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.

NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

WEEK OF FEBRUARY 5 - 7, 2013

State of New York Court of Appeals

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To be argued Tuesday, February 5, 2013

No. 28 People v Akieme Nesbitt

Akieme Nesbitt was staying with Anthony Johnson's family in their Manhattan apartment in September 2005, when Nesbitt and Johnson got into a heated argument. Nesbitt made threatening statements, pulled out a weapon consisting of three scalpels attached to a handle, and slashed Johnson's neck, back, arm and face. The neck wound was an inch from his carotid artery, a tendon in his arm was cut, and all of the wounds left visible scars. Several of Johnson's siblings witnessed the incident. Nesbitt was charged with second-degree attempted murder and two counts of first-degree assault, one alleging that he intentionally caused "serious physical injury" and the other that he caused serious and permanent disfigurement. All three charges are class B felonies.

At trial, Nesbitt's defense counsel told the court that the evidence of first-degree assault was overwhelming, that he could think of no defense to those charges, and that the only defense he could foresee was to attempted murder. When the court asked if he would request any lesser included offenses, counsel said he could not think of any. In his summation, defense counsel urged the jury to find Nesbitt not guilty of attempted murder, but said the assault charges were "up to you." The jury deadlocked on attempted murder, but convicted Nesbitt of both assault charges and he was sentenced to concurrent terms of 25 years in prison.

The Appellate Division, First Department affirmed on a 3-2 vote, finding defense counsel's tactics did not deprive Nesbitt of effective assistance of counsel. "The evidence of disfigurement and impairment suffered by the victim strongly supported defendant's conviction, and it is not probable that the jury would have found them only to meet the elements of a lesser included offense of assault in the second degree," the court said. In successfully defending against attempted murder, counsel "argued that the wounds the victim received were superficial, which could have given the jury a basis for finding defendant not guilty of the assault charges as well. Although counsel did not explicitly argue to the jury that they should find defendant not guilty on those charges, his comments were not a concession of guilt. Rather, it is apparent that counsel's strategy was to focus the jury on what he correctly believed was the winnable part of the People's case. This necessarily involved foregoing an argument on the much less defensible assault charges, which counsel would not have been unreasonable in believing would have eroded his credibility and resulted in conviction on all three counts."

The dissenters argued Nesbitt "received ineffective assistance of counsel when his attorney essentially conceded his guilt of first-degree assault.... [D]espite the strength of the People's case, there was a sound basis for counsel to argue that the victim did not suffer the requisite 'serious physical injury' or 'serious disfigurement,'" or that there was insufficient proof of Nesbitt's intent. Counsel "should have at least requested submission of second-degree assault as a lesser included offense," a class D felony, they said. "The majority inexplicably ignores the fact that counsel accomplished little or nothing by only defending against the attempted murder charge, albeit successfully. The acquittal did not limit defendant's sentencing exposure" since he "was still convicted of class B felonies" and sentenced to the maximum term.

For appellant Nesbitt: David J. Klem, Manhattan (212) 577-2523, ext. 527
For respondent: Manhattan Assistant District Attorney Patricia Curran (212) 335-9000

State of New York Court of Appeals

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To be argued Tuesday, February 5, 2013

No. 29 Matter of Howard v Stature Electric, Inc.

David W. Howard injured his back in March 2003 while working for his employer, Stature Electric, Inc. in Watertown. A Workers' Compensation Law Judge (WCLJ) awarded him lost wage benefits and authorized surgery to be covered by Stature's workers' compensation carrier, the State Insurance Fund (SIF). In November 2005, Howard was arrested on insurance fraud and other charges for allegedly misrepresenting his work status, based on evidence from SIF investigators purportedly showing that he held other jobs while receiving benefits. Howard ultimately entered an Alford plea to insurance fraud in the fourth degree in exchange for a sentence to a conditional discharge. His attorney stated on the record that he "is pleading guilty because of the risks involved in going to trial; and without an admission of wrongdoing." The factual allegations underlying the crime were not mentioned during the plea colloquy.

