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, February 11, 2014 (arguments begin at 2:30 p.m.)

No. 31 Matter of Kaslow v City of New York

David Kaslow was employed by New York City's Department of Environmental Protection (DEP) for three and a half years before he joined the City's Department of Correction (DOC) in 1991. He was placed in a newly created 20-year retirement plan for correction officers, the Tier 3 CO-20 Plan of the New York City Employees' Retirement System (NYCERS), which was established in December 1990 and is governed by Retirement and Social Security Law § 504-a. When Kaslow retired in 2009, he was given credit for three years of prior military service in the Navy, but not for his civilian employment at DEP.

City corrections officers in Tier 1 and Tier 2, as well as Tier 3 members who became correction officers prior to December 19, 1990, and later joined the Tier 3 CO-20 Plan, receive service credit toward their retirement benefits for prior city employment in civilian jobs. However, for Tier 3 CO-20 Plan members who became court officers after December 19, 1990, NYCERS has interpreted RSSL 504-a as limiting "credited service" to service as a correction officer, not civilian work. Kaslow brought this article 78 proceeding to challenge NYCERS's determination to exclude his prior employment at DEP from his pension benefit calculation.

Supreme Court granted Kaslow's petition and directed NYCERS to "recalculate [his] pension to include his DEP service." The Appellate Division, Second Department affirmed, saying NYCERS's "interpretation of the term 'credited service,' pursuant to [RSSL] 504-a, was irrational, unreasonable, and inconsistent with the other applicable statutes governing the retirement benefits of officers employed with the DOC...."

The City and NYCERS argue that NYCERS's interpretation of "credited service" as meaning only "allowable correction service" is consistent with the language of the statute and its legislative history. They say the lower court rulings improperly give the term "credited service," which is limited to correction service for retirement eligibility, member contributions and vesting, a broader meaning for benefit calculations by including civilian service.

For appellants City and NYCERS: Asst. Corporation Counsel Keith M. Snow (212) 356-4055
For respondent Kaslow: Mercedes Maldonado, Manhattan (917) 551-1300

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To be argued Tuesday, February 11, 2014 (arguments begin at 2:30 p.m.)

No. 32 People v Merlin G. Sage

Merlin Sage and Damion Clarke were charged with murder for the fatal beating of Hector Merced in a Rochester apartment in November 2007. A key prosecution witness, Andrew Mogavero, testified at Sage's trial that he had been out drinking for several hours with Sage and Clarke when they met Merced at a bar and that all four of them went to the apartment of Miguel Velez. Shortly after arriving, Mogavero said, Clarke began arguing with Merced and head-butted him. Mogavero said Merced then came at him and Mogavero punched him twice to protect himself. Mogavero testified that Sage, Clarke and Velez repeatedly punched and kicked Merced, Clarke jumped on his head and dropped a large speaker on his head, and Sage urinated on him. Mogavero, who was never charged, said he did not try to intervene because he feared the others would turn on him. Mogavero and Velez carried Merced outside and placed him on the porch of a neighboring house, where Mogavero said Sage struck Merced several times with a mop handle on the head and neck. Mogavero then went to Sage's house, where he placed his bloody clothing in a garbage bag and borrowed new clothes. Mogavero said he left after a few hours, around dawn, and learned later that day that Merced was dead. The next day Mogavero went to the police, who found Sage's fingerprints and Merced's blood on the mop handle. A pathologist testified that Merced's death was due to blunt force trauma and that some marks on the body could have been made by the mop handle. Sage denied participating in the beating, but admitted urinating on Merced and said he "poked" him with the mop handle to check on his condition.

Sage's attorney asked the trial court to issue an accomplice charge, instructing the jury to determine whether Mogavero was an accomplice and, if so, whether his testimony was corroborated. The court denied the request as unjustified, saying the pathologist testified that Mogavero's two punches "were contributory" and Mogavero testified his punches were "in the early stages of this prior to the jumping on the head" and beating with the speaker. Sage was acquitted of murder, but convicted of first-degree manslaughter and sentenced to 25 years.

The Appellate Division, Fourth Department affirmed, saying the trial court properly concluded that Mogavero "'may not reasonably be considered to have participated in the offenses charged or offenses based upon the same or some of the same facts or conduct that constitute the offenses charged[, and thus that] ... there was an insufficient basis upon which to submit [the witness's] accomplice status to the jury'...." It concluded, "We note in any event that there was overwhelming evidence corroborating the testimony of that witness...."

