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.

NOVEMBER 17 - 19, 2014 CALENDAR

NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

State of New York Court of Appeals

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To be argued Monday, November 17, 2014

No. 221 Trump Village Section 3, Inc. v City of New York

Trump Village Section 3, Inc. (Trump Village), organized under the Mitchell-Lama Law in 1961, owns a residential cooperative development consisting of three 23-story apartment buildings in Brooklyn. In 2007, Trump Village withdrew from the Mitchell-Lama affordable housing program and, pursuant to Private Housing Finance Law § 35(3), "reconstituted" itself as a for-profit corporation under the Business Corporation Law by amending its certificate of incorporation and bylaws. It also amended its stock certificates by removing language relating to Mitchell-Lama and replacing it with language pertinent to the new bylaws. This freed Trump Village of Mitchell-Lama's affordable housing restrictions and allowed its shareholders to sell their apartments at market rates. The New York City Department of Finance determined that the transaction qualified as "a conveyance of the underlying real property" and that Trump Village owed a real property transfer tax of $21.2 million, including interest and penalties, pursuant to Tax Law § 1201(b) and Administrative Code § 11-2102(a). Trump Village brought this action against the City, seeking a judgment that the tax did not apply.

Supreme Court granted the City's motion for summary judgment and declared that Trump Village's corporate conversion constituted a taxable conveyance. In Trump Village's voluntary dissolution as a Mitchell-Lama cooperative and reconstitution as a for-profit corporation, it said, the amended certificate of incorporation was a deed that was delivered to the new for-profit entity when the certificate was executed. Noting the value of the apartment buildings increased from $54 million before the transaction to $528 million afterward, the court said Trump Village's "dissolution and reconstitution represented a fundamental change in the characteristics of the legal entity that owned the land and buildings. Despite the fact that plaintiff's name and certain other characteristics may have remained the same, the economic reality is that plaintiff, as a reconstituted cooperative, is a completely different entity than it was previously with significant and dramatic substantive changes to the rights, restrictions and financial benefits its shareholders now possess, along with an increase in its market value by many multiples."

The Appellate Division, Second Department reversed and held the tax was improperly imposed because the amended certificate of incorporation was not a deed and Trump Village remained the same entity after its conversion and, thus, there was "no transfer or conveyance of any real property or an interest in real property." It said, "Upon amending its certificate of incorporation, Trump Village remained the same entity, although it was relieved of various restrictions previously imposed upon it by the Mitchell-Lama housing program.... This is so even if we adopt the argument of the City defendants that the word 'reconstitute' is synonymous with the word 'reincorporate'.... Moreover, the Administrative Code's definition of the term '[d]eed' ... does not encompass Trump Village's amendment to its certificate of incorporation."

For appellant City: Assistant Corporation Counsel Frances J. Henn (212) 356-2155
For respondent Trump Village: Daniel A. Ross, Manhattan (212) 806-5400

State of New York Court of Appeals

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To be argued Monday, November 17, 2014

No. 218 People v Raul Johnson

Raul Johnson was represented by counsel on burglary charges in the Town of Clarkstown, Rockland County, in 2007, when he offered to provide information about the perpetrator of a 2005 stabbing in Clarkstown. At a proffer meeting attended by his defense attorney, the prosecutor and two detectives, Raul signed a cooperation agreement in which he was offered leniency on the burglary charges in exchange for truthful information about the stabbing. He also agreed to wear a wire to secretly record the potential suspect. Six months later, the detectives met with Johnson at the police station to equip him with a recording device and prepare him to meet with the suspect. Johnson's defense attorney was not present. The detectives questioned him about the stabbing, and Johnson made statements incriminating himself. After a 30-minute break, the detectives read Johnson his Miranda rights, he waived them, and then provided a written confession to the stabbing.

County Court denied Johnson's motion to suppress the statements, finding they were not obtained in violation of his right to counsel. It said his indelible right to counsel had attached for the burglary case, but not the stabbing, because the "proffer meeting was requested by the defendant's lawyer on the pending burglary. The reason for the meeting was to achieve a benefit for the defendant on the burglary charge by providing information about an incident the police were investigating in which neither the police or counsel believed the defendant was a suspect.... The defendant's counsel was not retained or assigned to represent the defendant regarding the stabbing incident." The court said the questioning that led to Johnson's confession did not violate his derivative right to counsel under the related cases rule because "the stabbing was not 'so closely related transactionally, or in space or time' such that questioning regarding the stabbing 'would all but inevitably elicit incriminating responses regarding' the burglary...." In any case, it said, Johnson "tacitly waived" his right to counsel in the stabbing case at the proffer meeting, in the presence of his attorney, "by agreeing to continue to provide information to the police after the conclusion of the meeting."

