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 Monday, March 23, 2015

No. 53 Matter of State of New York v Robert F. *(papers sealed)*

Robert F. was convicted of first-degree sexual abuse and sentenced to five years in prison in 2005. He had a lengthy criminal history including convictions for rape and other sex offenses stretching back to 1974, when he was convicted of first-degree sexual abuse as a youthful offender at the age of 17. In 2009, as he drew near the end of his most recent prison term, the State brought this proceeding for his civil confinement under Mental Hygiene Law article 10.

After a jury found that he suffered from a mental abnormality that predisposed him to commit sex crimes, Supreme Court held a non-jury dispositional hearing to determine whether he should be confined. The State's expert witness testified in person that she had diagnosed him with pedophilia, antisocial personality disorder and alcohol dependence, and she opined that he was a dangerous sex offender requiring confinement. After the State rested, Robert F. took the stand and under cross-examination disclosed that the victim in his 1974 sexual abuse case had been a stranger to him. On rebuttal, the court allowed the State to recall its expert witness to testify by two-way video conference that she would have increased his recidivism risk score by one point if she had been aware the 1974 victim was a stranger. The court found Robert F. was a dangerous sex offender and committed him to a secure treatment facility. On appeal, Robert F. argued the court erred in allowing the State's expert to provide rebuttal testimony by video conference rather than in person.

The Appellate Division, Second Department affirmed. "[I]n the absence of an explicit prohibition, the trial court has the discretion to utilize live video testimony pursuant to its inherent power to employ innovative procedures where 'necessary to carry into effect the powers and jurisdiction possessed by it,'" the court said, citing Judiciary Law § 2-b(3) and People v Wrotten (14 NY3d 33). "The limited use of that power in the instant case was not an improvident exercise of discretion. In addition, it did not violate any constitutional right of the defendant..., especially since the proceeding was civil in nature...."

Robert F. argues that article 10 does not permit video testimony at dispositional hearings. Because the Legislature amended article 10 in 2012 to provide that psychiatric examiners "may be permitted, upon good cause shown, to testify by electronic appearance" at pre-trial probable cause hearings, but made no similar amendment for trials or dispositional hearings, "the Legislature's intent to exclude electronic appearances from the trial and dispositional hearing is evident..., and no further exceptions can legally be inferred." Even if video testimony is authorized upon a showing of good cause, he says, "the State never argued, let alone proved, that there were exceptional circumstances justifying the electronic appearance" in his case.

For appellant Robert F.: Timothy M. Riselvato, Mineola (516) 746-4373
For respondent State: Assistant Solicitor General Jason Harrow (212) 416-8025

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To be argued Monday, March 23, 2015

No. 70 Matter of Soares v Carter

In June 2012, during an Occupy Albany march on Lark Street, Albany police arrested four marchers for disorderly conduct, a violation, and charged one of them, Colin Donnaruma, with a misdemeanor count of resisting arrest. At their arraignments before Albany City Court Judge William A. Carter, the Albany County District Attorney's Office filed superseding informations and declared readiness for trial. At an appearance in August 2012, after plea negotiations, the prosecutor recommended that the charges be adjourned for six months in contemplation of dismissal. Judge Carter refused to accept the pleas unless community service was required, a condition the defendants rejected. The defendants moved to dismiss the charges. District Attorney P. David Soares did not oppose the motions and informed Judge Carter by letter that he declined to prosecute the cases and would not participate in future proceedings.

In November 2012, Judge Carter denied the motions and said, if a prosecutor failed to appear at the next court date, "this Court may be forced to utilize one of the few available options left to it under these circumstances, including, but not limited to, its contempt powers." In a second letter, Soares told the judge his office would appear at all court dates, but "the People will not be going forward or calling any witnesses at any hearings or trials ... and are, accordingly, not ready for trial." At a May 2013 suppression hearing, when the prosecutor said no witnesses would be called or proof presented, Judge Carter said a willful refusal to participate could result in contempt. The judge agreed the District Attorney has discretion to decide which cases to prosecute, but said, "You have already proceeded. You have already started. You simply can't walk away from this case.... That is nowhere in the law and its not the same thing as exercising your discretion." Soares brought this article 78 proceeding to prohibit the judge from ordering him to call witnesses under threat of contempt. The defendants also commenced a proceeding to require the judge to dismiss the charges and bar him from compelling Soares to prosecute. Supreme Court denied the defendants' petition, but granted Soares' petition to the extent of prohibiting Judge Carter from requiring him to call witnesses or submit proof at the suppression hearings.