Sage argues he was entitled to the accomplice instruction because the "trial testimony put ... Mogavero's involvement in ... Merced's beating death squarely at issue. The proof showed that Mogavero had himself assaulted Mr. Merced in the early stages of the beating, engaged in collaborative behavior with the alleged principal actors before, during, and following the attack, and demonstrated a consciousness of guilt" by carrying Merced away from the apartment, fleeing the scene, and disposing of his bloody clothing. Sage says, "The evidence of corroboration was not overwhelming and ... there is a significant probability that a properly charged jury would have reached a different verdict by finding no corroboration."

For appellant Sage: Drew R. DuBrin, Rochester (585) 753-4947
For respondent: Monroe County Assistant District Attorney Matthew Dunham (585) 753-4627

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To be argued Tuesday, February 11, 2014 (arguments begin at 2:30 p.m.)

No. 33 People v Vincent Zeh

Vincent Zeh is serving 20 years to life in prison for the murder of his estranged wife, Kimberly Zeh, who was stabbed to death in 1997 in Ulster County. The Appellate Division, Third Department affirmed his second-degree murder conviction in 2001, but said Zeh raised sufficient issues concerning the adequacy of the defense afforded by his trial counsel -- including counsel's failure to challenge statements Zeh made to police or clothing stained with the victim's blood that was seized from his home -- to warrant CPL 440 review. "Given the critical nature of defendant's oral statements to police and the seized physical evidence, the failure to make any pretrial motions is troubling," the court said, but to decide the issue on direct appeal "would require us to resort to 'supposition and conjecture'.... [P]rudence dictates that the issue of ineffective assistance of counsel be raised in a posttrial application ... where 'a thorough evaluation of each claim based on a complete record' can be made...."

Eight years later, Zeh filed a CPL 440.10 motion to vacate his conviction on the ground that he received ineffective assistance of counsel. In opposition, the prosecution submitted an affirmation from Zeh's trial counsel, in which he said that he and Zeh had agreed the best trial strategy "would be to show that despite the nature of the tactics that investigators used, including questioning the defendant for approximately 26 hours, the defendant had not confessed and that the defendant was with his children at the time of the murder." Counsel said he filed no suppression motions because he believed Zeh would have had to testify at the pretrial hearing, which might have undermined his ability to testify in his own defense at trial.

Ulster County Court denied the motion without a hearing, saying, "This court's comprehensive review of the record before it establishes that trial counsel made cogent argument, actively promoted a reasonable defense theory, conducted effective examination of witnesses, and that '[n]one of counsel's strategies or alleged errors were sufficient to constitute a deprivation of meaningful representation, either alone or when considered in aggregate.'"

The Appellate Division affirmed. Rejecting Zeh's claim that County Court improperly denied his motion without first conducting a hearing, it said, "Defendant's motion papers did not present any factual evidence to develop the record with regard to any of the alleged deficiencies of trial counsel beyond the trial record." It said trial counsel "presented strategic explanations for the alleged errors, which have not been controverted by defendant.... Inasmuch as defendant has not demonstrated that counsel's trial approach was the result of incompetence or imprudence rather than merely unsuccessful tactics, we find no error in County Court's denial of the motion without a hearing...."

Zeh argues that he was entitled to a hearing on his 440 motion and that his trial counsel's affirmation "establishes beyond any doubt that there was no legitimate trial strategy" for making no suppression motions. "No competent criminal trial lawyer in the State of New York would go forward on a case of this nature without testing the validity of statements made during a twenty-six hour interrogation and highly prejudicial physical evidence obtained through the use of six search warrants issued by a local magistrate," he says.

For appellant Zeh: Norman P. Effman, Warsaw (585) 786-8450
For respondent special prosecutor: Jacqueline L. Spratt, Albany (518) 432-1100

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No. 34 Jacobsen v New York City Health and Hospitals Corporation

William Jacobsen began working in the central office of the New York City Health and Hospitals Corporation (HHC) in 1979 and spent a day or two a week visiting construction sites at HHC facilities, where he was exposed to asbestos and other dust. In August 2005, he was reassigned to an office at Queens Hospital, which was undergoing major renovation including asbestos abatement, and he was required to monitor that work on a daily basis. He testified that he requested a respirator, but was provided only with a dust mask. In September 2005, he was diagnosed with pneumoconiosis, an occupational lung disease, and HHC granted him a three-month medical leave. His union asked that he be assigned work "that he is capable of doing in the office." Jacobsen's pulmonologist, Dr. Gwen Skloot, cleared him to work in the field in March 2006, but wrote that it was "imperative that he not be exposed to any type of environmental dust." He returned to work at Queens Hospital where, he testified, he complained to his supervisor about the dust and again requested a respirator. In May 2006, he sought reassignment to the central office as a reasonable accommodation for his disability. HHC refused, saying assignment to the central office was not feasible because the essential functions of his job required that he be able to visit construction sites. In June 2006, HHC placed him on a six-month unpaid leave and sought clarification of his condition. Dr. Skloot responded that Jacobsen was cleared to perform office work only. When the leave ended, HHC terminated him.