Convicted at trial of second-degree attempted murder and first-degree assault, Johnson was sentenced to 13 years in prison. The Appellate Division, Second Department affirmed, saying the police "were not barred from questioning [him] about the stabbing despite the fact that he was represented by counsel on a pending burglary charge, as the two charges were unrelated."

Johnson argues his confession to the stabbing was obtained in violation of his right to counsel, which could not be waived in the absence of his attorney. His "right to counsel indelibly attached at the proffer meeting[,] which was directly related to the attempted murder," he says. His attorney's "actions in representing [him] at the proffer session, asking to be contacted by the police after his client was to be fitted with a recording device, and his multiple conversations with the prosecutor after [Johnson] had made inculpatory statements show that he passed beyond the bright-line and entered the proceedings," and "no formal retainer or appointment" of defense counsel in the stabbing case was necessary.

For appellant Johnson: Ellen O'Hara Woods, New City (845) 638-5660
For respondent: Rockland County Assistant District Attorney Itamar J. Yeger (845) 638-5001

State of New York Court of Appeals

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To be argued Monday, November 17, 2014

No. 219 People v Clifford Jones *(most papers sealed)*

Clifford Jones was convicted of rape in Manhattan in 1980 and murdering a man who confronted him as he fled the scene of the rape. There was no physical evidence against him and the prosecution relied primarily on identification testimony by the rape victim. Jones was released on parole in June 2010, after serving 30 years in prison. Two months before his release, Jones filed a CPL 440.10 motion to vacate his conviction based on newly discovered evidence -- recent DNA testing of 3 of the 18 hairs recovered from a baseball cap the perpetrator left at the murder scene and of fingernail scrapings from the murder victim. Test results for two of the hairs excluded Jones as the source and the third was inconclusive. The genetic profile of one of the fingernail scrapings excluded Jones, a second matched the victim.

Supreme Court denied the motion without a hearing, finding it was unlikely the DNA evidence would have affected the jury's verdict. "The new evidence, if available at the time, is readily explained as inconclusive; it does not establish or even create an inference beyond speculation that some other person committed the crime," the court said. "As well, the absence of a match of the defendant's DNA with the few samples tested does not, in any meaningful way, exclude the defendant as the perpetrator."

The Appellate Division, First Department affirmed in a 3-2 decision, saying the rape victim's "lineup and in-court identifications of defendant were unusually strong and reliable.... She provided a detailed description that included the condition of defendant's teeth (one tooth, she testified, was 'chipped and he had a gap between his teeth')).... Given the strength of the evidence, the two portions of the DNA evidence, even when viewed collectively, would not have created the probability of a more favorable verdict. There are multiple explanations for the presence of hairs other than defendant's on the hat found at the scene." The majority said that "even if the reliability of the [DNA] evidence is assumed, defendant still did not establish a legal basis for ordering a new trial. Accordingly, the factual disputes in this case were not material, and defendant was not prejudiced by the absence of a hearing."

The dissenters argued Supreme Court "should have granted defendant further DNA testing and held an evidentiary hearing" before deciding his 440.10 motion. "Defendant's conviction was based solely on an identification by a single witness nearly four months after the event. That witness provided various inconsistent descriptions of the perpetrator immediately after the incident." They said Jones "met his initial burden by offering sworn evidence of mtDNA [mitochondrial DNA] analysis showing that the hairs from the perpetrator's hat were not his. The rebuttal offered by the People, in the form of an attorney's affirmation containing hearsay statements questioning the reliability of the mtDNA test results, is insufficient to discredit defendant's evidence. The question whether ... the laboratory's procedures were flawed or its results were inconclusive is an issue of fact, and should not have been summarily determined."

For appellant Jones: Heather K. Suchorsky, Manhattan (212) 225-2000
For respondent: Manhattan Assistant District Attorney David M. Cohn (212) 335-9000

State of New York Court of Appeals

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To be argued Monday, November 17, 2014

No. 220 Gammons v City of New York

Allison Gammons was a New York City police officer in 2008, when she was assigned to load wooden sawhorse-style police barriers onto a flatbed truck in Brooklyn. She stood on the truck with another officer stacking barriers that were handed up by officers on the ground. The flatbed had side rails, but was open at the rear where Gammons was standing. With she and her partner holding opposite ends of a barrier, he sought to move it into position and accidentally pushed it into her chest, knocking her backwards off of the truck. Gammons suffered fractures and other injuries, and was granted a full disability retirement five weeks later.

