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.

WEEK OF OCTOBER 13 - 15, 2015

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 Tuesday, October 13, 2015

No. 151 Matter of Sierra Club v Village of Painted Post

The Village of Painted Post in 2012 agreed to sell one million gallons of water per day to a Shell Oil Company subsidiary, SWEPI, LP, with an option for SWEPI to buy an additional 500,000 gallons per day. At the same time, the Village and its subsidiary, Painted Post Development LLC, leased a former industrial site to the Wellsboro & Corning Railroad for construction of a rail spur and transloading facility, where the water would be loaded into railcars for shipment to SWEPI's hydrofracking gas wells in Pennsylvania. The Village issued a negative declaration under the State Environmental Quality Review Act (SEQRA), asserting that no environmental review of the water sale agreement or railroad lease were necessary. When construction of the water loading facility began in the summer of 2012, the Sierra Club, two other environmental organizations, and five individual residents of Painted Post brought this article 78 against the Village, its development agency, SWEPI and the Railroad to block the project, contending the Village violated SEQRA by failing to prepare an Environmental Impact Statement. The water loading facility was completed and began operations in August 2012.

Supreme Court denied a motion by the Village and SWEPI to dismiss the suit for lack of standing. While the environmental groups and four individuals failed to allege "injury that is in some way different from that of the public at large," as required by Society of Plastics Indus. v County of Suffolk (77 NY2d 761), the court found that John Marvin, the petitioner who lived closest to the transloading facility and alleged that the noise of the increased train traffic "was so loud it woke me up and kept me awake repeatedly," had standing. Marvin "does not distinguish this noise from that of the previous train noises associated with the existing rail line or from the former industrial use of the area...," it said. "Marvin's undifferentiated complaint of train noise, however, may be considered in the context of an industrial and rail facility which fell into disuse for a considerable period of time prior to construction of the subject project, and thus his complaint of rail noise is availing to show harm distinct from that suffered by the general public." While proximity alone will not confer standing in a non-zoning case, it said, "this is not a proximity 'without more' case; Marvin has standing." The court granted summary judgment to the petitioners on the merits, finding the Village violated SEQRA.

The Appellate Division, Fourth Department reversed and dismissed the suit, finding Marvin lacked standing. It said he "raised no complaints concerning noise from the transloading facility itself," and maps showed the railroad runs through the whole village, with many houses "closer to the rail line than Marvin's residence." "Inasmuch as we are dealing with the noise of a train that moves throughout the entire Village, as opposed to the stationary noise of the transloading facility, we conclude that Marvin will not suffer noise impacts 'different in kind or degree from the public at large'.... '[S]tanding cannot be based on the claim that a project would indirectly affect ... noise levels ... throughout a wide area.'"

The petitioners argue that proximity should confer standing in all land use cases, not just zoning cases. If not, they urge the Court to clarify the rule requiring injury different from the public at large, saying that under the Appellate Division's reasoning, "there would be no resident within the Village of Painted Post who would have standing to challenge the inadequate SEQRA review...." This interpretation "has resulted in the absurd situation where the more people that are adversely affected by an environmental action, the less likely that anyone will have standing to require an environment review under SEQRA, or to obtain judicial review because of lack of standing."

For appellants Sierra Club et al: Rachel Treichler, Hammondsport (607) 569-2114
For respondents Painted Post et al: Joseph D. Picciotti, Pittsford (585) 419-8800

State of New York Court of Appeals

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To be argued Tuesday, October 13, 2015

No. 152 People v Willie L. Wragg *(papers sealed)*

A nine-year-old girl was walking by herself to a park in Rochester when, she said, "a man came out of nowhere" and touched her vaginal area with his hand outside of her clothing. She identified Willie Wragg in a photo array 18 days after the incident and identified him again in court as the stranger who accosted her. The reliability of her identification was the central issue at trial. Wragg was convicted of first-degree sexual abuse.

After the verdict was entered, but prior to sentencing, County Court told the prosecutor he believed Wragg should be sentenced as a "second child sexual assault felony offender" (under Penal Law § 70.07) and asked her to file the predicate offender statement required by CPL 400.19. Defense counsel objected that the filing would be too late, since CPL 400.19(2) provides that the predicate statement "may be filed by the prosecutor at any time before trial commences." The court said, "While ... at first blush the statute would seem to say that the People were obligated to make such designation prior to the trial, a closer review of the statute, and the few cases that have ventured to interpret this provision, leads this court to believe otherwise." The prosecutor ultimately filed a statement alleging that Wragg had been convicted in 2000 of first-degree rape involving a child under the age of 11. After a hearing, the court imposed an enhanced sentence of 15 years in prison. Wragg would otherwise have faced a maximum of seven years.