At a subsequent workers' compensation hearing, SIF argued Howard was ineligible for benefits because his insurance fraud conviction established a violation of Workers' Compensation Law § 114-a, which disqualifies a claimant who "knowingly makes a false statement or representation as to a material fact" to obtain benefits. The WCLJ ruled Howard was entitled to a hearing because "the plea agreement did not involve a hearing on the merits," but the Workers' Compensation Board held on appeal that his criminal conviction precluded him from contesting whether he violated section 114-a under the doctrine of collateral estoppel.

The Appellate Division, Third Department reversed and remitted the case for a hearing. "An Alford plea, by its very nature, is accepted on the explicit basis that the person making the plea does not admit having committed the charged acts," the court said. When Howard entered his Alford plea, "he made no factual admissions, his counsel specified that he was pleading guilty 'without an admission of wrongdoing,' and the transcript of the plea proceeding includes no discussion of the factual basis for the charge. The question of whether claimant committed the charged conduct, though decisive in determining whether he violated [section] 114-a, was not determined in the criminal action. Thus, the requirement of identicality was not met, and collateral estoppel does not apply...." After an evidentiary hearing, a WCLJ found SIF failed to prove Howard violated section 114-a by misrepresenting his work status and awarded him benefits. The Workers' Compensation Board affirmed.

SIF argues collateral estoppel bars Howard from asserting that he did not violate Workers' Compensation Law § 114-a because his insurance fraud conviction and his alleged violation of section 114-a are based on the same acts. "It is well-settled that an Alford plea binds as strongly as an admission of the facts constituting the crime and is the equivalent of a conviction," SIF says. "As such, the conviction vitiates the need for an administrative hearing in an administrative forum. Accordingly, the Third Department erred when it reversed the Board's finding that claimant violated [section] 114-a based upon his criminal conviction...."

For appellants Stature and SIF: Susan B. Marris, Liverpool (315) 453-6530
For respondent Howard: Christine Ann Scofield, Syracuse (315) 474-5533

State of New York Court of Appeals

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To be argued Tuesday, February 5, 2013

No. 30 People v Demetrius McGee

Demetrius McGee was arrested after a high-speed chase in Buffalo in May 2008. He was accused of driving a gold Equinox while his co-defendant, Mychal Carr, fired a handgun from the passenger seat at houses along Cambridge Avenue and at one of the pursuing police officers. He told an arresting officer that he "was just driving." After a joint trial, McGee was found guilty as an accomplice of first-degree attempted murder, for the shots fired at the officer, and first-degree reckless endangerment, for the shots fired at the residents and houses on Cambridge Avenue. He was sentenced to 25 years to life in prison.

The Appellate Division, Fourth Department affirmed, rejecting McGee's argument that there was insufficient evidence to support his conviction. Regarding attempted murder, the court said prosecutors "presented evidence establishing the defendant shared his codefendant's intent to kill the [officer] and intentionally aided the codefendant by, inter alia, driving the vehicle involved in the shooting, positioning the vehicle to enable the codefendant to get a clear shot at the victim and operating the vehicle at a high rate of speed in order to evade the police...." Similar evidence established that McGee "and the codefendant shared the requisite 'community of purpose' for accomplice liability to attach," including testimony that he "drove down the street at least twice prior to the shooting [and] operated the vehicle at a speed enabling the codefendant to fire multiple shots and strike several houses...." Rejecting McGee's ineffective assistance of counsel claim, the court said he "failed to demonstrate the lack of a strategic basis for defense counsel's failure to request a lesser included offense charge.... Indeed, defendant's theory of the case was that he was 'just the driver,' i.e., that he did not share the codefendant's criminal intent, not that he only intended to 'cause serious physical injury' rather than death."