Gammons brought this action against the City under General Municipal Law § 205-e, which provides a cause of action for police officers injured by another's failure to comply with "any of the statutes, ordinances, rules, orders and requirements of the federal, state" or local governments. She based her claim on Labor Law § 27-a(3)(a)(1), the Public Employee Safety and Health Act (PESHA), which requires public employers to provide "employment and a place of employment which are free from recognized hazards that ... are likely to cause death or serious physical harm ... and which will provide reasonable and adequate protection to the lives, safety or health of its employees." Gammons alleged the City violated PESHA by failing to provide one of its newer, longer flatbeds, which are equipped with tailgates and have room to safely hold two officers and the full length of the police barriers.

The City moved for summary judgment, arguing PESHA was not a proper predicate for a claim under section 205-e because it created an administrative workplace inspection scheme, but not a private right of action. Supreme Court denied the City's motion to dismiss the claim.

The Appellate Division, Second Department affirmed, saying Gammons was not seeking "to recover damages for a Labor Law § 27-a(3)(a)(1) violation. Rather, the plaintiff has alleged that the defendants' Labor Law § 27-a(3)(a)(1) violation is a predicate for her [section] 205-e cause of action." It said, "While Labor Law § 27-a imposes a general duty of care, that duty is nonetheless clear.... A violation of section 27-a(3)(a)(1) may be proved to a trier of fact with, for example, proof of violations of industry-wide standards or accepted practices in the field.... Since section 27-a provides an objective standard by which the actions or omissions of a public employer ... can be measured for purposes of liability, Labor Law § 27-a(3)(a)(1) can serve as a predicate for a section 205-e claim."

The City argues PESHA is not a valid predicate for Gammons' claim "because PESHA established a government workplace inspection scheme in which the State's Commissioner of Labor has exclusive jurisdiction to determine whether a violation of the statute has occurred.... [C]ourts lack subject matter jurisdiction to determine whether a section 27-a violation has occurred since the Legislature exclusively vested that power in the Department of Labor []. Accordingly, Labor Law § 27-a, which does not provide a private right of action for violations of its terms, cannot form the basis for municipal liability under GML § 205-e."

For appellant City: Assistant Corporation Counsel Michael Shender (718) 222-2371
For respondent Gammons: David L. Kremen, Manhattan (212) 233-2100

State of New York Court of Appeals

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To be argued Tuesday, November 18, 2014

No. 222 People v On Sight Mobile Opticians

On Sight Mobile Opticians, Inc. was charged with violating Brookhaven Town Code § 57A-11, which prohibits commercial advertising on public property, by placing five signs advertising its business along public roads in 2011. On Sight moved to dismiss the charges on constitutional grounds, arguing that section 57A-11 and the entire sign ordinance, chapter 57A of the Town Code, violated the First Amendment.

District Court denied the motion, saying, "The restrictions imposed are not predicated on the content of speech, but are based on aesthetics, business interests and traffic safety. The ordinances are narrowly tailored with respect to content and they accomplish legitimate governmental interests. Brookhaven Town Code Chapter 57A as written is clearly not invalid." On Sight then pled guilty and appealed.

Appellate Term, 9th and 10th Judicial Districts, reversed and dismissed the charges. It ruled section 57A-11 is not unconstitutionally vague, but said, "While the section of chapter 57A defendant violated, considered in isolation, represents a constitutional exercise of the Town's zoning authority, considered as a whole, chapter 57A unconstitutionally favors commercial speech over noncommercial speech.... [C]hapter 57A's language of limitation ('only the following signs' are 'permitted' or 'allowed') can only be construed as imposing broad restrictions on noncommercial speech that is not 'political.' Chapter 57A permits commercial advertising in every zoning district aside from public lands and roads, and bars noncommercial speech in most contexts in which commercial speech is allowed." It also ruled the unconstitutional provisions could not be severed. "In light of the ubiquitous use of the language of limitation ... and the relative absence of media of expression for noncommercial speech, it is impossible to sever so much of chapter 57A as permits 'commercial favoritism' while retaining the remainder. The chapter's provisions are so closely interwoven that removing them wholesale would render the regulatory scheme incoherent and would amount to a judicial rewriting of a legislative scheme, which the courts do not favor...."

