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 Wednesday, April 30, 2014 (arguments begin at 2:30 p.m.)

No. 97 People v Neil Gillotti *(papers sealed)*
No. 98 People v George Fazio *(papers sealed)*

In these appeals, child pornography offenders are challenging the risk levels assigned to them under the Sex Offender Registration Act (SORA). The issues concern the appropriate scoring of points on the Risk Assessment Instrument (RAI) for factor 3, "number of victims," and factor 7, "relationship with victim."

Neil Gillotti was serving in the Air Force in 2010, when authorities found about 1000 pornographic videos and photos of children he had downloaded to his computer as a teenager. He pled guilty in a military court to possession of child pornography and served eight months confinement. When he returned to his home in Niagara County, the Board of Examiners of Sex Offenders determined he was a presumptive level one offender based on his RAI score, but sought an upward departure to level two due to the number and graphic nature of the images. County Court granted the prosecution's request to assess him an additional 30 points under factor 3, because three or more children were depicted, and 20 points under factor 7, because they were strangers to him, making him a level three offender. It denied his request for a downward departure to level one. The Appellate Division, Fourth Department affirmed, saying Gillotti "failed to present clear and convincing evidence of special circumstances justifying a downward departure" of his risk level. Gillotti argues County Court abused its discretion by failing to consider whether a downward departure was justified under People v Johnson (11 NY3d 416), which said a downward departure would be appropriate when strict application of risk factor 7 in a child pornography case "produces a seemingly anomalous result."

George Fazio pled guilty to felony sex offenses in Pennsylvania in 2008, based on pornographic videos and photos of children police discovered on his computer. He served three years in prison and then moved to Albany County. The Board of Examiners assessed no points on his RAI for factors 3 and 7, recommending that he be designated a level one offender. At the prosecutor's request, County Court assessed him an additional 50 points under factors 3 and 7 because there were multiple images of children and they were strangers to Fazio, making him a level two offender. Fazio did not request a downward departure, but challenged the points assessed for factors 3 and 7. The Third Department affirmed, saying, "Children depicted in pornographic images may be found to constitute multiple separate victims for the purposes" of SORA, and Fazio "did not dispute that three or more children were depicted in the images and videos he possessed." Fazio argues child pornography offenders should not be assessed points under factors 3 and 7 because they do not accurately predict increased risk. He cites Johnson, which said offenders who knew the children depicted in such photos "would seem to present a greater threat" than those who had no contact with them, "[y]et, under factor 7, previous acquaintance with the children would ... decrease defendant's risk score, not increase it. It does not seem that factor 7 was written with possessors of child pornography in mind." Fazio says "the Court's rationale is equally applicable to the multiple victim factor."

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For respondent: Albany County Assistant District Attorney Steven M. Sharp (518) 487-5460

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No. 99 **Matter of New York State Commission on Judicial Conduct v Rubenstein** *(record sealed)*

Attorney Seth Rubenstein and a Manhattan judge were indicted on criminal charges stemming from alleged campaign finance fraud during the judge's election campaign in 2008. After a jury trial, they were acquitted of all counts in April 2010 and the case file was sealed in accordance with CPL 160.50, which provides that records of a criminal action resolved in favor of the accused "shall be sealed and not made available to any person or public or private agency...." In May 2010, Supreme Court granted the Commission on Judicial Conduct's application for an ex parte order releasing the sealed criminal records to the Commission for use in a disciplinary proceeding against the judge. In May 2012, Rubenstein filed an order to show cause and moved to vacate the 2010 order, preclude the Commission from using any information obtained from the criminal records, and return the records to the sealed file.

Supreme Court denied Rubenstein's motion for lack of standing and on procedural grounds. It also held the release of the criminal records was authorized by Judiciary Law § 42(3), which permits the Commission to "request and receive from any court, department, division, bureau, commission or other agency of the state or political subdivision thereof or any public authority such assistance, information and data as will enable it properly to carry out its functions, powers and duties." The court said, "The Commission's authority and the preservation of the integrity of the state's judiciary may not be stymied by the statutory constraints of
CPL 160.50; to conclude otherwise would dangerously undermine the ability of the Commission to meet its constitutional mandate."

While Rubenstein's appeal was pending, the judge under investigation agreed to accept public censure as a penalty. The Commission issued the censure in October 2012.

Four months later, the Appellate Division, First Department granted the Commission's motion to dismiss the appeal as moot. It also directed that all of the records released to the Commission "be returned forthwith to the court and be resealed for all purposes."

