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, November 18, 2015

No. 199 People v Anthony V. Pavone

In January 2010, former correction officer Anthony Pavone fatally shot Patricia Howard, his recently estranged girlfriend, and Timothy Carter at Carter's home in the Town of Dannemora, Clinton County, where Howard was spending the night. Pavone was arrested four days later in Broome County, where he was staying at a motel under a false name, and was charged with two counts of first-degree murder. He admitted killing the couple, but maintained at trial that he had acted under an extreme emotional disturbance, an affirmative defense that would have limited his criminal culpability to first-degree manslaughter. Prosecution and defense experts presented the jury with conflicting opinions as to whether Pavone suffered from extreme emotional disturbance at the time of the killings. The prosecutor sought to discredit his affirmative defense by presenting testimony from a police negotiator, who induced Pavone to surrender, and three other officers that Pavone said nothing to them about his emotional or mental state when he was arrested or as he was transported back to Clinton County, arguing in his summation that Pavone made up his story of emotional breakdown only after he was charged. The jury rejected the affirmative defense and convicted Pavone of first-degree murder and a related weapon charge. He was sentenced to life in prison without parole.

The Appellate Division, Third Department affirmed in a 3-1 decision. It found the testimony and summation comments on Pavone's failure to mention emotional trauma violated his constitutional right to remain silent, but it said the issue was "largely unpreserved" because defense counsel raised only one objection and sought no curative instructions. It also found admission of the testimony was "harmless in light of the overwhelming evidence" of Pavone's guilt and his "failure to prove his affirmative defense ... by a preponderance of the evidence.... [D]efendant systematically hunted down and then executed Howard and Carter, and the foregoing proof -- consisting of defendant's own words and admitted actions leading up to, during and following the shootings -- evidences a level of calculation, planning, calm deliberation and consciousness of guilt that is both entirely inconsistent with his claimed extreme emotional disturbance defense and completely undeserving of any leniency or mercy." The court rejected Pavone's claim that his attorney's failure to object to evidence of his pre-trial silence and failure to properly prepare his psychiatric expert deprived him of effective assistance of counsel.

The dissenter argued the majority erred in finding the error harmless. She said the issue is "whether the evidence controverting the extreme emotional disturbance defense is so overwhelming that there is no reasonable possibility that the constitutional error affected the jury's rejection of that defense.... Here, for this court to reach this conclusion as a matter of law -- in effect, rejecting the opinion of defendant's expert as unworthy of belief -- usurps the jury's prerogative to determine whether, in its discretion, the defense of extreme emotional disturbance is applicable.... Considering all of the evidence and, in particular, the conflicting expert opinions, I cannot conclude that the error of permitting the People to use defendant's postarrest silence to suggest that he had falsified his affirmative defense was harmless beyond a reasonable doubt...."

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For respondent: Clinton County Asst. District Atty. Nicholas J. Evanovich, III (518) 565-4770

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To be argued Wednesday, November 18, 2015

No. 200 Cusimano v Schnurr

This case, stemming from disputes over the operation and assets of three family-owned real estate entities formed in New York, hinges on whether the Federal Arbitration Act (FAA) applies and, if so, whether the plaintiffs waived their right to arbitration by commencing this action. Bernard Strianese and his wife formed the Strianese Family Limited Partnership (FLIP) in 1998 and later gave 4.5 percent shares to their daughters, Rita Cusimano and Bernadette Strianese. FLIP initially owned industrial property in New York, but later exchanged it for property in Florida that it leases to a CVS drug store. The second entity, Berita Realty LLC, was formed by sisters Rita and Bernadette as equal partners in 2001, and it holds a minority interest in a company that owns a Marriott Hotel in New York. The third, a pair of related entities known as Seaview Corporation, was formed by Bernard Strianese (50 percent interest) and his daughters (25 percent each), but Rita sold her share to Bernadette in 2000. Seaview owns two commercial buildings in New York. The relevant partnership, operating and sale agreements for all three entities provide that disputes will be submitted to arbitration under the rules of the American Arbitration Association (AAA).

Rita Cusimano and her husband brought this action against accountants Andrew Schnurr and Michael Gerard Norman in 2011, alleging they aided and abetted the Strianeses in fraud and misappropriation. Schnurr, who was an accountant for family members and their businesses from 1991 to 2002, and Norman, who handled their accounting after 2002, moved to dismiss the accounting malpractice claims as time-barred. Supreme Court ruled all malpractice claims that arose prior to 2008 were barred by the three-year statute of limitations. It also found the fraud claims were not pled with sufficient specificity, but granted leave to replead. Instead of repleading, the Cusimanos in 2012 filed a demand for arbitration with the AAA against the accountants and Strianeses. The accountants moved to stay the arbitration on the ground the claims were time-barred. The Strianeses intervened and filed a similar motion. The Cusimanos responded that, under the FAA, the limitations issue was for the arbitrator to decide.

Supreme Court held the FAA did not apply because "the totality of the economic activity" underlying the Cusimanos' claims "has no effect on interstate commerce." It also ruled Rita Cusimano waived any right to arbitration "by her resort to, and aggressive participation in this litigation." She turned to arbitration "only after receiving an unfavorable ruling from this court on the timeliness" of her claims, it said. "This is a flagrant example of forum shopping ... to get a second bite at the apple in arbitration." It permanently stayed all claims against Schnurr and certain claims against Norman and the Strianeses that it found time-barred.