Brookhaven argues that any challenge to the constitutionality of other sections of the sign code "is no defense to On Sight's violation of section 57A-11 of the Town Code," which is valid. On Sight's "sole resistence to the Town's prosecution of its admitted code violations has been its misplaced constitutional challenge to provisions of the Town Code that it was *not* charged with violating, based upon alleged impacts on noncommercial speech in which it has *no interest*," the Town says, arguing that On Sight was without capacity to challenge those sections. It also argues that any invalid Code provisions are severable. "Section 57A-11 ... is a stand-alone provision which has limited relationship to the other, purely regulatory provisions of the Town sign ordinance. Unlike the sections of chapter 57A challenged by On Sight, section 57A-11 has its own independent declaration of legislative purpose, grounded in the Town's constitutional right to manage and protect its own property.... Even were other provisions of the Code marred by some constitutional defect, there can be no question that the Town Board would wish for the prohibition against the placement of any private signs on *public property* to stand."

For appellant Brookhaven: Jonathan Sinnreich, Central Islip (631) 650-1200
For respondent On Sight Mobile Opticians: Raymond Negron, Mount Sinai (631) 928-3244

State of New York Court of Appeals

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To be argued Tuesday, November 18, 2014

No. 223 Rigano v Vibar Construction, Inc. (Proceeding No. 1)
Vibar Construction Corp. v Fawn Builders, Inc. (Proceeding No. 2)

George Vignogna, the sole owner of Vibar Construction Corp., and Nicholas Rigano, the sole owner of Fawn Builders, Inc., were longtime business partners in real estate development in Westchester County. Their last joint project included development of a parcel purchased by Fawn Builders in Pound Ridge, and Vibar built an access road to that parcel and other lots. In 2010, alleging that Rigano and Fawn Builders failed to compensate it for the cost of the access road, Vibar filed a notice of mechanic's lien which stated that the owner of the property subject to the lien was Fawn Builders. It also identified itself as Vibar Construction, Inc., instead of Corp. Rigano commenced Proceeding No. 1 pursuant to Lien Law § 19(6) to summarily discharge the mechanic's lien on the ground that he, not Fawn Builders, was the actual owner of the parcel. He said Fawn Builders transferred the parcel to him in 2007 and he attached a copy of the deed. Among other defects, Rigano argued that "Vibar Construction, Inc. does not exist." Vibar then commenced Proceeding No. 2 pursuant to Lien Law § 12-a(2) to amend the notice of lien nunc pro tunc to reflect that Rigano, not Fawn Builders, owned the property subject to the lien and that lienor's name was Vibar Construction Corp., not Inc.

Supreme Court initially granted Vibar's petition in Proceeding No. 2 to amend the notice of lien to correct the names of the parcel's owner and of the lienor, finding the original notice "substantially complied with the Lien Law."

The court later granted Rigano's motion for reargument, vacated its prior order, and granted Rigano's petition in Proceeding No. 1 to summarily discharge the mechanic's lien. "While a failure to state the true owner or a misdescription of the true owner will not affect the validity of a notice of lien (see Lien Law [9][7]), it has been held, at least in the Second Department, that a misidentification of the true owner is a jurisdictional defect which cannot be cured by an amendment nunc pro tunc (Tri-State Sol-Aire Corp. v Lakeville Pace Mechanical, Inc., 221 AD2d 519...).... PM Contracting Company v 32 AA Associates, LLC, 4 AD3d 198, a First Department case..., appears to be inconsistent with the Second Department cases cited above," the court said, but observed that it was "constrained to follow the Second Department. Here, the notice totally misidentifies the owner as of the date it was filed. Whether or not Vibar knew or should have known of the misidentification is irrelevant."

The Appellate Division, Second Department affirmed, saying the lower court "properly discharged the mechanic's lien and denied [Vibar's] petition to amend the notice of lien." It said the notice "completely misidentified the true owner of the subject premises as of the date it was filed. Thus, the mechanic's lien was jurisdictionally defective and was properly discharged...."

Vibar argues it should be allowed to amend its notice because it "substantially complied" with Lien Law § 9 "when it named Fawn Builders, Inc., the original owner of the subject property, in its mechanic's lien rather than ... Rigano, the actual owner." It says the First Department's decision "represents the correct view of the intent ... of the Lien Law and of the requirement that it be liberally construed to achieve its purposes" and "also recognizes the reality that ... a lienor, often proceeding without the benefit of counsel, may not have had a full opportunity to ascertain who is the true owner of the subject property, and pressed to comply with the short statute of limitations..., files a mechanic's lien which is not a model of precision."

