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, October 22, 2015

No. 175 People v Ally Golo *(papers sealed)*

Ally Golo is appealing the denial of his motion for resentencing under the Drug Law Reform Act of 2009 (CPL 440.46), arguing the lower courts erred in ruling on the merits of his motion without affording him a hearing.

Golo pled guilty to third-degree criminal sale of a controlled substance on April 21, 2004, admitting that he sold cocaine to an undercover officer in Queens in 2003, and on June 7, 2004, he was sentenced to 3½ to 10 years in prison. On June 10, 2004, Golo pled guilty to two counts of first-degree robbery arising from separate hold-ups he committed in 2003 against 13-year-old and 14-year-old boys while claiming to have a gun. He moved for resentencing on his drug conviction on March 13, 2012.

Supreme Court denied his motion without a hearing, finding him ineligible for resentencing under CPL 440.46 because he had been convicted of an "exclusion offense" -- the first-degree robbery convictions, which are violent felony offenses -- within the 10-year period preceding the date of his motion. It went on to say that "resentencing would not be warranted, even if defendant was eligible, considering his violations of parole and his history of infractions in prison.... Moreover, defendant's lengthy criminal history shows that not only was he in the business of selling drugs, but has also continuously committed violent crimes -- factors which further show he is not the type of defendant the legislature intended to benefit from the DLRA."

The Appellate Division, Second Department affirmed, although it found Golo was eligible for resentencing. It said the robberies "did not constitute an 'exclusion offense' within the meaning of CPL 440.46(5)(a) because he committed those offenses after committing the drug offense for which he seeks resentencing.... Furthermore, the defendant was convicted and sentenced on the robbery convictions after he was convicted and sentenced on the present drug offense. As a result, the robbery convictions cannot be characterized as 'previous felon[ies]' within the meaning of CPL 440.46(5)(a).... However, in light of the defendant's criminal history, convictions of robbery in the first degree, parole violations, and institutional record of confinement, the Supreme Court providently exercised its discretion in concluding that considerations of substantial justice dictated the denial of the defendant's motion...."

Golo argues he was entitled to a hearing under chapter 738, section 23 of the Laws of 2004, which governs resentencing motions under CPL 440.46 and provides, "The court shall offer an opportunity for a hearing and bring the applicant before it." He says "the only possible interpretation of this language is that a hearing, and the defendant's production in court for it, are mandatory" before a court may address the merits of a resentencing motion. Once the Appellate Division found him eligible for resentencing, he says, "the only appropriate relief was to remand the case to the trial court for the mandated hearing."

For appellant Golo: David P. Greenberg, Manhattan (212) 693-0085 ext. 206
For respondent: Queens Assistant District Attorney Danielle S. Fenn (718) 286-5838

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To be argued Thursday, October 22, 2015

No. 176 People v Samuel Small *(some papers sealed)*

Samuel Small was arrested in April 2006 for a burglary in Brooklyn that occurred the same day. At his arraignment, the prosecutor notified him pursuant to CPL 190.50(5)(a) that the matter would be presented to a grand jury. The statute requires such notice only when the defendant "has been arraigned in a local criminal court upon a currently undisposed of felony complaint." Defense counsel served notice that Small would testify before the grand jury. Three days later, while Small was still in custody for the April burglary, police linked him to fingerprints left at the scene of a burglary in February 2006. The prosecutor filed a felony complaint and obtained an arrest warrant. Small was not arraigned on the new complaint nor given a grand jury notice under CPL 190.50. When he was produced for the grand jury proceeding, the prosecutor informed him that he would be questioned about both the February and April burglaries. He complained he had just learned of the February case, but he proceeded to testify about both cases. He was indicted on two counts of second-degree burglary.

