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 Thursday, September 11, 2014 (arguments begin at 1 p.m.)

No. 155 People v Stanley R. Kims, II

Stanley R. Kims, II was on parole in 2010, when parole officers received reports that he was living and selling drugs at a Watertown address that had not been approved by the Division of Parole. The officers saw Kims and another man come out the front door of the apartment and climb into Kims' SUV. When they showed themselves, Kims locked the doors, rolled up the windows and tried to back away from them, but was blocked by the officers' vehicle. They handcuffed both men and, when they found crack cocaine on the ground and in the console of the SUV, they called detectives. During a sweep of the apartment, the officers found a man asleep on a couch and, on top of a kitchen counter, they found a bowl of powdered cocaine, a cutting agent for drugs, packaging materials and a digital scale. After obtaining a search warrant, they seized more than 12 ounces of cocaine and nearly 3 pounds of marijuana from the apartment. Kims was charged with criminal possession of a controlled substance in the first and third degrees and three lesser drug charges.

At trial, County Court charged the jury on the "room presumption" in Penal Law § 220.25(2), which states, "The presence of a narcotic drug ... in open view in a room, other than a public place, under circumstances evincing an intent to unlawfully ... prepare for sale such controlled substance is presumptive evidence of knowing possession thereof by each and every person in close proximity to such controlled substance at the time such controlled substance was found...." Kims was convicted of all counts.

The Appellate Division, Fourth Department modified in a 4-1 decision by reversing his convictions on the top two possession counts, ruling Kims was not "in close proximity" to the drugs when they were discovered. The presumption was enacted to permit officers raiding a drug factory to arrest "persons who might, upon the sudden appearance of the police, hide in closets, bathrooms or other convenient recesses," it said. "Here, unlike the scenario envisioned by the Legislature, defendant walked out the 'front' of his apartment, entered his nearby vehicle and was apprehended almost immediately by parole officers who were investigating whether he resided at that location. Several minutes later, parole officers and police detectives" conducted a search and "found another person present" and drugs in the rear of the apartment. Distinguishing People v Alvarez (8 AD3d 58 [1st Dept]), which held the presumption applied where "defendant jumped out of the window as police approached,"the majority said Kims "was not in flight from the police; he was apprehended in the driveway ... several minutes after leaving the apartment...; and the apartment was occupied by another person."

The dissenter, citing Alvarez, argued Kims was in close proximity to the cocaine when it was found. "[A]pproximately five minutes before the cocaine was found by the police, defendant was observed leaving the apartment that he rented but may not have used as his residence, and he was in the company of a person who admitted that he had purchased cocaine from defendant." He said the presumption would not apply if Kims "had not been observed leaving the apartment less than five minutes before the cocaine was found."

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To be argued Thursday, September 11, 2014 (arguments begin at 1 p.m.)

No. 156 Ellington v EMI Music Inc.

In 1961, big-band jazz composer and pianist Duke Ellington entered into a then-standard songwriter royalty agreement with a group of music publishers including Mills Music, Inc., a predecessor of EMI Mills Music, Inc. (EMI). The agreement designates Ellington and members of his family as the "First Parties," and it defines the "Second Party" as including the named music publishers and "any other affiliate of Mills Music, Inc." Regarding royalties for international sales, the agreement requires the Second Party to pay Ellington's family "a sum equal to fifty (50%) percent of the net revenue actually received by the Second Party from ... foreign publication" of his songs. Under such a "net receipts" arrangement, the foreign subpublisher retained 50 percent of the revenue from foreign sales and remitted the remaining 50 percent to EMI. EMI would then pay Ellington's family 50 percent of its net receipts, amounting to 25 percent of all revenue from foreign sales. At the time the agreement was executed, foreign subpublishers were typically not affiliated with American music publishers; but EMI subsequently acquired ownership of foreign subpublishers and, thus, fees that had been charged by independent foreign subpublishers are now charged by subpublishers owned by EMI.

In 2010, Ellington's grandson and heir, Paul Ellington, brought this breach of contract action against EMI, claiming EMI engaged in "double-dipping" by having its foreign subsidiaries retain 50 percent of revenue before splitting the remaining 50 percent with the Ellington family. He alleges this enabled EMI to inflate its share of foreign revenue to 75 percent, and reduce the family's share to 25 percent, in violation of its contractual agreement to pay the family 50 percent "of the net revenue actually received by the Second Party from ... foreign publication."

Supreme Court dismissed the suit, saying the parties "made no distinction in the royalty payment terms based on whether the foreign subpublishers are affiliated or unaffiliated with the United States publisher." The term 'Second Party' does not include EMI's new foreign affiliates, it said, because the definition "includes only those affiliates in existence at the time that the contract was executed."

The Appellate Division, Second Department affirmed, saying there is "no ambiguity in the agreement which, by its terms, requires [EMI] to pay Ellington's heirs 50% of the net revenue actually received from foreign publication of Ellington's compositions. 'Foreign publication' has one unmistakable meaning regardless of whether it is performed by independent or affiliated subpublishers." It said the definition of 'Second Party' includes only affiliates "that were in existence at the time the agreement was executed," not "foreign subpublishers that had no existence or affiliation with Mills Music at the time of contract."

Paul Ellington argues the agreement was intended to split foreign royalties 50/50 between EMI and his family, while allowing EMI to deduct a reasonable amount for foreign royalty collection costs, and EMI breached the contract by "diverting" half of the revenue to its own foreign subsidiaries. "Per the plain terms of the Agreement..., EMI is 'actually receiv[ing]' all the revenue, and it must, therefore, split it all equally with plaintiff." He argues the definition of Second Party includes affiliates EMI might acquire in the future, since there is no language limiting the term to affiliates then in existence. In any case, he says the language is ambiguous and cannot be resolved on a motion to dismiss.