For appellant Vibar: Jeffrey Rizzo, Bronx (718) 618-7509
For respondent Rigano: John Brian Macreery, Katonah (914) 232-8174

State of New York Court of Appeals

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To be argued Tuesday, November 18, 2014

No. 224 Matter of State of New York v Michael M. *(papers sealed)*

Michael M. pled guilty in 1997 to felony sexual abuse charges involving two girls under the age of 12 and was sentenced to a maximum of 11 years in prison. In 2008, after he reached the maximum term, the Attorney General's office filed a petition under Mental Hygiene Law article 10 for an order authorizing civil management. He was confined at a psychiatric facility for two years while he litigated the validity of the petition. Supreme Court ruled in his favor in 2010 and dismissed the petition, and Michael M. was released from custody without supervision. Although the Appellate Division reversed and reinstated the petition, he remained free in Buffalo without supervision for a year and a half pending his article 10 hearing. During that time, he got a job, rented an apartment, became engaged to be married, and had no contact with the criminal justice system. When the hearing was held in 2011, Supreme Court found he suffered from a mental abnormality (pedophilia) that predisposed him to commit sex offenses, but also found he was capable of living in the community under strict and intensive supervision and treatment (SIST) based on his positive conduct while free. The court issued a civil management order, set the conditions of SIST, and placed him under supervision of the Department of Corrections and Community Supervision. Within a month, he was fired when his employer learned he was a sex offender from newspaper stories about his article 10 proceedings, he was evicted when he was unable to pay his rent, he lost his fiancée and the State filed this petition -- based on alleged violations of his SIST conditions -- to revoke SIST and confine him at a secure treatment facility under Mental Hygiene Law § 10.11(d).

Supreme Court granted the petition and adjudicated Michael M. a dangerous sex offender requiring confinement, but also criticized the State's treatment of him. It said the "primary basis" for the petition was his late arrival for a counseling session on a day when his parole officer and therapists scheduled back-to-back appointments without leaving him time to get from the first appointment to the counselor's office. The second violation was based on his discharge from a jobs program for failing to complete enough employment applications, which the court attributed to an "'attitudinal thing'.... It is clear that the parole officer and therapists were put off by [him]. The animus projected toward [him] throughout this proceeding literally was pooling on the courtroom floor." It said Michael M. is a pedophile who "needs treatment to continue recognizing and controlling his impulses. The Court believes Parole and Mid-Erie [Treatment Services] will never allow this to happen.... I must, accordingly, find in the absence of the positive improvements in [his] life, before SIST, that he is now a dangerous sex offender" who "is a danger to others to commit sex offenders if not confined.... This case, however, must be viewed for what it is -- an indictment of the regimen of [SIST] as contemplated by article 10."

The Appellate Division, Fourth Department affirmed, saying Michael M.'s constitutional and statutory claims were unpreserved and, in any event, there was no evidence the State "failed to fulfill its treatment responsibilities or violated [his] due process rights." It also rejected his claim that the State was required to "refute the possibility of a less restrictive placement."

Michael M. argues his confinement violates due process because "it failed to appropriately balance the severity of [his] conduct (e.g. being late) with the risk at hand.... Any technical violations of SIST conditions, without evidence of clinical significance, should never be sufficient to justify loss of liberty...." He also argues, "The least restrictive alternative doctrine should apply to sex offender civil management."

For appellant Michael M.: Margot S. Bennett, Buffalo (716) 845-3650
For respondent State: Assistant Solicitor General Frank Brady (518) 486-4502

State of New York Court of Appeals

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To be argued Tuesday, November 18, 2014

No. 205 People v Graham Reid

Graham Reid was stopped by police in Harlem in 2009 after officers saw him repeatedly weave across the double yellow center lines and make a turn without signaling. Officer Jacob Merino testified at the suppression hearing that he saw two plastic cups in the center console of Reid's car, his eyes appeared to be watery, his clothing was disheveled, and the car smelled of alcohol. He asked Reid if he had been drinking and Reid replied he had a beer after work about 13 hours earlier. Officer Merino had him step out of the car and asked if he had any weapons. When Reid said no, the officer patted him down, felt a hard object in his jacket pocket, and pulled out a switchblade knife. The officer acknowledged that he had not intended to arrest Reid until he found the switchblade. In a search at the precinct, officers recovered two bags of heroin. A breath test showed Reid had no alcohol in his bloodstream.

Supreme Court denied Reid's motion to suppress the evidence, ruling Officer Merino recovered the knife during a valid search incident to arrest. The court said the officer "had no reason to believe that [Reid] had a weapon. There was no bulge. He did nothing to indicate that he was armed." But it found the roadside frisk was legal because the officer had probable cause to arrest Reid for drunk driving, although no arrest had yet been made. Reid pled guilty to third-degree criminal possession of a weapon and was sentenced to two to four years in prison.