The Appellate Division, Fourth Department affirmed, rejecting Wragg's claim that he was improperly sentenced as a second child sexual assault felony offender because the prosecutor failed to file the CPL 400.19 statement before his trial began. It also found he received effective assistance of counsel.

Wragg argues the trial court could not legally impose the enhanced sentence under Penal Law § 70.07 because CPL 400.19 requires the prosecution, if it chooses to seek such a sentence at all, to file the predicate offender statement "at any time before trial commences." He says, "The wording in this statute about timing is clear and unambiguous." He notes that Penal Law § 70.07 provides, "The provisions of [CPL 400.19] shall govern the procedures that must be followed to determine" whether a defendant qualifies as a predicate child sexual assault offender. Wragg also argues his attorney's performance at trial deprived him of meaningful representation.

The prosecution argues enhanced sentencing is mandatory under Penal Law § 70.07(1), which provides that a defendant "who stands convicted of a felony offense for a sexual assault against a child, having been subjected to a predicate felony conviction for a sexual assault against a child, must be sentenced in accordance with the [statute's] provisions" for predicate offenders. "The timing provision of the procedural statute [CPL 400.19] does not displace the mandatory nature of second child sexual assault offender sentencing as set forth in Penal Law § 70.07(1). Providing that the People 'may' file a statement at any time before trial does not mean that, if no statement is filed before trial, the 'must' of [section] 70.07(1) becomes a 'cannot.'"

For appellant Wragg: Shirley A. Gorman, Brockport (585) 637- 5645
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 Tuesday, October 13, 2015

No. 153 Pegasus Aviation I, Inc. v Varig Logistica S.A.

Pegasus Aviation I, Inc. and two related companies (collectively Pegasus) leased several cargo planes to Varig Logistica S.A. (VarigLog), a Brazilian cargo carrier, in 2005 and 2006. Subsidiaries of MatlinPatterson LLC (MP defendants) and three Brazilian investors purchased VarigLog out of a Brazilian bankruptcy proceeding in 2006. A dispute arose after the purchase and the Brazilian investors used their voting control to freeze the MP defendants out of VarigLog's facilities and business in 2007. VarigLog also stopped making lease payments to Pegasus in 2007 and refused to return the planes. A Brazilian court removed the Brazilian investors for mismanagement and, on April 1, 2008, appointed an MP defendant as sole remaining shareholder to manage VarigLog under judicial supervision.

In February 2008, Pegasus sued VarigLog in Florida for breach of the aircraft leases and conversion of the aircraft. Pegasus discontinued that suit and brought this action in New York in October 2008, asserting the same claims against VarigLog and, on an alter ego theory, against the MP defendants. VarigLog had installed new computer systems that provided regular back-up of its electronically stored information (ESI) after the Florida suit was filed, but it did not institute a litigation hold to preserve ESI relevant to the suit. Computer crashes in February and March of 2009 destroyed all of VarigLog's ESI. When Pegasus learned of the loss of VarigLog's ESI, it moved for sanctions against VarigLog and the MP defendants for spoliation of evidence.

Supreme Court granted the motion and struck VarigLog's answer, making it liable for damages. As for the MP defendants, it ruled Pegasus was entitled to an adverse inference instruction informing the jury it could infer the lost ESI would have supported Pegasus' claim. The MP defendants had enough control over VarigLog that they were obligated to ensure the ESI was preserved, the court said, and "the failure to issue [a] litigation hold constitutes gross negligence," creating a presumption the ESI was relevant. Only the MP defendants appealed.

The Appellate Division, First Department reversed. A three-justice majority said the MP defendants had sufficient control over VarigLog to trigger a duty to preserve its ESI, but there is no per se rule that failure to issue a litigation hold is gross negligence. "Because the record supports, at most, a finding of simple negligence against the MP defendants, [Pegasus] must prove that the lost ESI would have supported [its] claims," proof it said Pegasus failed to offer.

In a partial dissent, one justice agreed with the majority that the conduct of the MP defendants "did not rise to the level of gross negligence," but he argued a "hearing should be held to assess the extent of the prejudice suffered by [Pegasus]" and to determine "the sanction, if any, that would be appropriate." The fifth justice dissented and voted to affirm Supreme Court, arguing that the MP defendants' "failure to take any meaningful steps to preserve evidence constitutes gross negligence" and "an adverse inference would be the correct sanction."