Jacobsen brought this action against HHC alleging, among other things, that he was wrongfully terminated because of his disability in violation of the New York State and City Human Rights Laws. Supreme Court granted HHC's motion for summary judgment to dismiss.

The Appellate Division, First Department affirmed in a 4-1 decision, finding that HHC engaged in the required "interactive process" to consider reasonable accommodations. "HHC sought clarification from Dr. Skloot regarding plaintiff's medical condition and his ability to perform his job.... It was only after plaintiff's doctor and plaintiff himself confirmed that he could no longer work at construction sites that HHC terminated him." Rejecting Jacobsen's claim that HHC failed to consider a respirator as a reasonable accommodation, it said he "focused below on HHC's denial of his request to work in an office, not on the adequacy of the equipment provided to him.... [A]ll of the letters that plaintiff relies on ... make a request for relocation to the central office.... None of the letters ask for a respirator...."

The dissenter said Jacobsen "testified that he could visit [construction] sites so long as he was provided with proper respiratory protection. Thus, a triable issue of fact exists as to whether plaintiff was capable of performing the essential functions of his job. A triable issue of fact also exists as to whether [HHC] made a reasonable accommodation for plaintiff's disability.... [T]he provision of a dust mask, of the type to be found in any hardware store, is not a 'reasonable accommodation' for a worker who is exposed to asbestos dust on a daily basis." She said a respirator "designed to filter and protect against airborne dust from known toxins and potential carcinogens would be the type of 'reasonable accommodation' envisioned by the statute."

For appellant Jacobsen: Kenneth F. McCallion, Manhattan (646) 366-0880
For respondent HHC: Assistant Corporation Counsel Elizabeth S. Natrella (212) 356-2609

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To be argued Tuesday, February 11, 2014 (arguments begin at 2:30 p.m.)

No. 35 People v Angel Cintron

In 2001, Angel Cintron was convicted of first-degree robbery in the Bronx and sentenced to ten years in prison, but Supreme Court failed to impose a mandatory term of post-release supervision (PRS) as part of the sentence. The Appellate Division, First Department affirmed the judgment in 2004. In 2008, while Cintron was out of prison on conditional release, Supreme Court sought to correct the legal defect in his sentence by resentencing him to add a five-year term of PRS. Cintron's maximum sentence expired in 2009. In March 2010, Cintron filed a CPL 440.20(1) motion to vacate the PRS term on the ground that it violated double jeopardy because he was not in prison, but on conditional release, when it was imposed.

Supreme Court granted his motion to vacate the PRS term. Citing People v Williams (14 NY3d 198 [2010]), the court said, "[I]t was error to resentence defendant after his release from incarceration, when he had an expectation of finality in the court's original sentence."

The Appellate Division, First Department dismissed the prosecution's appeal as academic. Based on People v Lingle (16 NY3d 621 [2011]), it said Supreme Court erred in vacating the PRS term because Cintron was on conditional release, and therefore still serving his original sentence, when PRS was imposed. However, it concluded that the valid 2008 resentence could not be reinstated under Williams. "[A] term of PRS cannot now be added because the maximum expiration date of defendant's sentence has passed," the court said. "To add this term to his sentence would violate his legitimate expectation of finality in his sentence, which has been fully served."

The prosecution argues that reinstating the PRS term would not violate the double jeopardy clause because Cintron was still serving his original sentence when it was imposed and no resentencing is now required. If Supreme Court's order is reversed, it says, "defendant's sentence reverts back to the lawful one imposed on June 18, 2008, well before defendant's maximum expiration date" in 2009. It also argues that Cintron "cannot have an expectation of finality in an illegal sentence [without PRS] ... when the People have timely exercised their right to appeal."

For appellant: Bronx Assistant District Attorney Justin J. Braun (718) 838-7111
For respondent Cintron: Mark W. Zeno, Manhattan (212) 577-2523