The Appellate Division, First Department affirmed, saying, "Because ... we find that at the time of the pat down the officer actually had probable cause to arrest defendant for driving while intoxicated, the search was permissible and the fruits of the resulting full search were admissible." Merino's observations -- including the smell of alcohol, watery eyes and disheveled clothing -- provided probable cause, it said. "This probable cause to arrest defendant for [DWI] existed regardless of whether, at the moment of searching defendant, Merino intended to make an arrest on those grounds.... [W]e conclude that, even if the police are incorrect in their assessment of the particular crime that gives them grounds to conduct the search, or if they incorrectly assess the level of police activity that is justified by their knowledge, where the facts create probable cause to arrest, a search must be permissible."

Reid argues that probable cause alone cannot justify a warrantless search of a person who has not been arrested, and says the lower court rulings in this case conflict with decisions of the New York Court of Appeals and U.S. Supreme Court. "For more than thirty years, this Court has consistently held that the *ability* to effect a lawful arrest (i.e., probable cause) does not suffice to justify a warrantless search, and has consistently limited application of the search-incident-to-arrest doctrine to the context of actual arrests." He says, "The rule adopted by the Appellate Division ... presents a significant risk of abuse, and would infringe impermissibly on citizens' rights to be secure in their persons and free from unreasonable searches and seizures. It would allow police officers, once probable cause to arrest has arisen, a free option to undertake purely exploratory searches even for the most minor offenses."

For appellant Reid: Antonio J. Perez-Marques, Manhattan (212) 450-4000
For respondent: Manhattan Assistant District Attorney Richard Nahas (212) 335-9000

State of New York Court of Appeals

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To be argued Wednesday, November 19, 2014

No. 225 Matter of Ford v New York State Racing and Wagering Board

The State Racing and Wagering Board adopted regulations in 2009 -- the "out-of-competition testing rules" -- that prohibit the use of certain performance enhancing substances in racehorses and permit the Board to conduct doping tests on all racehorses under the care or control of licensed trainers or owners when the horses are expected to compete at a New York track within 180 days. The rule establishes penalties for violations, allows the Board to test horses away from the track on farms where they are kept, and requires a trainer or owner to bring to a New York track any racehorse that is stabled out-of-state within 100 miles of the track. The Standardbred Owners Association and four licensed owners and trainers of harness racehorses brought this article 78 proceeding to challenge the regulations that apply to harness racing, alleging that the Board exceeded its statutory authority in adopting the testing rules and that the regulations authorize unreasonable searches and are arbitrary and capricious.

Supreme Court granted the petition to the extent of annulling the testing rules that apply to harness racing. It held the Board exceeded its authority under Racing, Pari-Mutuel Wagering and Breeding Law § 902(1), which provides that "equine drug testing at race meetings shall be conducted by a state college within this state with an approved equine science program." Finding the rules "stretch beyond the Board's enabling legislation," the court said, "Obviously, horses stabled 'off-track' on privately-owned farms as much as six months preceding a race are neither 'at race meetings' nor at facilities 'overseen' by the Board." It went on to find that the 180-day testing period and other provisions are arbitrary and capricious and that the rules regulating private horse farms "are overly intrusive and infringe upon the fundamental right to privacy."

The Appellate Division, Third Department largely reversed, saying section 902(1) mandates that on-track testing at race meetings "be conducted by an approved entity," but "does not define or otherwise limit [the Board's] authority to implement regulations to conduct drug testing." It cited section 101, which gives the Board "general jurisdiction over all horse racing activities and all pari-mutuel betting activities, both on-track and off-track, in the state and over the corporations, associations, and persons engaged therein;" and section 301, which directs the Board to "prescribe rules and regulations for effectually preventing the use of improper devices, the administration of drugs or stimulants or other improper acts for the purpose of affecting the speed of harness horses in races in which they are about to participate." It said, "Considering the plain language of [section] 101, as well as [the Board's] 'very broad power to regulate the harness racing industry' ... and 'the State's interest in assuring the integrity of racing carried out under its auspices'..., [the Board] did not exceed its statutory authority when it adopted regulations permitting off-track, out-of-competition drug testing." A rule prohibiting protein and peptide-based drugs was properly annulled because it conflicted with a rule allowing the use such drugs at certain times, the court said, but it found the other rules were neither arbitrary nor violated the rights of horse farm owners, who "have a reduced expectation of privacy due to the fact that horse racing is a highly regulated industry."