For appellant Pegasus: Richard R. Patch, San Francisco, CA (415) 391-4800
For respondent MP defendants: Thomas C. Rice, Manhattan (212) 455-2000

State of New York Court of Appeals

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To be argued Tuesday, October 13, 2015

No. 154 People v Matthew P. *(papers sealed)*

Matthew P. was arrested in June 2011 by two plainclothes police officers, who said he approached them in the Chambers Street subway station and offered to let them into the subway for two dollars. When they gave him the money, they said, Matthew used a Transit Authority key to open an emergency exit gate and allow them to enter the subway, "thereby depriving the Transit Authority of revenue otherwise owed it ... for access to the subway system." He was charged with petit larceny, among other things. In July 2011, while those charges were pending, he was arrested in the station at 23rd Street and 8th Avenue by a police officer who said Matthew entered the subway through an exit gate "without permission or authority to do so and without paying the required fare." He was charged with theft of services. Matthew pled guilty to both charges and was sentenced as a youthful offender to 15 days in jail, time he had already served.

On appeal, Matthew argued the charges were jurisdictionally defective because the facts alleged in the misdemeanor informations did not establish that he committed either crime. He cited People v Hightower (18 NY3d 249), in which the Court held that allegations the defendant took money to swipe riders through a subway turnstile with an unlimited ride MetroCard were facially insufficient to establish petit larceny because they did not satisfy the definition of "larceny" as the taking of property "from an owner thereof" [Penal Law § 155.05(1)]. While the money collected by the Hightower defendant "could have been due and owing" to the Transit Authority, the Court said, the authority "never acquired a sufficient interest in the money to become an 'owner' within the meaning of" the Penal Law.

The Appellate Term, First Department affirmed. "'[G]iven a fair and not overly restrictive or technical reading,'" it said, the facts alleged in the petit larceny information "established prima facie that defendant deprived the Transit Authority of the two dollar fee that he accepted from the ersatz subway riders through his unauthorized possession and use of a subway entrance key...." It distinguished Hightower on the ground that it involved the use of a "valid MetroCard," rather than unauthorized use of a subway key. Regarding the theft of services charge, it said the allegations "were 'sufficiently evidentiary in character' ... to establish the defendant's knowledge of his unlawful entry into the subway station and his intent to unlawfully obtain subway service...."

Matthew argues he did not commit petit larceny because, "as in Hightower, the [Transit Authority] cannot be considered the owner of the money voluntarily given to appellant at the time he let the officers and himself through the emergency gate.... The money received by appellant represented only an unpaid fare and thus was never within the [Transit Authority's] possession or control." He said Hightower did not "turn on a distinction of whether the unlimited MetroCard there was valid," but on whether the Transit Authority ever became an owner of the money the defendant received. He says the theft of services charge was defective because it failed to allege that "he unjustifiably refused to pay" when he entered through an exit gate.

For appellant Matthew P.: Amy Donner, Manhattan (212) 577-3487
For respondent: Manhattan Assistant District Attorney Ryan Gee (212) 335-9000

State of New York Court of Appeals

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To be argued Tuesday, October 13, 2015

No. 155 People v Alfred Gary

Alfred Gary was one of 14 defendants charged with participating in a conspiracy to steal millions of dollars in mortgage proceeds through a series of sham real estate transactions in Nassau County from 2004 to 2009. The criminal enterprise headed by James Robert Sweet used straw buyers to obtain mortgage loans and purchase residential properties, sometimes impersonating the seller as well, then stole the loan proceeds and left the properties to foreclosure. Gary was accused of falsifying verifications of employment for the loan applications of some straw buyers, saying they worked at his New Jersey car dealership. He was also accused of laundering stolen funds through his dealership and recruiting a friend with an investment firm to do the same. All of the defendants but Gary entered guilty pleas.

Prior to Gary's bench trial, the parties stipulated to the admission of a large number of exhibits into evidence to expedite the proceedings. The evidence included 24 loan files from defrauded banks, in one of which was a verification of employment form with a handwritten note that read, "1/12 spoke w/ Gary and he QC [quality controlled] all info." Gary's defense attorney moved to redact the note early in the trial, saying he was unaware of the note when he agreed to admit the document and objecting that it was hearsay. Supreme Court denied the motion, saying a prosecution witness had already testified about the note without objection. Gary was acquitted of enterprise corruption, scheme to defraud, money laundering and falsifying business records, but was convicted of a single count of fourth degree conspiracy. He was sentenced to serve five years of probation and pay $139,910 in restitution.

The Appellate Division, Second Department affirmed, saying, "The defendant waived his contention that a document offered by the People contained inadmissible hearsay by, prior to trial, stipulating to the admission into evidence of that document, among others." It also ruled there was legally sufficient evidence of guilt and the verdict was not repugnant.