McGee argues there was insufficient proof that he was driving the vehicle, that he intended to kill or injure anyone, or that he and Carr had formed a common scheme or plan, saying that he "had no knowledge of his co-defendant's intentions to fire the weapon." During the chase, he says, "the passenger had many, many opportunities to fire" at the officers and "the driver had several opportunities to cause a collision with any one of the police vehicles. Indeed, [McGee] and his co-defendant had the ideal opportunity to injure or even kill the two officers standing vulnerable in the street as they sped by. All of the foregoing facts point to the inescapable conclusion that the appellant's main objective was to avoid a confrontation with the police and that he clearly had not formed the specific intent to murder or even injure a police officer." McGee also argues he was deprived of effective assistance of counsel based, in part, on his attorney's failure to seek severance of his trial or to request submission of the lesser-included offense of second-degree attempted assault.

For appellant McGee: Karen C. Russo-McLaughlin, Buffalo (716) 853-9555
For respondent: Erie County Assistant District Attorney Michael J. Hillery (716) 858-2424

State of New York Court of Appeals

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To be argued Tuesday, February 5, 2013

No. 31 Marinaccio v Town of Clarence

Paul Marinaccio, Sr. brought this action for trespass and private nuisance against the Town of Clarence and Kieffer Enterprises, Inc. (KEI), the developer of a residential subdivision adjacent to Marinaccio's 42-acre property in Erie County. He sought damages for flooding caused by water intentionally diverted from the subdivision onto his property. After a jury trial, Marinaccio was awarded $1,642,000 in compensatory damages against the Town and KEI, as well as $250,000 in punitive damages against KEI. KEI appealed the award of punitive damages.

The Appellate Division, Fourth Department affirmed in a 3-2 decision, saying there was adequate support for "the jury's conclusion that KEI's conduct was sufficiently egregious to warrant an award of punitive damages." KEI and the Town were aware that prior phases of the subdivision had caused drainage problems and that construction of Phase III in 2006 would divert more water to the area of Marinaccio's property, the court said. The Town had said it would obtain an easement from Marinaccio, but the Town and KEI conceded they did not obtain his permission to route water onto his property. Marinaccio's expert engineer testified KEI diverted more water onto his land than its drainage plans called for and his wetlands expert testified the project greatly expanded the amount of wetland on his property, from about six acres in 2001 to 30.23 acres in 2009. The majority said the evidence "is legally sufficient to allow the jury to conclude that KEI knowingly and intentionally disregarded plaintiff's property rights in a manner that was either 'wanton, willful or reckless.'"

The dissenters argued that punitive damages were unjustified. "Although there is no question that KEI discharged water into the furrow [across Marinaccio's property] and that it did so with knowledge and intent, we conclude that there is insufficient evidence in this record that KEI was motivated by maliciousness or vindictiveness or that KEI engaged in such "'outrageous or oppressive intentional misconduct"' to warrant a punitive damages award...," they said. KEI's owner "relied on the expertise of his engineers to prepare an appropriate drainage plan, and that plan was submitted to, and approved by, the [Town's] Engineering Department ... and the Town Board. Indeed, the record reflects that KEI developed Phase III in accordance with all of the Town's requirements."

For appellant KEI: Michael B. Powers, Buffalo (716) 847-8400
For respondent Marinaccio: Joseph J. Manna, Buffalo (716) 849-1333

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To be argued Wednesday, February 6, 2013

No. 32 People v Gerard Ippolito, a/k/a Gerald Ippolito

In June 2003, an elderly Monroe County woman gave a full power of attorney to Gerard Ippolito, an accountant and businessman, to manage her affairs. The woman revoked the power of attorney in July 2006 and Ippolito was arrested for theft and forgery later that year, accused of taking nearly $700,000 from the complainant's trust accounts, pension and social security checks for his own use.