The Appellate Division, Third Department affirmed, finding the order did not infringe on Judge Carter's contempt powers or his authority to require compliance with the Criminal Procedure Law (CPL). "[S]ince the CPL does not require [Soares] to call witnesses or put on proof at the suppression hearing, and given a district attorney's broad discretion -- implicating separation of powers -- in determining the manner to proceed in a criminal case..., [Judge Carter] cannot mandate such action under threat of contempt. It is a simple, narrow, potentially ultra vires action that is being prohibited by Supreme Court's judgment." While district attorneys may not unilaterally dismiss criminal cases, it said these charges could be resolved with a motion to dismiss in the interest of justice under CPL 170.40, especially where the prosecutor and defendants agree on dismissal.

Judge Carter argues he did not direct Soares to call witnesses at a hearing, but required him to resolve the cases in compliance with the CPL by pursuing prosecution, entering a plea agreement, or moving to dismiss, and Supreme Court's order improperly diminished his contempt powers. "[A] deliberate attempt by a district attorney to avoid the strictures of the [CPL], when done in contradiction to the repeated orders of a judge, amounts to contempt, and a city court judge has the lawful power to hold such a district attorney in contempt." He says the Appellate Division decision gives district attorneys the power to unilaterally terminate criminal actions by refusing to continue prosecutions and "has the effect of reallocating the ultimate power to approve or disapprove of certain dispositions from the judicial branch to the executive branch."

For appellant Carter: James C. Knox, Troy (518) 274-5820
For respondent Soares: Albany County Asst. District Atty. Christopher D. Horn (518) 487-5460
For respondents Donnaruma et al: Mark S. Mishler, Albany (518) 462-6753

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To be argued Monday, March 23, 2015

No. 55 People v Sergio Rodriguez

Rodney Paige was walking home to the Baruch Houses in Manhattan in May 2007 when he was accosted by three men on bicycles. One of them produced a gun and demanded that Paige hand over his gold chain. As Paige tried to remove it, the gunman shot him three times. An accomplice took Paige's chain and cell phone, and the three men fled. Paige later identified Sergio Rodriguez as the shooter.

Rodriguez was convicted of second-degree attempted murder, first-degree assault, first-degree robbery (two counts), and second-degree robbery. Supreme Court originally sentenced him to 40 years in prison, imposing consecutive terms of 25 years for attempted murder and 15 years for assault, and concurrent terms of 25 and 15 years for the robbery convictions.

The Appellate Division, First Department held the consecutive terms for attempted murder and assault violated Penal Law § 70.25(2) "because there is no basis for finding that these crimes were committed through separate acts." It remitted the case so the trial court "may restructure the sentences to arrive lawfully at the aggregate sentence which it clearly intended to impose," suggesting that one of the robbery sentences could be made consecutive to the sentence for attempted murder or assault to maintain the 40-year term. It said this would not violate CPL 430.10 because "the People seek resentencing only to realign which sentences are to run consecutively, not to disturb any of the individual sentences." CPL 430.10 provides that "when the court has imposed a sentence of imprisonment and such sentence is in accordance with law, such sentence may not be changed, suspended or interrupted once the term or period of the sentence has commenced."

This Court affirmed in People v Rodriguez (18 NY3d 667), saying, "[W]hile it is premature for us to take a position on whether the trial court may sentence defendant other than to make all sentences run concurrently, it is clear that CPL 430.10 does not preclude the Appellate Division remitting for resentence."

At resentencing, the trial court made the 25-year term for first-degree robbery run consecutively to the 15-year term for first-degree assault. The Appellate Division affirmed, saying, "[T]he fact that those sentences had originally been imposed concurrently did not result in a violation of CPL 430.10, even though defendant's sentences had already commenced. Furthermore, the consecutive terms did not violate Penal Law § 70.25(2), because the robbery conviction was based on defendant's display of something appearing to be a firearm (which proved to be an actual firearm), and the assault count was based on defendant's separate act of shooting the victim...."

Rodriguez argues that his "newly imposed consecutive sentences run afoul of [Penal Law] § 70.25(21), as would any consecutive sentencing in his case. In essence, ... the assault -- whose *actus reus* was the shooting -- was part of a single, aggravated robbery, and thus did not allow for cumulative punishment. He also argues that CPL 430.10 "barred the trial court from changing his previously -- and lawfully -- imposed sentences to his detriment" once they had commenced. "Neither the Appellate Division's remand authority, under [CPL] 470.20, nor the exceptions to § 430.10 itself ... permitted this adverse change."

For appellant Rodriguez: Susan H. Salomon, Manhattan (212) 577-2523 ext. 518
For respondent: Manhattan Assistant District Attorney Eleanor J. Ostrow (212) 335-9000

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To be argued Monday, March 23, 2015

No. 56 Matter of Kasckarow v Board of Examiners of Sex Offenders of the State of New York *(papers sealed)*

Daniel Kasckarow was 18 years old and living in Florida in 1998 when he was charged with the felony crime of sexual battery on a child under the age of 16. He entered a plea of nolo contendere. The Florida court withheld adjudication and placed him on "sex offender probation" for four years. Florida law gives criminal courts discretion to "either adjudge the defendant to be guilty or stay and withhold the adjudication of guilt" where they find that a defendant "is not likely again to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that the defendant presently suffer the penalty imposed by law." The court granted him early termination of his probation in 2001, but he was required to register as a sex offender in Florida for the rest of his life.