For appellants Ford et al: Andrew J. Turro, Garden City (516) 741-6565
For respondent Board: Assistant Solicitor General Kathleen M. Arnold (518) 474-3654

State of New York Court of Appeals

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To be argued Wednesday, November 19, 2014

No. 226 People v Dwight Giles

Dwight Giles was arrested on the Upper West Side of Manhattan in 2001 by two police officers who said they saw him trying to break into a medical office by picking the lock with a pocket knife. The Court of Appeals reversed his convictions for attempted burglary and possession of burglar's tools in 2008. At the retrial, the building superintendent testified for the prosecution that there were fresh scratch marks on the lock the morning after the arrest. Giles' defense attorney did not call as a witness a defense investigator who testified at the first trial that he saw no scratches when he examined the lock two days later. The jury found Giles guilty of second-degree attempted burglary and criminal possession of burglar's tools.

Prior to sentencing, Giles made a pro se motion for appointment of new counsel on the ground that his trial counsel provided ineffective assistance by failing to call the defense investigator as a witness, among other things. Supreme Court appointed new defense counsel, who filed a motion to set aside the verdict under CPL 330.30(1) based, in part, on the ineffective assistance of counsel claim. The prosecution submitted an affirmation by Giles' trial counsel explaining his decision not to call the investigator: "[T]he credibility of this possible defense witness was undermined by his failure to take reliable photographs in support of his claimed observations. The investigator produced photographs at the first trial that were too blurry or out-of-focus to support his claimed observations. Put another way, a paid defense witness at the first trial admitted that his own photographs did not support his testimony." The court denied the motion, saying trial counsel was "quite plainly effective" and "I see no reason to have a hearing on what appears on its face to be a credible explanation from a credible respective member of the bar." On the attempted burglary count, which ordinarily carries a maximum term of seven years, the court adjudicated Giles a persistent felony offender and sentenced him to 20 years to life.

The Appellate Division, First Department modified by reducing the sentence to 15 years to life and otherwise affirmed. "Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters of strategy not reflected in the record...," it said. Giles' CPL 330.30(1) motion "was procedurally defective, and '[t]o the extent the motion could be deemed a de facto or premature motion to vacate judgment pursuant to CPL 440.10, the issues raised in the motion are unreviewable since defendant failed to obtain permission from this Court to appeal'...." Citing People v Battles (16 NY3d 54), it also rejected his claim that his sentencing as a persistent felony offender, based on non-jury findings, is unconstitutional under Apprendi v New Jersey (530 US 466).

Giles argues his ineffective assistance claim may be reviewed on direct appeal. Although a CPL 330.30 motion "is limited to grounds which appear 'in the record,' the ineffectiveness claim as to the failure to call the investigator was fully litigated below. [Trial counsel] provided his reasons for failing to call the investigator and the court addressed the merits of the claim. Proceedings which occur post-verdict, but pre-sentencing, are clearly part of the record on appeal.... Appellant's claim raises a ground appearing on the record which requires reversal as a matter of law, and thus, was reviewable on direct appeal." He also asserts his Apprendi challenge to his enhanced sentence, asking the Court to reconsider Battles.

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For respondent: Manhattan Assistant District Attorney Sheryl Feldman (212) 335-9000

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 19, 2014

No. 227 People v Sean Hawkins *(papers sealed)*

Charged in Brooklyn with sex offenses involving an 11-year-old girl in 2008 and 2009, Sean Hawkins was convicted at a Criminal Court bench trial of 10 counts each of second- and third-degree sexual abuse and one of endangering the welfare of a child. Prior to sentencing, Hawkins moved to set aside the verdict under CPL 330.30(1) on the ground that he was denied his constitutional right to a public trial. In support of his motion, Hawkins submitted the affirmations of two attorneys who said they tried to enter the courtroom during the trial, but stopped when they saw a "Do Not Enter" sign posted on the door. One of them said he was also told by a court officer not to enter the courtroom. Criminal Court granted the motion and ordered a new trial, finding there had been a clear violation of the public trial guarantee.

The Appellate Term, 2nd, 11th and 13th Judicial Districts, reversed on a 2-1 vote. It said the trial court improperly granted the motion under CPL 330.30(1), which permits a defendant to move, before sentencing, to set aside a verdict on "[a]ny ground appearing in the record" that would require a reversal or modification by an appellate court. "Defendant's CPL 330.30(1) motion should have been denied ... because the motion was procedurally defective as it was based on a ground which did not appear in the record.... We note that the Criminal Court did not treat the motion as a 'de facto CPL 440.10 motion'.... Defendant should have waited until after sentencing before making an appropriate CPL 440.10 motion, in which matters may be raised which do not appear in the record.... Even if the motion had been treated as a 'de facto CPL 440.10 motion' it is not properly before this Court, since defendant did not seek leave to appeal from the denial of the motion...."