Gary says, "[T]his Court is asked to resolve whether a criminal defendant is forever bound by a stipulation entered into by his counsel before trial -- or whether a defendant ... may still raise a Sixth Amendment Confrontation Clause claim to inadmissible hearsay -- particularly where counsel promptly recognizes his error and vigorously moves to strike the hearsay from evidence." He says the note "was devastating to the defense because it suggested that Alfred Gary authorized the preparation of a false verification in his name" and "supported the prosecution's claim that the bank relied on that false information in issuing a mortgage."

For appellant Gary: Erica T. Dubno, Manhattan (212) 319-5351
For respondent: Nassau County Assistant District Attorney Jason R. Richards (516) 571-3800

State of New York Court of Appeals

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To be argued Wednesday, October 14, 2015 (arguments start at noon)

No. 157 People v Frankie Hatton *(papers sealed)*

Frankie Hatton was charged with six misdemeanor counts of forcible touching based on allegations that he slapped six different women on the buttocks in separate incidents on the streets of Brooklyn during a three week period in 2009. Prior to his arraignment, Hatton's defense attorney appeared on behalf of another defendant in an unrelated case and, before Hatton entered the courtroom, answered "yes" when a court officer asked, "Counsel, do you waive the reading of the rights and charges, but not the rights thereunder for this case and all other cases before the court?" Hatton ultimately pled guilty to one count of forcible touching (Penal Law § 130.52) and was sentenced to a year in jail.

On appeal, he argued the accusatory instrument to which he pled was jurisdictionally defective because its factual allegations did not address every element of the crime. Penal Law § 130.52 states, "A person is guilty of forcible touching when such person intentionally, and for no legitimate purpose, forcibly touches the sexual or other intimate parts of another person for the purpose of degrading or abusing such person; or for the purpose of gratifying the actor's sexual desire." In the factual portion of the instrument, the arresting officer said the victim told him Hatton "smacked [her] about the buttocks," which "caused [her] to become alarmed and annoyed;" an eyewitness said Hatton "smacked the buttocks of [the victim];" and Hatton himself admitted he "smacked the buttocks of [the victim]."

The Appellate Term (2nd, 11th and 13th Judicial Districts) reversed the conviction and dismissed the accusatory instrument, rejecting the prosecution's argument that Hatton impliedly waived his right to be prosecuted by a criminal information when his attorney made a blanket waiver of the reading of the rights and charges for all her cases. "The right to be prosecuted by information is a substantial right" and a waiver must be knowing and intelligent, it said. "A purported waiver through counsel of that right for all of the cases pending before the court ... prior to the defendant's appearance in court does not constitute a knowing and intelligent waiver...." Under the standards that govern informations, it held the accusatory instrument was facially defective. The factual allegations that the victim was "alarmed and annoyed" when Hatton "smacked" her sufficiently addressed the lack of consent and use of force elements of the crime, but there were "no factual allegations ... that the act was committed 'for no legitimate purpose,' and that defendant touched the victim's sexual or intimate parts 'for the purpose of degrading or abusing [the victim]; or for the purpose of gratifying [his] sexual desire'...."

The prosecution argues Hatton "impliedly waived his right to prosecution by information, because ... his attorney ... waived the reading of the rights for all cases before the court, and because the defendant subsequently entered a plea of guilty without asserting his right to prosecution by information or challenging the facial sufficiency of the accusatory instruments," and therefore the less rigorous standards for sufficiency of misdemeanor complaints should apply. Even if there was no waiver, it says the allegations were sufficient because Hatton's intent can be inferred from his conduct. "[A] person could not have any 'legitimate purpose' in forcibly touching another person's buttocks without her consent, particularly when ... that touching causes the person who is touched to become 'alarmed.' Moreover, in general, a person could not have any purpose, other than the purpose of 'degrading or abusing' the person who is touched or 'gratifying the actor's sexual desire,' in forcibly touching another person's buttocks without her consent...."