After Kasckarow notified New York authorities that he was a registered sex offender in Florida and he intended to move to New York, the Board of Examiners of Sex Offenders determined that he was required to register as a sex offender under New York's Sex Offender Registration Act (SORA). On the Board's recommendation, Supreme Court designated him risk level one. Kasckarow brought this article 78 proceeding to challenge the determination, arguing his Florida plea was not a "conviction" under New York law.

Supreme Court dismissed the proceeding, holding that "a nolo contendere plea is sufficiently akin to a guilty plea to be deemed a conviction" for SORA purposes. "There is also nothing fundamentally unfair about [this] ... since, as [Kasckarow] concedes, [his] nolo contendere plea with adjudication withheld ... constitutes a conviction for purposes of Florida's sex [offender] registration requirements...." Rejecting his assertion that a nolo contendere plea with adjudication withheld is equivalent to a youthful offender adjudication, it said the argument "ignores the fact that Florida has its own youthful offender statute ... and that [Kasckarow] was not adjudicated as a youthful offender...."

The Appellate Division, Second Department affirmed, saying Kasckarow's "nolo contendere plea was similar to an Alford plea..., in which a defendant may plead guilty to a crime without admitting culpability.... The Court of Appeals has held that 'a conviction premised upon an Alford plea may generally be used for the same purposes as any other conviction'...."

Kasckarow argues his nolo contendere plea is not a conviction under SORA, since it "reflects a defendant's choice to 'not plead either guilty or not guilty'.... SORA does not define the word 'conviction'..., but under the [CPL 1.20(13) definition of the word, there was never a 'conviction' in this case because there was no guilty plea or guilty verdict." Coupled with the Florida court's decision to withhold adjudication, he says his plea "cannot be treated as a conviction because he is, by virtue of the adjudication being withheld, 'not a convicted person'...." He says his nolo contendere plea with adjudication withheld is comparable to a youthful offender adjudication in New York.

For appellant Kasckarow: Anna Pervukhin, Manhattan (212) 693-0085
For respondent Board: Assistant Solicitor General Claude S. Platton (212) 416-6511

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To be argued Monday, March 23, 2015

No. 57 People v Anthony N. Pacherille

In April 2010, Anthony Pacherille came upon Wesley Lippitt, an African American classmate at Cooperstown High School, in a park and chased him into the village police station. Pacherille fired twice at him with a .22 caliber rifle, striking the victim once in the arm. Pacherille then attempted suicide by shooting himself under the chin. Both survived. Pacherille left a lengthy suicide note in which he expressed racist views. He was charged with several hate crimes, including first-degree attempted murder.

Pacherille pled guilty to second-degree attempted murder as a non-hate crime, in satisfaction of all charges, and waived his right to appeal. At sentencing Pacherille, who was 16 at the time of the crime, asked to be sentenced as a youthful offender. County Court denied the request and sentenced him as an adult to the promised term of 11 years in prison. The court said, in part, "Today he asks the court to vacate, that is essentially erase his conviction, and sentence him to little or no additional jail time as a youthful offender.... Due to the violent nature of his crime and its resulting harm and his admission during the plea allocution his actions were racially motivated, the court cannot say the interests of justice would be served by granting youthful offender status or by not imposing the agreed upon sentence."

Pacherille filed a CPL 440.20 motion to set aside his sentence. The sentencing judge recused himself and a different judge denied the motion, saying that any "lenient deviation from the agreed upon sentence" would require the consent of the prosecutor. "That the sentencing judge took pains ... to articulate why ... a youthful offender adjudication would be inappropriate, should not be mistaken for the proposition that a youthful offender sentence was indeed a potential outcome in this case. In point of fact, absent the consent of the People, there is no circumstance under which this defendant, under the circumstances of this plea, was going to be adjudicated a youthful offender...."

The Appellate Division, Third Department affirmed the sentence and the denial of the motion to vacate.

Pacherille argues that his sentencing violated CPL 720.20(1) and People v Rudolph (21 NY3d 497). CPL 720.20(1) provides that, where a convicted defendant is eligible for youthful offender status, the sentencing court "must determine whether or not the eligible youth is a youthful offender." In Rudolph, this Court said, "We read the legislature's use of the word 'must' in this context to reflect a policy choice that there be a youthful offender determination in every case where the defendant is eligible, even where the defendant fails to request it, or agrees to forgo it as part of a plea bargain." He also argues that the sentencing court abused its discretion in refusing to treat him as a youthful offender and that his sentence amounted to cruel and unusual punishment.

For appellant Pacherille: Frank Policelli, Utica (315) 793-0020
For respondent: Otsego County District Attorney John M. Muehl (607) 547-4249