After a jury trial, Ippolito was convicted of grand larceny in the second degree and 43 counts of criminal possession of a forged instrument in the second degree. Forty of those forgery counts were based on checks he signed with the complainant's name and without any notation that he was acting pursuant to a power of attorney. Ippolito was sentenced to 14½ to 29 years in prison and ordered to pay $696,595.14 in restitution.

On appeal, Ippolito argued there was insufficient evidence to support 40 of the forgery counts because he had a valid power of attorney when he signed the checks; that he was entitled to a hearing on the amount of restitution; and that a new trial was necessary because County Court erred in responding to a juror's question without first consulting with the parties. Just prior to the jury charge, a juror had said, "Can I ask a question?" The court replied, "You're not supposed to, but go ahead." The juror said, "I just want to know if we would have a copy of the law in the room." The court replied, "Good question. The answer to that is no. I'll read it to you as many times as you request, but you cannot get a copy to go back there."

The Appellate Division, Fourth Department modified in a 4-1 decision by reversing his conviction of 40 counts of possessing a forged instrument. "Those 40 counts involve the checks on which defendant signed the victim's name while he was her attorney-in-fact pursuant to the power of attorney...," it said. "[W]e conclude that the ostensible maker of the checks, i.e., the victim, authorized the actual maker of the checks, i.e. defendant, to make the checks, 'which purport [] to be [the] authentic creation[s]' of the victim (§ 170.00[4]). Thus, it cannot be said that the checks in question were falsely made..., although 'recitals in the instrument may be false' or defendant may have exceeded the scope of authority delegated to him by the victim...."

The dissenter argued the checks "were forgeries inasmuch as they 'purported to be what [they were] not, [i.e.], the personal act[s] of [the victim]' in signing each check.... The checks at issue bore no indication that defendant was acting in a representative capacity or under the authority of a power of attorney. Indeed, by signing the victim's name to the checks without any such indication and presenting the checks to third-party banking institutions, defendant denied those institutions the right and opportunity to inquire into the validity of his authority or the instrument under which he claimed such authority...." The justices ruled unanimously that Ippolito was entitled to a restitution hearing and that his claim regarding the trial court's response to the juror was unpreserved.

For appellant-respondent: Monroe County Asst. District Attorney Leslie E. Swift (585) 753-4564
For respondent-appellant Ippolito: James Eckert, Rochester (585) 753-4431

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To be argued Wednesday, February 6, 2013

No. 33 Overstock.com, Inc. v New York State Department of Taxation and Finance
No. 34 Amazon.com, LLC v New York State Department of Taxation and Finance

Internet retailers Amazon.com and Overstock.com are challenging the constitutionality of Tax Law § 1101(b)(8)(vi), an amendment enacted in April 2008 to require out-of state vendors to collect sales tax on New York transactions when they use New York residents to solicit business within the state through Internet websites. The statute creates a presumption that a seller is "soliciting business [in New York] through an independent contractor or other representative" if: (1), the seller enters into an agreement to pay "a commission or other consideration" to a New York resident who "directly or indirectly refers potential customers, whether by a link on an internet website or otherwise, to the seller;" and (2), if all such referrals result in more than $10,000 in gross sales to New Yorkers by the seller during the preceding year. The statute also provides that the presumption may be rebutted by "proof that the resident with whom the seller has an agreement did not engage in any solicitation in the state on behalf of the seller that would satisfy the nexus requirement of the United States constitution" during the prior year.

Neither Amazon nor Overstock have offices, employees, or property in New York. They take orders from customers solely through their websites and they ship purchases directly to customers from distribution centers outside the state. Both companies permit owners of websites around the world to place advertising banners and links on their sites that redirect visitors from the affiliate to the Amazon or Overstock site. If the visitor makes a purchase, the affiliate is paid a commission. After Tax Law § 1101(b)(8)(vi) was enacted, Overstock suspended its agreements with all of its affiliates in New York, but Amazon did not.