For appellant: Brooklyn Assistant District Attorney Leonard Joblove (718) 250-2511
For appellant Hatton: Arthur H. Hopkirk, Manhattan (212) 577-3669

State of New York Court of Appeals

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To be argued Wednesday, October 14, 2015 (arguments start at noon)

No. 158 Matter of Gentil v Margulis

Estevan Gentil was arrested for possession of a .38 caliber revolver near Captain Tilly Park in Queens in 2012. In a three-count indictment, he was charged with criminal possession of a weapon in the second degree (counts one and two) and criminal possession of a weapon in the third degree (count three). During its second day of deliberations, the jury sent out a note saying it was unable to reach a verdict on counts two and three. Defense counsel said the note implied the jury had reached a verdict on count one and asked Supreme Court to accept a partial verdict on that count. The court denied the request and directed the jury to continue deliberating. The next day, a juror informed the court that a family emergency had arisen and he did not believe he could concentrate on the case. Defense counsel declined to consent to the substitution of an alternate juror and, at the court's invitation, moved to discharge the distracted juror. He also renewed his request to take a partial verdict on count one. The court refused to accept a partial verdict before discharging the juror. Because defense counsel would not consent to seating an alternate juror, the court declared a mistrial on its own motion and set a date for a retrial.

Gentil later moved to dismiss the indictment, arguing that the court erred in declaring a mistrial without first determining whether the jury had reached a partial verdict and that a retrial would subject him to double jeopardy. Supreme Court agreed it erred in refusing to take a partial verdict on count one, but it dismissed only that count. When the distracted juror was discharged and the defense refused to consent to a substitution, the court said, "there was 'manifest necessity' for a mistrial, at least with respect to counts two and three, so that ... retrial of counts two and three is not barred on the basis of double jeopardy...." Gentil then brought this article 78 proceeding against the trial judge and the Queens district attorney to prohibit them from retrying him on the remaining counts.

The Appellate Division, Second Department granted Gentil's petition, ruling that double jeopardy barred his retrial. "Even if the reasons for declaring a mistrial are deemed actual and substantial, the court must explore all appropriate alternatives prior to declaring a mistrial...," it said. "Here, the trial court failed to explore all appropriate alternatives before declaring, on its own motion, a mistrial.... Accordingly, there was no manifest necessity for the declaration of a mistrial and, thus, retrial on counts two and three of the indictment is precluded."

The district attorney argues, "Defendant impliedly consented to a mistrial [on counts two and three] when he requested a deliberating juror be removed, refused to substitute an alternate, and asked for a partial verdict only as to count one, knowing full well that a retrial would ... be necessary as to counts two and three. Moreover, even assuming defendant's actions did not constitute a waiver..., a mistrial was manifestly necessary ... because the affected juror had been removed at defendant's request and an alternate could not be substituted in the absence of defendant's consent. In addition, it would not have been possible to take a partial verdict as to counts two and three, as the jury had never indicated it had a verdict as to those counts."

For appellant: Queens Assistant District Attorney Nancy Fitzpatrick Talcott (718) 286-6696
For respondent Gentil: Garnett H. Sullivan, South Hempstead (516) 285-1575

State of New York Court of Appeals

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To be argued Wednesday, October 14, 2015 (arguments start at noon)

No. 159 People v Pettis Hardy

Pettis Hardy was accused of stealing a purse belonging to Saajida Roberts in 2011 while he worked as a security guard at the Amnesia nightclub in Manhattan, where a music video was being filmed. Roberts lost track of her handbag during the filming and when she called the club to report it missing the next day, the club manager reviewed footage from its security cameras, which showed Hardy picking up the bag, searching through it, and carrying it around inside the club. None of the security video showed Hardy leaving the club with the purse. Donnelly McCants, who supervised the security guards, testified that he called Hardy and asked him to return the purse, but Hardy denied any knowledge of it. McCants testified that, when he said, "It's on the video," Hardy responded, "I don't have it, but I can get it." When Hardy returned to the club for his paycheck, without the handbag, police officers were waiting to arrest him.

After the close of evidence, Hardy's attorney asked Supreme Court to give the jury "the full circumstantial evidence charge. By that I mean the charge ... that instructs the jury that ... if there are multiple inferences that can be drawn and they are all reasonable..., the inference of guilt is not beyond a reasonable doubt." The court denied his request "because I don't think the case is based entirely on circumstantial evidence." After a full day of deliberations, the jury sent out a note that said, "We are unable to come to a unanimous decision on all 5 counts." Defense counsel moved for a mistrial, saying, "[T]his has been a relatively short trial. There were four witnesses called.... The jury has been deliberating longer than we had witnesses on the stand." The court replied, "The note does not use the strong type of language that we sometimes see. There is no indication they are hopelessly deadlock[ed]." It denied the motion and directed the jury to continue deliberating. The next day, the jury sent a note that said, "We are still unable to reach a unanimous decision for all 5 counts." The court denied Hardy's mistrial motion and delivered an Allen charge, urging the jury to reach a verdict. At the end of the day, the jury returned a guilty verdict on four counts of fourth-degree grand larceny and one of petit larceny. Hardy was sentenced to two to four years in prison.