Small filed three successive motions to dismiss the indictment, each alleging that the prosecution violated the notice requirement of CPL 190.50 for the February burglary and that it failed to arraign him in order to avoid the notice requirement. Supreme Court denied the motions, saying in one decision the prosecutor was "not required to arraign defendant on the February case prior to the Grand Jury presentation.... As defendant was informed of his right to testify and did in fact do so, 'there is no evidence that the prosecutor intentionally delayed arraignment in order to deprive defendant[] of notice of the grand jury proceeding' in order to deny him his right to testify...."

The indictment was consolidated with an indictment charging Small with a burglary in January 2005. A jury acquitted him of the April 2006 burglary, but found him guilty of second-degree burglaries in January 2005 and February 2006. The prosecutor sought to have him sentenced as a second violent felony offender based on his October 1985 robbery conviction. Penal Law § 70.04(1)(b) provides that a prior felony cannot serve as a predicate for enhanced punishment if the sentence was imposed more than 10 years before commission of the current felony, but it excludes from that limit any time the defendant "was incarcerated for any reason." Small argued that 442 days he was imprisoned for a parole violation should not be excluded from the 10-year period because he was released on a writ of habeas corpus after a court found the parole violation arose from "a breakdown in communications" and "the evidence did not support the imposition of 18 months" of confinement. Supreme Court found the 442 days should be excluded because, "although the defendant was released pursuant to his writ of habeas corpus..., the declaration of delinquency was never annulled or dismissed, and therefore is still valid." It sentenced him as a second violent felony offender to 15 years in prison.

The Appellate Division, Second Department affirmed. Because Small was not arraigned on the felony complaint for the February 2006 burglary, the prosecutor was not required to notify him of the grand jury proceeding, it said. "In any event, the People ultimately apprised the defendant of the expanded scope of the grand jury's inquiry, and afforded him an adequate and reasonable opportunity to exercise his right to testify...." Rejecting Small's challenge to his sentence, it said his imprisonment for the parole violation "was not without reason or unconstitutional, and this period was thus properly excluded" from the 10-year time limit.

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For respondent: Brooklyn Assistant District Attorney Ann Bordley (718) 250-2464

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To be argued Thursday, October 22, 2015

No. 177 Matter of Hawkins v Berlin

Crystal Hawkins began receiving public assistance from the New York City Human Resources Administration (HRA) in 1989. When her first son, Michael, was born and added to her public assistance case in 1990, she assigned to HRA her right to receive child support from Michael's father, as required by Social Services Law § 158(5). She did the same when her second son was born in 2000. Section 158(5) provides that the "assignment shall terminate with respect to current support rights upon a determination by the social services district that such person is no longer eligible for [benefits], except with respect to the amount of any unpaid support obligation that has accrued during the period that a family received safety net assistance." In January 2007, when the federal Social Security Administration (SSA) found Michael eligible for supplemental security income (SSI) benefits retroactively to September 2005, HRA terminated Michael's safety net benefits and Hawkins' child support assignment, although it continued to collect child support arrears from Michael's father that accrued prior to January 2007. SSA paid HRA $1,232.50 in reimbursement for interim assistance it provided for Michael from September 2005 through January 2007.

Hawkins became eligible for SSI in December 2011, ending her benefits from HRA, and she sought payment from HRA for Michael's child support it had collected in excess of her public assistance benefits since September 2005. HRA determined that it owed her nothing. She sought review by the state Office of Temporary and Disability Assistance (OTDA), arguing she was owed all child support collected since September 2005 because HRA provided no benefits for Michael after January 2007 and SSA reimbursed HRA for benefits it paid after September 2005. OTDA confirmed HRA's decision, finding that cash assistance she received from 1989 to 2011 exceeded assigned child support collections and SSA reimbursement by $53,832. Hawkins brought this article 78 proceeding against OTDA and HRA to challenge the determination.

Supreme Court dismissed her suit, finding that, under Social Services Law § 158(5), her "rights to child support are permanently assigned to [OTDA and HRA] as long as the support payments received do not exceed the total amount of assistance paid to the family as of the date the family no longer receives public assistance."