Amazon and Overstock brought these separate actions against New York State and its Department of Taxation and Finance, alleging the statute violates the federal Commerce, Due Process and Equal Protection Clauses, among other claims. Supreme Court granted the State's motions to dismiss the complaints, ruling the statutory presumption "is not constitutionally defective and can be rebutted."

The Appellate Division, First Department upheld the dismissal of the companies' facial challenges to the statute. There is no Commerce Clause violation because the law applies only when an Internet vendor contracts with a New York affiliate to refer customers and then pays commissions based on sales in New York, satisfying the nexus requirement, it said. The law applies only to "solicitation, not passive advertising," and it provides "a ready escape hatch or safe harbor" by permitting the in-state affiliates to certify they are not soliciting. Rejecting the due process claims, it said the presumption is both rational and rebuttable.

Amazon and Overstock argue the statute violates the Commerce Clause because it requires tax collection by out-of-state sellers "who merely cause advertisements to be placed in the state," conduct that "cannot rise to the level of a substantial nexus." It also violates due process because the presumption of solicitation is "irrational and effectively irrebuttable."

For appellant Overstock: Daniel S. Connolly, Manhattan (212) 508-6100
For appellant Amazon: Randy M. Mastro, Manhattan (212) 351-4000
For respondent State: Steven C. Wu, Special Counsel to the Solicitor General (212) 416-6312

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To be argued Wednesday, February 6, 2013

No. 35 People v Dayshawn P. Handy

Dayshawn P. Handy was in the Monroe County Jail in November 2006, when he got into an altercation with a deputy over his possession of prohibited boxer shorts and sandals in his cell. The deputy subdued and handcuffed him and, with the help of other deputies, took him from C Block though B Block on the way to the special housing unit. As Handy continued to struggle, Deputy Timothy Schliff reached for one of his legs to help control him. Deputy Schliff said Handy kicked backwards, injuring his thumb. Handy was charged with assault.

Prior to trial, Handy's attorney sought any video recordings that might exist of the events, but did not learn there were recordings until a deputy testified at trial that he had watched a video that captured a "very small part" of the incident. The deputy could not recall what the video portrayed nor remember if there were recordings from other cameras. No videos were available at the time of the trial because the routine procedure at the jail was to reuse the tapes, thereby erasing any prior recording. County Court denied Handy's request for an adverse inference charge regarding the prosecution's failure to preserve and disclose recordings. He was convicted of second-degree assault based on the injury to Deputy Schliff, was acquitted of two other assault counts, and was sentenced to five years in prison.

The Appellate Division, Fourth Department affirmed. "[A]n adverse inference charge was not warranted inasmuch as defendant failed to establish that the alleged videotape was discoverable evidence that the People were required to preserve...," it said. "There is no support in the record for defendant's assertion that the alleged videotape was exculpatory and thus his contention that the alleged videotape was Brady material is merely speculative...." It also ruled there was legally sufficient evidence of Handy's intent to cause injury.

Handy urges this Court to impose an obligation on law enforcement to preserve and disclose recordings of events that form the basis of criminal charges. Otherwise, he says, "[A] recording that captures some or all of the actual crime ... may intentionally or negligently be destroyed or lost by the party who has it, with no consequence and no remedy for the loss unless defendant is able to show that the recording he does not have and has never seen contains Brady material." He also argues there was insufficient evidence he intended to injure Deputy Schliff.