The Appellate Division, First Department affirmed, saying, "The court properly declined to provide a circumstantial evidence charge, since there was both direct and circumstantial evidence of defendant's guilt, notwithstanding that defendant's intent was a matter to be inferred from the evidence...." It also said the trial court did not err in denying mistrial motions after both jury notes. "Although the trial was relatively short and simple, at each of the two junctures the circumstances indicated that further deliberations might be fruitful...."

Hardy says he was entitled to the full circumstantial evidence charge because there was no direct evidence -- from the security video, witnesses, or his own alleged statement: "I don't have it, but I can get it" -- that he took the purse out of the nightclub. The statement "was in no way an admission to actually stealing the purse," but was "direct evidence only ... that he knew where the purse was located and believed he could obtain it." He also argues the trial court's refusal to grant a mistrial resulted in a "coerced" verdict and deprived him of a fair trial.

For appellant Hardy: Eunice C. Lee, Manhattan (212) 402-4100
For respondent: Manhattan Assistant District Attorney Jared Wolkowitz (212) 335-9000

State of New York Court of Appeals

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To be argued Wednesday, October 14, 2015 (arguments start at noon)

No. 160 People v Antonio Martinez *(papers sealed)*

Antonio Martinez was arrested in 2008 for allegedly raping a six-year-old girl ten years earlier, when she was staying at his family's apartment in the Bronx while her parents were away. The prosecution offered to accept a plea to second-degree rape with a sentence of 10 years of probation, but Martinez declined the offer. After a jury trial, he was convicted of first-degree rape, first-degree sexual abuse and two misdemeanors. Supreme Court initially sentenced him to 20 years in prison, but later granted his motion to set aside the determinate sentence as illegal and resentenced him to 10 to 20 years.

The Appellate Division, First Department affirmed the convictions and sentence in a 3-1 decision. It found the evidence was legally sufficient, there was no basis for disturbing the jury's credibility determinations, and concluded, "We perceive no basis for reducing the sentence."

The dissenter agreed the convictions should stand, but argued that the sentence, "the maximum available," was "unduly harsh." He said Martinez was 53, had no prior criminal record, had risen from poverty in the Dominican Republic to become a successful businessman in New York, and faced deportation after completing his sentence. "Numerous family members, community members and customers submitted letters ... attesting to his good works." The judge also noted the prosecution had offered a plea with a probationary sentence, which remained on the table through jury selection. "Accordingly, I dissent in part and as a matter of discretion in the interest of justice would reduce defendant's sentence to an aggregate term of 6 to 12 years, which appropriately takes into account the abhorrent nature of his conduct."

Martinez argues his sentence is illegal. "The objected-to and unexplained disparity between probation and 20 years' imprisonment raises a legal presumption that Mr. Martinez was unconstitutionally punished for exercising his right to trial," he says, and he "asks that the taint of judicial vindictiveness be removed from the lengthy incarceratory sentence he received after trial by reducing the disparity in his sentence or remanding for an explanation justifying that extraordinary disparity."

For appellant Martinez: David J. Klem, Manhattan (212) 577-2523 ext. 527
For respondent: Bronx Assistant District Attorney Jordan K. Hummel (718) 838-7322

State of New York Court of Appeals

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To be argued Thursday, October 15, 2015 (arguments start at 1 p.m.)

No. 162 People v Alma Caldavado

Alma Caldavado was charged with first-degree assault and endangering the welfare of a child for allegedly shaking and injuring a seven-month-old girl she was babysitting at her home in Queens in 2006. Physicians testifying for the prosecution said the child suffered subdural hematomas (bleeding between the brain and skull), multiple brain contusions, and extensive retinal hemorrhages in both eyes, which they attributed to "shaken baby syndrome." Caldavado's attorney cross-examined the medical experts, using information he obtained from a pediatric neurologist that the child's records indicated pre-existing hematomas that could have caused seizures and caused new bleeding without significant shaking; but he did not present expert testimony to rebut the prosecution experts. He presented character witnesses and Caldavado's own testimony. She was convicted on both counts and sentenced to eight years in prison.

After her conviction was affirmed, Caldavado brought this CPL 440.10 proceeding to vacate her conviction based on newly discovered evidence from two pediatric neurological experts, who opined that the child suffered from "benign enlargement of the subarachnoid spaces" (BESS), a condition that could make the child susceptible to subdural hematoma with minimal trauma. She also argued that her trial attorney was ineffective in not presenting any expert testimony, and she asserted her actual innocence.