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To be argued Thursday, September 11, 2014 (arguments begin at 1 p.m.)

No. 158 People v Andrew Blake

On December 31, 2006, during an altercation with four men near the Grant Houses in Manhattan, Andrew Blake's companion handed him a gun and Blake fired at his antagonists, wounding two of them and a bystander. Blake fled, but was arrested a week later at his apartment in Wilmington, Delaware. He told detectives he acted in self defense, saying the men had razors and "were going to kill me." At least two surveillance cameras recorded portions of the incident, but the police failed to secure one of the recordings before it was destroyed.

At trial, Supreme Court allowed defense counsel to argue the video recording was lost deliberately because it would have supported his claim of self defense. However, counsel did not request that the jury be given an adverse inference instruction. Blake was convicted of three counts of attempted murder in the second degree, among other charges, and was sentenced to 25 years in prison.

The Appellate Division, First Department affirmed, finding "trial counsel's failure to request the instruction did not deprive defendant of effective assistance under the state and federal standards." It said "the present unexpanded record is insufficient to determine whether counsel's failure to request an adverse inference charge fell below an objective standard of reasonableness. Counsel may have had strategic reasons for that course of action, including a concern that the language of such an instruction might undermine her summation argument." In any event, it said there was no reasonable possibility that lack of the instruction affected the outcome of the trial. "The jury was fully aware of the loss of the tape and its surrounding circumstances. Furthermore, the court permitted defense counsel to assert in summation that the missing tape would have actually supported defendant's claim of self defense, by showing the 'aggressors' attacking the 'terrified' defendant, who was 'defending himself' and trying to get away.... However, there was overwhelming evidence that directly refuted defendant's self-defense claim, including ... another videotape. In addition, there was extensive evidence of conduct by defendant that was inconsistent with that of a person who had acted in self-defense, including interstate flight, an attempt to destroy evidence, a false initial statement to the police, and a bribe offer."

Blake argues there was no strategic reason for his trial counsel's failure to request an adverse inference charge. "After the State's summation..., the charge was necessary to correct certain statements by the prosecutor, and the failure to request it constituted ineffective assistance. The prosecution used the State's own destruction of evidence against Mr. Blake, telling the jury to reject his self-defense claim because there was no objective evidence of it. The prosecution also told the jury that speculation was impermissible, even though the destruction of footage made it necessary." Citing People v Handy (20 NY3d 663), he says, "If anything, the dearth of evidence should have been held against the State, not Mr. Blake, given that the police destroyed crucial surveillance footage. And 'speculation' -- at least about the content of the footage -- was absolutely permissible, since it 'was State agents who, by destroying the video, created the need to speculate about its contents.'"

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To be argued Thursday, September 11, 2014 (arguments begin at 1 p.m.)

No. 42 People v Diane Wells

Diane Wells was charged with assaulting her wealthy mother in May 2005 in their Manhattan apartment. After a jury trial in Criminal Court, she was convicted of a misdemeanor count of third-degree assault and sentenced to 60 days in jail. In March 2010, the Appellate Term, First Department reversed the conviction and remanded the case for a new trial, finding the jury had been given improper instructions. The prosecution applied for leave to appeal to the Court of Appeals and, while the application was pending, Criminal Court adjourned the case. A Court of Appeals Judge denied leave to appeal on May 14, 2010. The case was not recalendared in Criminal Court until August 23, 2010. On that date, Wells moved to dismiss the assault charge pursuant to CPL 30.30 on the ground that, because more than 90 days had passed since the date of the Court of Appeals order denying leave to appeal, her statutory right to a speedy trial would be violated.

Criminal Court granted her motion to dismiss, finding the 101-day period from May 14 to August 23, 2010 should be charged to the prosecution. "Pursuant to CPL 30.30(5)(a), where a defendant is to be retried following an order for a new trial, the action is deemed to have commenced on [']the date the order occasioning a retrial becomes final.['] Here, the case law supports, and the parties concede, that the order remanding the matter for a new trial became final on May 14, 2010 when the Court of Appeals denied the People's application for leave to appeal." Therefore, it said, the 90-day speedy trial period began to run on that date and expired on August 12, 2010, without any statement of readiness by the prosecution.

The Appellate Term, First Department reversed and reinstated the assault charge. Relying on People v Vukel (263 AD2d 416 [1st Dept 1999]), it said that, because the case had been adjourned by the trial court while the application for leave to appeal was pending, the entire time from May 14 to August 23, 2010 should be excluded from the speedy trial period. In Vukel, the Appellate Division held that the time from denial of leave to appeal until the next adjourned court date is excludable as a "period of delay resulting from ... appeals" under CPL 30.30(4)(a).

Wells argues that Vukel "eviscerates the long-standing rule that the speedy trial clock starts on the date that this Court denies leave. In virtually every case, the trial court adjourns proceedings during the pendency of this Court's decision on a leave application.... Effectively, the 'Vukel exception' would turn on its head this Court's conclusion that CPL 30.30 was enacted to 'discourage prosecutorial inaction'.... Under Vukel, the People are able to wait through the duration of an adjournment in the trial court -- even after this court has denied leave, and the adjournment has no more legitimate purpose -- without advancing the case, and that inaction has no consequences under CPL 30.30. Such a result is contrary to this Court's jurisprudence, well-settled case law, and the spirit of the speedy trial statute."

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