The dissenter agreed CPL 330.30(1) was not the proper vehicle to set aside the verdict, but said, "[I]n the interest of judicial economy, I would treat defendant's motion as a motion to vacate the conviction pursuant to CPL 440.10.... Although the majority opines that a CPL 440.10 motion cannot be made where, as here, defendant has not been sentenced, I disagree. Judiciary Law § 2-b(3) authorizes a court 'to devise and make new process and forms of proceedings, necessary to carry into effect the powers and jurisdiction possessed by it.' Thus, a court may consider a CPL 330.30 motion as one made under CPL 440.10 'where fairness and judicial economy are not sacrificed'.... For this court to reverse the Criminal Court's order at this stage only to have defendant's conviction ultimately vacated on a subsequent CPL 440.10 motion would defeat the interest of judicial economy.... Such a result, particularly in this case where the verdict was obtained in clear violation of defendant's right to a public trial, is patently unfair."

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For respondent: Brooklyn Assistant District Attorney Sholom J. Twersky (718) 250-2537

State of New York Court of Appeals

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To be argued Wednesday, November 19, 2014

No. 228 172 Van Duzer Realty Corp. v Globe Alumni Student Assistance Association, Inc.

In 2006, the Globe Alumni Student Assistance Association leased a building in Staten Island from 172 Van Duzer Realty Corp. for use as a dormitory for students of the Globe Institute of Technology. The lease term, as extended, ran to September 2016. Globe Institute guaranteed full performance of the Association's lease obligations, including payment of rent. In January 2008, Van Duzer sent the Association a notice to cure lease violations, based on city citations for failing to maintain the property. Rather than cure the violations, the Association vacated the building in February 2008 and stopped paying rent. Van Duzer terminated the lease in March 2008 and obtained a judgment of possession in Civil Court. Van Duzer brought this breach of contract action against the Association and Globe Institute in September 2009, seeking the balance of rent due for the entire lease term as liquidated damages under an acceleration provision in the lease.

The acceleration clause states that, upon termination of the lease or repossession by Van Duzer, "Landlord shall be entitled to recover, as liquidated damages a sum of money equal to the total of ... (iv) the balance of the rent for the remainder of the term, (v) any other sum of money and damages reasonably necessary to compensate Landlord for the detriment caused by Tenant's Default.... In the event of Lease termination Tenant shall continue to be obligated to pay rent and additional rent for the entire Term as though this Lease had not been terminated."

Supreme Court granted Van Duzer's motion for summary judgment on liability, saying the Association's default was uncontested. "As to the Association's liability for the remaining rents due after termination of the Lease, although the termination of the Lease ends the landlord-tenant relationship, the parties clearly contracted to make the defaulting tenant liable for rent after such termination...." Decisions from other departments, holding acceleration clauses are not enforceable where the landlord is not required to mitigate its losses by re-renting the premises, "conflict with controlling First Department caselaw," it said. Van Duzer "is within its rights under New York law to do nothing and collect the full rent due under the lease." After a hearing, the court awarded a judgment of $1,488,604.66 to Van Duzer.

The Appellate Division, First Department affirmed, saying Van Duzer "made a prima facie showing of its entitlement to accelerated rent, pursuant to the express terms of the lease, which also provided that the obligation to pay rent was to continue in the event of termination of the lease.... In opposition, defendants failed to raise a triable issue of fact as to whether the liquidated damages provision was an unenforceable penalty...."

The Association and Globe Institute argue, "[T]he confluence of three factors makes the acceleration clause here unenforceable: (1) plaintiff terminated the lease and took possession of the building; (2) the lease does not provide for the landlord's accounting for mitigation upon re-leasing the premises; and (3) plaintiff nevertheless has obtained a judgment providing payment up front of all rent payments due under a multi-year lease, which is grossly disproportionate to the landlord's probable loss. Having terminated the lease, obtained possession of the property and having no contractual duty to mitigate, the landlord can rent out the property at will to others without having to make any accounting to defendants for the rent obtained. The ability to 'double dip' ... is not just compensation, it is a windfall which renders the acceleration a penalty."

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For respondent Van Duzer: Noah B. Potter, Manhattan (212) 953-6633