Supreme Court denied her motion without a hearing, saying the articles authored by the new experts "were written between 2004 and 2008" and, therefore, the experts' articles and opinions "would have been available to the defense at the time of the trial, and do not constitute newly discovered evidence." It said her trial attorney had a "strategy to attack the prosecution's medical evidence ... and to suggest through character evidence and testimony by defendant that defendant would not and did not shake the baby under circumstances evincing a depraved indifference to human life. This strategy was not successful, but it does not rise to the level of constitutional ineffective assistance of counsel."

The Appellate Division, Second Department affirmed, saying, "Defendant failed to demonstrate the absence of a strategic explanation for trial counsel's decision not to present certain expert testimony and instead to cross-examine the People's witnesses based on the opinion of a medical expert he received prior to trial, and also to focus on the mens rea element of assault in the first degree...." It said her claim "based on newly discovered evidence was properly denied, since the evidence defendant offered was not newly discovered within the meaning of CPL 440.10(1)(g)...."

Caldavado argues that where "newly discovered expert medical evidence ... forms the basis of a motion to vacate judgment ... and where such information could easily have been presented at trial but for counsel's indolence or ineptitude, it seems unfair, and certainly not constitutionally appropriate, to hold an apparently innocent person to a strict standard of due diligence." She also argues that, "where the prosecution ... relied solely on the classic triad symptoms of retinal hemorrhaging, cerebral edema and subdural hematoma" to establish shaken baby syndrome, "it amounted to ineffective assistance of counsel, per se..., for defense counsel not to have offered affirmative evidence ... that, at least since 1998," a growing body of medical opinion had "discredited the theory that the triad symptoms, without more,"could prove an infant was shaken.

For appellant Caldavado: Mark M. Baker, Manhattan (212) 750-7800
For respondent: Queens Assistant District Attorney John M. Castellano (718) 286-5801

State of New York Court of Appeals

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To be argued Thursday, October 15, 2015 (arguments start at 1 p.m.)

No. 163 Davis v South Nassau Communities Hospital

Edwin Davis and his wife are asking this Court to reinstate their suit to recover damages from South Nassau Communities Hospital and other medical providers for injuries he suffered in March 2009, when a vehicle driven by Lorraine Walsh crossed the center line and collided with the school bus Davis was driving. Walsh had driven herself to South Nassau Communities Hospital prior to the accident, complaining of abdominal pain. She was examined by the emergency room staff, who administered a powerful painkiller, Dilaudid, and an anti-anxiety sedative, Ativan, among other things. She was discharged 90 minutes after the drugs were administered. The accident occurred about 20 minutes later when, the Davises allege, the drugs caused Walsh to lose consciousness at the wheel of her vehicle. The Davises initially asserted a claim for medical malpractice against the Hospital, Island Medical Physicians, P.C., and two members of the emergency room staff, alleging they committed malpractice by discharging Walsh in an impaired condition and by failing to warn her that the drugs she was given could impair her ability to drive. They later moved for leave to amend their complaint to add a claim for ordinary negligence.

Supreme Court granted defense motions to dismiss the suit, saying "the absence of a doctor/patient relationship between plaintiffs and defendants precludes a cause of action based on medical malpractice." It also denied the Davises' motion to add a claim for ordinary negligence. "In the absence of a special relationship between plaintiffs and defendants and no direct duty owed by defendants to plaintiffs," it said, "there is no basis" for such a claim.

The Appellate Division, Second Department affirmed. Regarding ordinary negligence, it said, "the proposed amended complaint failed to allege that the defendants possessed sufficient authority and ability to control Walsh's conduct so as to give rise to a duty to protect Davis, a member of the general public.... Thus, the proposed amendment was palpably insufficient and patently devoid of merit...." The malpractice claim was properly dismissed because "only Walsh, and not Davis, had a physician-patient relationship with the defendants."

The Davises argue they should be allowed to assert a claim for ordinary negligence because the defendants had a "special relationship" with Walsh, who "voluntarily submitted to [their] authority" and "would have done anything they told her to do," and the defendants accepted this "actual control" by treating her, thus giving rise to a duty to protect Davis and other members of the public. They say the defendants' negligence occurred in their "misuse of 'control,'" when they discharged Walsh to drive home in an impaired state and without warnings. Even if there is no special relationship, the Davises say, the defendants owed a duty of reasonable care to any person foreseeably put at risk by their conduct in creating Walsh's impairment and then discharging her without proper warnings.

For appellants Davis et al: Joseph G. Dell, Garden City (516) 880-9700
For respondents Island Medical et al: James W. Tuffin, Islandia (516) 359-6420
For respondent Hospital: Robert G. Vizza, Mineola (516) 877-2900

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 15, 2015 (arguments start at 1 p.m.)