The Appellate Division, First Department reversed, ruling that, because the entities' business activity "bears on interstate commerce in a substantial way," the FAA applies and statute of limitations issues must be decided by the arbitrator. "Because commercial real estate can affect interstate commerce, the ownership of and investment in the commercial buildings here, one of which is occupied by an international chain hotel and another which houses a national chain drug store located out-of-state, renders the FAA applicable to these agreements." It ruled the plaintiffs did not waive their right to arbitration because their "actions in this litigation" did not result in prejudice to the opposing parties, where "they did not engage in aggressive litigation..., nor did they pursue state court appeals," and they "did not obtain any evidence that would not be available to them in arbitration."

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For respondents Cusimano et al: David S. Pegno, Manhattan (212) 943-9000

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To be argued Wednesday, November 18, 2015

No. 201 People v Luis Ortiz

In July 2006, Luis Ortiz was accused of forcing his way into a Bronx apartment occupied by two men and a woman, holding a razor blade to the woman's neck, and forcibly taking a chain from one of the men. Ortiz testified at trial that he went to the building with his girlfriend to see if there was a room for rent, got into a fight when one of the men flirted with his girlfriend, and denied that he had a razor. The jury acquitted Ortiz of first-degree burglary and first-degree robbery, which required proof that he used or threatened to use a dangerous instrument, and convicted him of second-degree burglary, which does not. The Appellate Division reversed his conviction and ordered a new trial on a sole count of second-degree burglary.

At his retrial, Ortiz moved to preclude all evidence of his alleged use of a razor based on the doctrine of collateral estoppel, arguing that the jury at his first trial had necessarily decided he did not use or threaten to use a dangerous instrument when it acquitted him of the armed robbery and burglary counts. Supreme Court denied the motion and the complaining witnesses again testified that Ortiz threatened to cut the woman's neck with a razor. He was convicted of second-degree burglary.

The Appellate Division, First Department affirmed the conviction. Rejecting Ortiz's collateral estoppel claim, it said he "failed to meet his heavy burden to establish that the jury at his first trial necessarily decided these particular factual issues in his favor (see People v Acevedo, 69 NY2d 478, 487 [1987])." "Moreover, it is apparent in this case that 'the Acevedo rule [could not] practicably be followed if a necessary witness [were] to give truthful testimony,'" it said, citing People v O'Toole (22 NY3d 335 [2013]). "[T]he case turned on the credibility issue of whether the incident was an altercation or a home invasion. Thus, the presence of the razor blade was essential to completing the complaining witnesses' narrative and establishing the criminal intent element of burglary, and defendant was properly precluded from 'tak[ing] unfair advantage of the dilemma that Acevedo creates for the People' (id.)."

Ortiz argues that his case is indistinguishable from O'Toole, in which the facts "were nearly identical to the facts in this case." In O'Toole, the jury at the defendant's first trial acquitted him of first-degree robbery, which required proof that he or an accomplice displayed a gun, and convicted him of second-degree robbery, which did not. The conviction was reversed and at the second trial, the victim again testified that the defendant's accomplice pointed a gun at him. The O'Toole Court said the first jury "could not logically" acquit the defendant of first-degree robbery and convict him of second-degree robbery "without finding that the People had failed to prove beyond a reasonable doubt that the robbery involved the display of a firearm," and it applied collateral estoppel to bar the prosecution from presenting evidence at a later trial that contradicted the first jury's finding. Ortiz contends he is entitled to a new trial under O'Toole.

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To be argued Wednesday, November 18, 2015

No. 202 Matter of RAM I LLC v New York State Division of Housing and Community Renewal

Phyllis Berk has lived in a rent controlled apartment in a residential cooperative in Manhattan since 1958. In 1994, the building's owner obtained J-51 tax benefits for capital improvements and, pursuant to Administrative Code § 26-403(e)(2)(j), the building was exempt from luxury deregulation while it continued to receive the benefits. The J-51 benefits expired in 2005. RAM I LLC, which purchased the unsold cooperative shares allocated to Berk's apartment in 1996, filed a petition with the New York State Division of Housing and Community Renewal (DHCR) seeking luxury decontrol of the apartment. Berk met the income and rent thresholds for luxury decontrol, and the agency's rent administrator issued an order deregulating the apartment.

DHCR revoked the order on administrative appeal, concluding that, once a landlord accepts J-51 tax benefits, the statutory prohibition of luxury decontrol for a rent controlled apartment continues -- even after the benefits expire -- until the apartment becomes vacant. Supreme Court annulled DHCR's decision and reinstated the order deregulating the apartment.

The Appellate Division, First Department reversed and ruled that luxury decontrol is not available for a rent controlled apartment after J-51 benefits expire, citing significant differences between the City's Rent Control Law (RCL) and Rent Stabilization Law (RSL). The luxury deregulation provisions in both laws "are essentially the same" and provide that deregulation "shall not apply to housing accommodations which became or become subject to this law" by receiving J-51 benefits, it said. "However, the RSL contains an additional provision, Administrative Code § 26-504(c)," which provides that apartments that were subject to rent stabilization before J-51 benefits were received revert to their former status when the benefits expire, including "the right of an owner to seek luxury deregulation in appropriate cases." It said section 26-504(c) "has no counterpart in the RCL."

RAM I argues that "nothing in the relevant statutes bars luxury deregulation of rent-controlled apartments when J-51 tax benefits end. Nor when such benefits expire does any pertinent statute bar an owner from pursuing high rent/high income deregulation of a rent-controlled apartment while a tenant remains in possession. Indeed, the legislative history of the Rent Regulation Reform Act of 1993 shows a clear legislative intent to permit luxury deregulation of rent-controlled apartments when a building no longer receives J-51 benefits."

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