For appellant Handy: Janet C. Somes, Rochester (585) 753-4329
For respondent: Monroe County Assistant District Attorney Geoffrey Kaeuper (585) 753-4674

State of New York Court of Appeals

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To be argued Wednesday, February 6, 2013

No. 36 People v Austin Cornelius

Austin Cornelius was charged with illegally entering a Duane Reade pharmacy in midtown Manhattan and attempting to steal disposable cameras in January 2009, allegedly injuring a store detective who tried to detain him. At trial, Supreme Court allowed the prosecutor to introduce three trespass notices that were issued to Cornelius after previous shoplifting incidents. The notices barred him from ever entering any Duane Reade store and contained an account of his conduct, reporting that he "was observed removing and conceal[ing] 33 boxes of Visine" in one case and was "observed concealing store merchandise" in another. Two of the trespass notices were prepared by Duane Reade employees who did not testify at the trial. The court also issued Molineux and Sandoval rulings allowing the prosecutor to introduce evidence of convictions for two prior thefts from Duane Reade and to cross-examine Cornelius about four prior convictions. He was found guilty of second-degree burglary and sentenced to 10 years.

The Appellate Division, First Department reduced the sentence to seven years and otherwise affirmed, rejecting Cornelius' Confrontation Clause claim. "The trespass notices barring defendant from entering a chain of drugstores were properly admitted as business records and did not violate defendant's right of confrontation...," it said. "Those documents were 'not created in order to memorialize witness testimony,' but for business purposes...." The evidence of prior convictions and uncharged crimes "was probative of defendant's knowledge and intent with regard to the burglary in this case, and helped establish that defendant knew that his entry into the store was unlawful."

Cornelius argues that the admission of two trespass notices prepared by absent witnesses violated his Sixth Amendment right to confront witnesses against him "because the trespass notices were akin to formal affidavits as they were signed, dated, and witnessed, they contained direct accusations of criminal activity, and they were prepared in contemplation of use in a criminal prosecution.... These statements were entered for their truth." He also argues the Molineux and Sandoval rulings admitted evidence that "was cumulative, excessive, and overwhelmingly prejudicial in its similarity to the crime charged."

For appellant Cornelius: Margaret E. Knight, Manhattan (212) 402-4100
For respondent: Manhattan Assistant District Attorney Allen J. Vickey (212) 335-9000

State of New York Court of Appeals

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To be argued Thursday, February 7, 2013

No. 37 Gelman v Buehler

Geoffrey Gelman and Antonio Buehler entered into an oral agreement in September 2007 to form Cardinal and Crimson Capital, LLC for the purpose of engaging in a "search fund" venture. They agreed to solicit $600,000 in capital from investors, search for and acquire a business with growth potential, operate the business to increase its value, and then create a "liquidity event" such as selling it for a profit, allowing the investors to receive a return on their investments. Gelman alleges that they agreed to "operate the business until the liquidity event could be achieved, or, if the liquidity event could not be achieved earlier, they would operate the business for a period of approximately 4 to 7 years." Buehler withdrew from the partnership in February 2008, after he and Gelman had found potential investors, but before they received any investment money. Gelman brought this breach of contract action against Buehler.

Supreme Court dismissed the suit, saying Gelman "failed to allege sufficient facts or submit any evidence to support a finding that the partnership was for a definite term or a particular defined objective. Accordingly..., this court finds that the alleged partnership was a partnership 'at will subject to dissolution at any time by any partner.'"

The Appellate Division, First Department reinstated the breach of contract claim on a 3-2 vote. Buehler "could not unilaterally dissolve the partnership since the partnership had the specific undertaking of acquiring a business and expanding it until the investors would receive a return on their capital investments," the court said. "Moreover, the partnership also had a definite term, namely, to achieve the liquidity event.... Here, neither party expressly held out that the partnership was to be one terminable at will. Nor was the venture to be perpetual in nature. That is, the partnership did not seek to achieve an indefinite number of 'liquidity events,' but rather to achieve the one discernable event to give a return to a limited number of investors...."

The dissenters argued that, while "the parties discussed various plans and business scenarios," Gelman failed to show that "the oral partnership agreement was for a definite term or particular undertaking." They said, "[A] partnership formed for the purpose of acquiring, improving and reselling a business with no specified term of duration is a partnership at will. Absent a 'definite term,' the purported partnership was at will and the defendant could dissolve it at any time."