No. 164 People v Davon Harris

In 2002, a woman sleeping at her cousin's apartment in Far Rockaway, Queens, woke in the middle of the night to find a man standing over her and masturbating. She screamed and kicked him and he fled. She told the police that cash and jewelry were stolen, but officers made no mention of that in their report. The perpetrator was not identified until 2010, when a sample of semen he left at the scene was matched with the DNA profile of Davon Harris.

In 2011, Harris was charged in a two-count indictment with second-degree burglary, a felony count that was still timely, and petit larceny, a misdemeanor count for which the statute of limitations had expired. During jury selection, Supreme Court denied defense counsel's request to strike, for cause, a prospective juror who "didn't seem to be accepting the possibility" that a witness might lie under oath. At trial, defense counsel argued Harris was not guilty of burglary because there was no evidence he intended to commit a larceny when he entered the apartment, but counsel did not move to dismiss the petit larceny charge as time-barred. Harris was convicted of both counts and sentenced to concurrent terms of ten years for burglary and one year for petit larceny.

The Appellate Division, Second Department affirmed, rejecting Harris's claim that his attorney's failure to raise a statute of limitations defense to petit larceny constituted ineffective assistance of counsel. "The defendant has failed to demonstrate 'the absence of strategic or other legitimate explanations' for counsel's alleged shortcoming...," the court said. It also said the trial court properly denied his challenge to the juror because the "record does not support a finding that the prospective juror possessed 'a state of mind that [was] likely to preclude him from rendering an impartial verdict based upon the evidence adduced at the trial'...."

Harris argues, "Because the record is devoid of any strategic reason for defense counsel's failure to raise the 'clear-cut and winning' argument that the petit larceny count was time-barred, this is one of the 'rare' cases in which a single substantive error constituted ineffective assistance of counsel," and so his petit larceny conviction should be reversed. He says both convictions should be reversed because the trial court violated his rights to due process and an impartial jury "when, without conducting its own inquiry, it denied defense counsel's for-cause challenge of a juror who showed an inability to accept that a witness could purposely lie under oath."

For appellant Harris: Alexis A. Ascher, Manhattan (212) 693-0085
For respondent: Queens Assistant District Attorney Christine DiSalvo (718) 286-5837

State of New York Court of Appeals

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To be argued Thursday, October 15, 2015 (arguments start at 1 p.m.)

No. 165 People v Nugene Ambers *(papers sealed)*

In 2010, Nugene Ambers was charged with sexually abusing two young sisters in Ozone Park, Queens, more than three years earlier. One of the girls said Ambers began to abuse her in December 2002, when she was 8 years old, and continued the abuse until April 2007. Her sister said Ambers first abused her in September 2003, when she was 11 years old, and continued until August 2005. One of the girls first revealed the abuse in November 2009 to a friend from a bible study group, who urged her to tell the police. In May 2010, Ambers was charged with felony counts of course of sexual conduct against a child in the first and second degrees and second-degree rape, all of which were timely, and two misdemeanor counts of endangering the welfare of a child for which the statute of limitations had expired. Defense counsel did not move to dismiss the misdemeanor counts as time-barred or on any other ground. Ambers was convicted of most of the charges, including both misdemeanors, and sentenced to an aggregate term of 17 years in prison.

The Appellate Division, Second Department affirmed, rejecting Ambers' claim that he was deprived of effective assistance of counsel by his attorney's failure to move for dismissal of the misdemeanor counts on statute of limitations grounds and his failure to properly object to the prosecutor's alleged misconduct during her summation. "The defendant has failed to demonstrate 'the absence of strategic or other legitimate explanations' for counsel's alleged shortcoming...," it said. It said his claim that the prosecutor's remarks in summation deprived him of a fair trial was unpreserved "as the defendant either did not object to the remarks at issue, made only a general objection, or failed to request further curative relief or make a timely motion for a mistrial...."

Ambers says both misdemeanor counts "were clearly time-barred" and, because his trial attorney "actively sought acquittal on all charges, he could not have had any strategic reason for failing to advance a defense that would have resulted in the dismissal" of those charges. He says that "error, standing alone," deprived him of effective assistance of counsel, a deprivation compounded by "the cumulative effect of counsel's errors" in failing to object to "a barrage of improper and unfair argument" by the prosecutor in summation.

For appellant Ambers: Mark W. Vorkink, Manhattan (212) 693-0085
For respondent: Queens Assistant District Attorney Anastasia Spanakos (718) 286-5928