The Appellate Division, First Department affirmed on a 3-2 vote, saying the assignment of rights to child support is permanent and, "since the total amount of [assistance] paid to petitioner and her family exceeded the amount of child support collected by HRA..., no excess support payment was owed to petitioner." In a partial dissent, two justices said they "do not believe that petitioner's assignment of child support is permanent, lasting for the duration of the family's public assistance case, even for a period of time when the subject child [Michael] is not a part of that household." The court agreed unanimously that Hawkins was not entitled to child support collected prior to January 2007, when Michael's SSI application was approved.

For appellant Hawkins: Andrea Hood, Manhattan (212) 530-5000
For respondent State OTDA: Assistant Solicitor General Claude S. Platton (212) 416-8023
For respondent NYC HRA: Assistant Corporation Counsel Scott Shorr (212) 356-0852

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To be argued Thursday, October 22, 2015

No. 178 People v Mark Jurgins

Mark Jurgins was charged with robbery, assault and weapon possession for a knife-point robbery of a livery cab driver in the Bronx in May 2008. He pled guilty to first-degree robbery. At the plea proceeding, the prosecution sought to have him sentenced as a second felony offender based on his 2000 conviction of "attempt to commit robbery" in Washington, D.C., and Jurgins did not contest the constitutionality of the prior conviction nor its validity as a predicate felony. Supreme Court sentenced him as a second felony offender to 25 years in prison.

Jurgins filed this CPL 440.20 motion to set aside his sentence, arguing, for the first time, that his prior attempted robbery conviction was not the equivalent of a New York felony. The Washington, D.C. statute (D.C. Code § 22-2801) provides, "Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery...." He argued that his D.C. conviction was not a valid predicate offense because a theft "by sudden or stealthy seizure or snatching" would be a misdemeanor in New York.

Supreme Court denied his motion, ruling Jurgins waived the claim when he failed to raise it at his plea or sentencing. Alternatively, it found the D.C. statute "is equivalent, in relevant part, to New York's attempt to commit robbery statute, [Penal Law] § 110/160.00." Because the D.C. statute "delineates three different types of robbery" -- "by force ... against resistance or by sudden or stealthy seizure or snatching," and "by putting in fear" -- and two of those would be felonies in New York, the court examined the D.C. complaint to "identify the exact crime of which [Jurgins] was accused." It found he was charged with attempted robbery "against resistance" or "by putting in fear," which "are equivalent to the New York elements requiring 'the use or threatened use of force'" for felony robbery.

The Appellate Division, First Department reduced the sentence to 15 years and otherwise affirmed. It said Jurgins' claim that his D.C. conviction was not the equivalent of a New York felony "is unpreserved and waived." On the merits, it said, "Resort to the foreign accusatory instrument is appropriate here ... and it establishes the necessary equivalency. The foreign statute criminalizes several acts, each of which constitutes a category of theft even if not separately enumerated, as opposed to constituting mere ways of committing the crime...."

Jurgins says a challenge to an illegal sentence, including the validity of a predicate offense, does not require preservation; and in any case, a CPL 440.20 motion brought at the "trial level" affords "the sentencing court an opportunity to correct its error" and "satisfies any preservation requirement." He argues his D.C. conviction is not a proper predicate because a theft "by force" under that statute encompasses "both takings 'against resistance' and those 'by stealthy snatching,'" which includes "pickpocketing," and therefore "one can violate D.C.'s robbery statute through conduct that would only constitute a misdemeanor in New York." The lower courts erred in looking beyond the D.C. statute to the charges against him because "the statute's operative act element is a taking 'by force or violence,'" he says, and thefts "against resistance" and those by "stealthy seizure" are not separate criminal acts, but merely "ways in which the act element -- 'by force or violence' -- can be committed."

For appellant Jurgins: Lisa A. Packard, Manhattan (212) 577-2523
For respondent: Bronx Assistant District Attorney Catherine M. Reno (718) 838-7119