For appellant Buehler: Paul R. Niehaus, Manhattan (212) 631-0223
For respondent Gelman: Geoffrey Gelman (*pro se*), Brooklyn (617) 909-2066

State of New York Court of Appeals

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To be argued Thursday, February 7, 2013

No. 38 Hecker v State of New York

Kenneth J. Hecker was a millwright employed by Hohl Industrial Services, Inc. in December 2007, when he was injured at a state-owned work site in the Town of Ogden, Monroe County. About six months earlier, Hohl had completed a contract to renovate the historic Washington Street Lift Bridge over the Erie Canal, but it sent a crew back to the bridge in December to replace defective components in the lift mechanism located 30 feet below ground. Hecker was directed to shovel more than a foot of snow from metal decking at all four corners of the bridge in order to clear access doors that would enable the workmen to reach the lift mechanism. After about 40 minutes of shoveling, he slipped and fell, injuring his back.

Hecker brought this personal injury action against the State under Labor Law § 241(6), based on alleged violation of an Industrial Code provision, 12 NYCRR 23-1.7(d), which states, "Ice, snow, [and] water ... which may cause slippery footing shall be removed, sanded or covered to provide safe footing." The Court of Claims granted the State's motion for summary judgment dismissing the claim, saying Hecker "cannot maintain a Labor Law cause of action for Defendant's failure to have removed the snow and ice from his work area, when he was the very person charged with removing that snow and ice."

The Appellate Division, Fourth Department unanimously rejected the lower court's rationale, but split 3-2 in affirming the order on the ground that 12 NYCRR 23-1.7(d) does not apply to the facts of the case. The majority said, "Although claimant had shoveled sidewalks to reach the corners of the bridge where he would access the subterranean work site, and the pit door through which he would access the work site was located in a sidewalk, we conclude that claimant was not using the area in which he fell as a floor, passageway or walkway at the time of his fall...." Although the parties did not "specifically address" whether the regulation applies, the majority said it could decide that question because "claimant's bill of particulars and cross motion alleged the applicability of the regulation and claimant appealed from the entire order, including that part denying his cross motion."

The dissenters argued Hecker's claim should be reinstated, saying the State never disputed the applicability of 12 NYCRR 23-1.7(d) and "it is 'fundamentally unfair to determine this issue sua sponte'.... We should not be 'in the business of blindsiding litigants, who expect us to decide their appeals on rationales advanced by the parties, not arguments their adversaries never made' (Misicki v Caradonna, 12 NY3d 511, 519 [2009])." They also argued that the regulation applies, saying, "Inasmuch as the pit door was located on the sidewalk and was the only way to access the underground work site, we conclude that, at the time of his accident, claimant was using a passageway or walkway within the meaning of the regulation...."

For appellant Hecker: Jeffrey A. Vaisey, Rochester (585) 287-6525
For respondent State: Richard C. Brister, Rochester (585) 232-1911

State of New York Court of Appeals

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To be argued Thursday, February 7, 2013

No. 39 People v Tyrell Norris
No. 40 People v Elbert Norris

Tyrell Norris and Elbert Norris were arrested in 2002 during a police crackdown on drug trafficking at the Cypress Hills Houses in Brooklyn. The defendants, who are not related to each other, were convicted of multiple counts of third-degree criminal sale of a controlled substance and were sentenced to consecutive terms of 5 to 10 years on each count, resulting in an aggregate sentence of 15 to 30 years for each defendant.

In 2010, the defendants moved for resentencing on their B felony drug convictions under the Drug Law Reform Act of 2009 (2009 DLRA) and asked that the new sentences be made concurrent. Supreme Court, the same justice who presided at their trial, issued orders specifying that he would impose consecutive terms unless the defendants withdrew their motions. He informed Tyrell Norris that he would impose consecutive terms of 7 years on 3 drug sale counts, for an aggregate determinate sentence of 21 years. He informed Elbert Norris that he would impose consecutive terms of 6 years on each of four counts, for an aggregate determinate sentence of 24 years. The judge said he was required to impose consecutive sentences by People v Acevedo (14 NY3d 828 [2010]), which rejected a drug offender's argument that the 2004 DLRA gave the resentencing court the power to make his drug sentences, which were originally ordered to run consecutively to a sentence for weapon possession, run concurrently instead. Tyrell and Elbert Norris rejected the proposed resentences and appealed.

