York State Public Employment Relations Board

Until 2008, the Town of Islip assigned town-owned vehicles to numerous employees who were allowed to take them home, despite provisions in the Town's Ethics Code (Town Code § 14-12) and its Administrative Procedure Manuel limiting such use to official business and to employees who were on call 24 hours a day. During contract negotiations in 2007, the Town proposed to eliminate the use of take-home vehicles for employees who did not qualify under its written policies, but it withdrew the proposal two months later, contending the issue was not a mandatory subject of collective bargaining under the Taylor Law (Civil Service Law article 14).

In 2008, after an impasse in negotiations was declared, the Town Board adopted a resolution that unilaterally restricted the assignment of take-home vehicles to elected officials, emergency responders, and employees who had no fixed work site. About 80 employees lost the use of take-home vehicles, including at least 45 who were members of the predecessor of the United Public Service Employees Union (UPSEU). The union filed an improper practice charge with the State Public Employment Relations Board (PERB), alleging the Town's action violated the Taylor Law because use of a take-home vehicle to commute to work is an economic benefit subject to mandatory bargaining. The Town argued that the Town Code prohibited it from providing vehicles to employees who did not qualify under its written policy.

An administrative law judge ruled in favor of the union and PERB affirmed, saying "use of an employer-owned car for personal purposes is an economic benefit and a term and condition of employment which cannot be unilaterally withdrawn."

The Appellate Division, Second Department confirmed PERB's determination, saying the Town could be required to negotiate the issue, despite the prohibition in its Ethics Code, because "the Town frequently and openly ignored that Code and its policy for managing its vehicle fleet, only to contend later that the Code allowed it to act unilaterally in taking the vehicles away from the employees who had been permanently provided with them. The PERB was not required to give more effect to the Town Ethics Code than the Town itself gave to it." The court said the assignment of take-home vehicles "continued unabated for many years" and "created a reasonable expectation among the affected unit employees that the practice would continue."

The Town argues that PERB "does not possess the authority to compel the Town to continue an illegal past practice" and that the effect of PERB's decision "is to make laws adopted by a Town, or any municipality in the State of New York, unenforceable by the lack of diligence and/or management of prior administrations in acting in accordance with the law, thereby forever negating the Local Law as applied to unionized employees.... As a matter of public policy, an illegal past practice should not be permitted to ripen into a binding term and condition of employment that cannot be corrected by a public employer."

For appellant Town: Ernest R. Stolzer, Garden City (516) 267-6300
For respondent UPSEU: Liam L. Castro, Manhattan (917) 551-1300
For respondent PERB: David P. Quinn, Albany (518) 457-2678

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To be argued Tuesday, April 29, 2014

No. 96 IDT Corp. v Tyco Group, S.A.R.L.

IDT Corp. and affiliates of Tyco Telecommunications entered into a settlement agreement in October 2000 to resolve litigation over a failed fiber optic communications venture. The settlement required Tyco to provide fiber optic capacity to IDT, free of charge for 15 years, on a network Tyco was building to connect North America, Asia and Europe, and it specified various terms. The settlement also required the parties to negotiate additional agreements, including an "indefeasible right to use" (IRU) agreement for IDT's use of the fiber optic network that was to be "consistent with" the standard agreements Tyco was developing for other customers "and, in any event, containing terms and conditions consistent with those described herein." In June 2001, Tyco proposed an IRU that would have allowed it to shut down the network after five years, as well as other terms allegedly inconsistent with the settlement. Negotiations continued into March 2004. Two months later, IDT sued Tyco for breach of the settlement agreement.

In 2007, Supreme Court granted IDT's motion for summary judgment on liability. The Appellate Division, First Department reversed and dismissed the suit, finding no breach. It said the settlement agreement was not fully enforceable when the parties entered into it because essential terms remained indeterminate until Tyco devised its standard customer agreements. The Court of Appeals affirmed in IDT Corp. v Tyco Group, S.A.R.L. (13 NY3d 209 [2009]), saying, "Although there was a valid settlement agreement in this case, Tyco's obligation to furnish capacity never became enforceable because agreed-upon conditions were not met."