Rubenstein argues his appeal is not moot "because the continuing presence of the State Commission's determination on its website, with no steps to protect Mr. Rubenstein's identity, has 'enduring consequences' for his credibility and reputation.... In publishing its decision censuring Judge Doe..., the State Commission has done the very thing CPL 160.50 was designed to prevent -- the sullying of Mr. Rubenstein's personal and professional reputation." CPL 160.50 contains no exception giving the Commission access to sealed records, he says. "Had the Legislature intended that Judiciary Law § 42(3) override CPL 160.50's explicit proscription against disclosure, it would have said so, given 'the strong public policy in favor of sealing dismissed actions' embodied in CPL 160.50." Even if the appeal is moot, he says the mootness exception should apply because the issue "is novel and substantial, likely to recur and to continue to evade review."

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For respondent Commission: Assistant Solicitor General Won S. Shin (212) 416-8808

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No. 100 People v Hazel E. Gordon

Hazel Gordon was accused, along with two accomplices, of stealing jewelry from an Albany County department store in May 2009. Prosecution witnesses testified that Gordon threatened loss prevention officers with two pens when they tried to detain her and that she injured another store employee with her car when he tried to stop her in the parking lot. No stolen property was found in the possession of Gordon or her accomplices. She was convicted of first-degree robbery, two counts of second-degree robbery, and second-degree assault.

The Appellate Division, Third Department modified by reducing all three robbery convictions to petit larceny, finding they were not supported by sufficient evidence. The robbery counts, as charged in the indictment, required proof that Gordon forcibly stole property, it said. "As relevant here, forcible stealing is defined as using or threatening to use 'physical force upon another person for the purpose of ... [p]reventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking' (Penal Law § 160.00[1]...)." The court said, "Where a defendant is found to be in possession of stolen property, a jury may infer that he or she threatened or used force to prevent or overcome resistance to its taking or retention...; however, when such evidence is lacking, 'it is impossible to conclude beyond a reasonable doubt that defendant's conscious objective in threatening to use physical force was to prevent or overcome resistance to the retention of the property'...." Since no stolen property was recovered from Gordon or her accomplices, it said, the evidence of robbery was insufficient.

The prosecution argues that it proved Gordon's guilt of robbery beyond a reasonable doubt even though no stolen property was found in her possession at the time of her capture. Loss prevention officers saw her remove and discard the packaging from earrings, place the jewelry in her pockets, and leave the store. When they confronted her and asked her to return the earrings, she threatened them with the pens. "The plain inference from defendant's conduct was that defendant was using force to retain the earrings" at the time she was confronted, even if she disposed of them later, the prosecution says. "Following the charge and based on common sense..., the jury concluded that defendant used force in an effort to retain the earrings. This inference was reasonable and should not be disturbed on appeal," since "intent is the exclusive domain of the jury."

Gordon argues in her cross-appeal that the assault and petit larceny convictions should be reversed because they are not supported by sufficient evidence.

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No. 101 Wittorf v City of New York

In November 2005, Rhonda Wittorf and a companion, Brian Hoberman, rode their bicycles to the entrance of the Central Park transverse road at West 65th Street. A New York City Department of Transportation (DOT) crew supervisor was setting up warning cones to close off the transverse road to vehicular traffic before beginning repairs on damaged sections of the road. Hoberman asked the supervisor if they could ride through and he responded, "Go ahead." Hoberman crossed the transverse safely, but Wittorf struck a large pothole and suffered severe facial injuries.

Wittorf brought this personal injury action against the City, claiming the DOT supervisor had been negligent in allowing her to ride through the barrier without warning her of the hazards ahead. At trial, the jury found that the supervisor was negligent and that his negligence was a substantial factor in causing Wittorf's injuries, assigning 60 percent of the fault to the City.

Supreme Court granted the City's motion to set aside the jury verdict for failure to state a prima facie case and dismissed Wittorf's complaint, finding the DOT supervisor was acting in a "discretionary governmental" capacity and. therefore, the City was immune from liability.

The Appellate Division, First Department affirmed in a 4-1 decision. "[A]t the time of plaintiff's accident, the repair work had not begun, and the supervisor was engaged in traffic control, which is 'a classic example of a governmental function undertaken for the protection and safety of the public pursuant to the general police powers'...," it said. "Thus, the City is entitled to governmental function immunity because the specific act or omission that caused plaintiff's injuries was the supervisor's discretionary decision to allow plaintiff to proceed since his crew had not completed its preparations for the road work, and not the City's proprietary function in maintaining the roadway.... The fact that the supervisor was a DOT employee and not a police officer is of no consequence. Controlling traffic is a governmental function."

The dissenter argued the City is not immune because the DOT supervisor's negligent conduct "occurred while he was engaged in physical maintenance of the road, a proprietary act.... The decision to allow plaintiff to proceed along the transverse cannot be viewed separately from the City's proprietary function in maintaining the roadway. Here, the DOT employee was in the process of barricading an entrance to the traverse, an activity integral to his overall assignment of repairing hazardous roadway conditions. The fact that the specific function of barricading a street as part of a maintenance project might be one performed by a police officer, in my view, is not determinative of the governmental or proprietary nature of the activity."

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