The Appellate Division, Second Department affirmed. Citing Acevedo, it held that the 2009 DLRA "does not authorize the Supreme Court to alter the sentences for multiple felony drug convictions, originally imposed to run consecutively to each other, such that they run concurrently with each other" (People v Tyrell Norris [90 AD3d 788]).

The defendants argue that Acevedo "only considered the question of whether a resentencing court could alter a previous order that DLRA-eligible drug sentences run consecutively to non-drug sentences not subject to DLRA relief; the decision was silent with respect to whether a resentencing court can order the very drug sentences that are being vacated to run concurrently with each other. Applying Acevedo to the situation at hand would directly contradict the sweeping structural and philosophical changes the Legislature has enacted in [the 2009 DLRA] and seriously impede the ameliorative relief it intended in reforming New York's draconian drug laws."

For Tyrell Norris: Paul Skip Laisure, Manhattan (212) 693-0085
For Elbert Norris: Kathleen E. Whooley, Manhattan (212) 693-0085
For respondent: Brooklyn Assistant District Attorney Caroline R. Donhauser (718) 250-2487

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To be argued Thursday, February 7, 2013

No. 41 People v William Monroe

In 2007, William Monroe pled guilty to second-degree conspiracy in exchange for a promised sentence of 6 to 12 years to run concurrently with a prior sentence of 4½ to 9 years, which was imposed in 2006 for two drug felony convictions stemming from cocaine sales in Manhattan. Supreme Court explained to him that, under the 2007 sentencing agreement, his conspiracy plea would effectively add 1½ to 3 years to the time he was already serving for the drug convictions.

After adoption of the Drug Law Reform Act of 2009, Monroe moved for resentencing on his prior drug convictions. His motion was granted, the original sentence of 4½ to 9 years was vacated, and he was resentenced to a determinate term of 3 years. Monroe then moved to vacate his conspiracy conviction and withdraw his plea, arguing that his plea was unknowing because it was induced by the promise of concurrent time to a sentence that was later reduced. He cited People v Pichardo (1 NY3d 126) and People v Rowland (8 NY3d 342), which held that a defendant who pled guilty in return for a promise of concurrent sentencing is entitled to withdraw his plea and face trial when "the removal or reduction of the preexisting sentence nullified a benefit that was expressly promised and was a material inducement to the guilty plea." Supreme Court denied Monroe's motion.

The Appellate Division, First Department affirmed, saying, "What distinguishes this case from Rowland and Pichardo is that defendant's drug convictions and sentences were never reversed on appeal or otherwise invalidated. Instead, defendant invoked the ameliorative provisions of the Drug Law Reform Act to obtain a more lenient sentence. A concurrent sentence that subsequently proves to be invalid cannot be equated with a valid concurrent sentence that is subsequently reduced as a result of a defendant's request for leniency. The former, but not the latter, may be viewed as an unfair inducement to plead guilty that affects the voluntariness of the plea."

Monroe argues that his conspiracy plea must be vacated "because the reduction of his drug sentences means that the original promise cannot be fulfilled..... That the reduction of the preexisting sentence resulted from an ameliorative legislative enactment rather than following a successful appeal is of no import. The relevant focus is on whether there has been a change in the factual circumstances that induced the plea.... The 4½-to-9 year sentences that induced Mr. Monroe to accept a 6-to-12 year sentence on the conspiracy charge were reduced, altering the benefit of the bargain. As such, Mr. Monroe is entitled to get his plea back."

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