The parties resumed negotiations, although Tyco told IDT that the appellate decisions dismissing the suit established that it had no further obligations under the 2000 settlement. In November 2010, IDT brought this action for breach of contract against Tyco.

Supreme Court granted Tyco's motion to dismiss the suit, saying this Court's statement that "Tyco's obligation to furnish capacity never became enforceable" meant that "Tyco does not have any further obligations" under the settlement and "all rights of IDT ... were extinguished."

The First Department reversed and reinstated the complaint, saying the Court of Appeals "was simply observing that the allegations" in the 2004 lawsuit "did not articulate a breach at the time the action was commenced given the non-occurrence of condition precedent: namely, the parties had not yet entered into final agreements, and the defendants had not otherwise breached their duty to negotiate." It said Tyco's "obligations in this case did not have an expiration date, nor ... did one arise through the mere passage of time," and Tyco's alleged statements that it had no further duty to negotiate would be an anticipatory breach of the settlement. Since IDT's claims are based on Tyco's actions after the Court of Appeals ruling, it said, they are not barred by res judicata or collateral estoppel.

Tyco argues this Court's 2009 ruling "that the condition precedent had not been satisfied -- despite protracted, good faith efforts by Tyco to reach a settlement -- relieved both parties of any extant obligations under the 2000 Settlement Agreement." It says the First Department's contrary view "is at odds with decades of well-established law," as is its "ruling that, unless there is an express 'expiration date,' parties who are subject to a duty to negotiate must continue to negotiate indefinitely." Tyco contends IDT's suit is barred by res judicata and collateral estoppel because it "seeks to relitigate the same claims and the same issues already decided in the 2004 litigation."

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To be argued Tuesday, April 29, 2014

No. 59 Matter of Working Families Party v Fisher

In February 2010, Richmond County District Attorney Daniel M. Donovan, Jr. submitted a confidential ex parte application to Deputy Chief Administrative Judge Fern A. Fisher requesting to be relieved from further investigation of possible election law, campaign finance and criminal violations during a 2009 City Council election on Staten Island and seeking the appointment of a special prosecutor to pursue the case. He asked that his application be sealed. Judge Fisher granted the application in January 2012, finding that Donovan and his assistants "should be relieved from acting further in the matter" and, pursuant to County Law § 701, appointing Roger Bennet Adler to act as a special district attorney "in any and all stages of investigation and prosecution" of the case. She ordered that Donovan's application remain sealed. In January 2013, Adler served grand jury subpoenas on the treasurer and assistant secretary of the Working Families Party. The following month, the Working Families Party brought this article 78 proceeding for a writ of prohibition to vacate Judge Fisher's order and quash the subpoenas, contending that the standard for disqualification of a district attorney under County Law § 701 had not been met, among other things.

The Appellate Division, Second Department denied the Party's petition. "Prohibition is an available remedy to void the improper appointment of a Special District Attorney pursuant to County Law § 701 when the Special District Attorney is performing the quasi-judicial act of representing the State in its efforts to bring individuals accused of crimes to justice...," it said. "However, it is not an available remedy when the Special District Attorney is performing the purely investigative function of investigating 'suspicious circumstances' with a view to determining whether a crime has been committed, since, in such circumstances, his or her acts are to be regarded as executive in nature.... Here, the WFP failed to establish that Special District Attorney Adler was performing a quasi-judicial act" and, thus, "prohibition does not lie."

The Working Families Party argues that prohibition is available here because its petition challenges Judge Fisher's authority to relieve Donovan of his duties and appoint Adler as special district attorney, not Adler's conduct of his investigation. "It is undisputed that Judge Fisher was acting in a judicial capacity when she entered the Order," it says. "The petition challenged the Order entered by *Judge Fisher* on the grounds that *Judge Fisher* acted in excess of her jurisdiction. The fact that *Special District Attorney Adler* might be acting in an executive capacity is irrelevant." On the merits, the Party argues Judge Fisher improperly allowed Donovan to disqualify himself without "a showing of actual prejudice based on a demonstrated conflict of interest," as required by County Law § 701.

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For respondent Donovan: Richmond County Asst. Dist. Atty. Morrie I. Kleinbart (718) 556-7010