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 or gspencer@nycourts.gov.

NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

Week of October 17 thru October 18, 2017

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 or gspencer@nycourts.gov.

To be argued Tuesday, October 17, 2017

No. 55 People v Otis Boone

Otis Boone was charged with robbing two men at knife-point in Brooklyn in February 2011. In the first incident, a stranger approached a man on a sidewalk and gestured toward his wrist as if asking for the time. When the victim took out his cell phone, the robber snatched it and fled. The victim pursued him, but abandoned the chase when the robber turned and pulled out a knife. Ten days later, a teenager was texting on his cell phone when a stranger came up behind him and asked for the time. The boy turned to answer, the robber grabbed the phone, and a brief struggle ensued. The robber then stabbed the victim in the back and fled with the phone.

The victims, who are white, identified Boone, who is black, as the perpetrator in separate lineups and at trial. Boone asked Supreme Court to give the jury a cross-racial identification charge, instructing jurors that they may consider whether there is a difference in race between the defendant and the witness who identified him and, if so, whether that difference affected the accuracy of the witness's identification. New York's pattern jury instructions say, in part, "Ordinary human experience indicates that some people have greater difficulty in accurately identifying members of a different race...." The court denied Boone's request, saying, "There is no evidence before this jury regarding ... a lack of reliability of cross-racial identification. There was no expert testimony to that effect. There was no cross-examination as to that." Boone was convicted of two counts of first-degree robbery and sentenced to an aggregate term of 25 years.

The Appellate Division, Second Department reduced Boone's sentence to 15 years and otherwise affirmed. The trial court "properly declined to charge the jury on the unreliability of cross-racial identification, as the defendant never placed the issue in evidence during the trial..., and the court's charge correctly conveyed the applicable legal principles on witness credibility and identification testimony...," it said.

Boone cites scientific research on the difficulties witnesses have in accurately recognizing people of different races and he argues, "In light of the now-undeniable science, its nationwide legal recognition, and New York's own model charge, New York should adopt the same rule as New Jersey and Massachusetts: trial courts must include a cross-racial identification charge unless the parties agree that no cross-racial identification has occurred. Alternatively, trial courts must include the charge in that situation when requested by defense counsel. At a minimum, the charge must be given if the People's case relies on a cross-racial identification and there is little or no corroboration of it." Boone says he is entitled to the charge under any of these standards because the witnesses' encounters with the robber lasted no more than a minute and the prosecutor "offered no corroborating evidence" linking him to either crime.

The prosecution argues that, "where the trial court not only charged the jury on evaluating credibility and that identification had to be proven beyond a reasonable doubt, but also provided an expanded identification charge -- the court committed no error of law in failing to include in its expanded identification charge an instruction on cross-racial identification." In any case, it says, "there was no evidence presented at defendant's trial that would have enabled the jury to assess -- pursuant to the CJI cross-racial identification charge -- whether the cross-race effect might have impeded either victim's ability to identify the person who had robbed him or ... enhanced the probability that either victim's identification of defendant ... was mistaken: No testimony was elicited regarding either victim's history of contacts with black people."

For appellant Boone: Leila Hull, Manhattan (212) 693-0085
For respondent: Brooklyn Assistant District Attorney Seth M. Lieberman (718) 250-2516

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 or gspencer@nycourts.gov.

To be argued Tuesday, October 17, 2017

No. 118 Matter of Jamie J. *(papers sealed)*

At the request of the Wayne County Department of Social Services (DSS), Family Court issued an ex parte order temporarily removing Michelle E.C.'s one-week-old child, Jamie J., from her care pursuant to Family Court Act § 1022 in November 2014. DSS placed the child in foster care and commenced a neglect proceeding against Michelle under Family Court Act article 10, alleging that Jamie was at imminent risk of harm due to her mother's inability to provide proper care. The court held a permanency hearing under Family Court Act article 10-A in June 2015, and continued the child's foster care placement. In December 2015, the court dismissed the article 10 neglect petition on the ground that DSS did not prove Michelle "failed to exercise a minimum degree of care." However, Jamie was not returned to her mother and the court held another permanency hearing in January 2016, agreeing with DSS that it retained jurisdiction to hold the hearing under article 10-A despite its dismissal of the article 10 petition. After the hearing, Michelle consented to an order continuing Jamie's foster care placement through DSS, but reserved her right to challenge the court's jurisdiction after the neglect petition was dismissed.

The Appellate Division, Fourth Department affirmed the permanency order in a 3-2 decision, saying Family Court retained subject matter jurisdiction to conduct the permanency hearing under article 10-A despite the dismissal of the neglect petition. It held, "based upon the plain language of ... article 10-A, that the court obtains jurisdiction as a result of a placement with [DSS] pursuant to section 1022 (see § 1088), and that the court is required to make a determination whether to return the child to the parent based upon the best interests and safety of the child, including whether the child would be at risk of abuse or neglect if the child were to return to the parent (see § 1089[d][1], [2][i])." It said, "We note that there is no provision in ... article 10-A that provides for the termination of the child's placement with [DSS] when a neglect or abuse petition is dismissed." It said Michelle failed to preserve her constitutional claim that she could not be deprived of the right to raise her child without a finding of neglect. In any event, her rights were protected by article 10-A, it said. "Because the court was required to determine ... whether the child would be at risk of abuse or neglect if returned to the mother..., and the evidence at the hearing clearly supported the court's determination that the child would be at such risk, we would conclude that the requisite 'overriding necessity' was established here..., and thus that the mother's substantive due process rights were not violated."

The dissenters said, "Pursuant to the legislative scheme of article 10, absent a finding of abuse or neglect, the court lacks any jurisdictional basis to block, delay, or impose conditions on the return of the child.... We cannot agree with the majority that the enactment of ... article 10-A abrogated that settled law and extended the subject matter jurisdiction of Family Court beyond the dismissal of the neglect petition." The language of article 10-A, "considered in isolation, appears to confer continuing jurisdiction regardless of the outcome of the underlying article 10 proceeding," they said, but that "'would require us to interpret the statute in a manner that would render it unconstitutional'.... The majority's application of the plain language ... effectively sanctions the use of the temporary order issued in an ex parte proceeding ... as the jurisdictional predicate for [DSS's] ongoing, open-ended intervention in the parent-child relationship after the neglect petition was dismissed on the merits. We agree with the mother that ... the court's exercise of jurisdiction pursuant to article 10-A resulted in the violation of her fundamental right to raise her child."

For appellant Michelle E.C.: Katharine F. Woods, Geneva (315) 781-1465
For respondent Wayne County DSS: Gary Lee Bennett, Lyons (315) 946-7540
Attorney for the child: Sean D. Lair, Sodus (315) 483-6931
For intervenor foster parents: James S. Hinman, Rochester (585) 325-6722

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 or gspencer@nycourts.gov.

To be argued Tuesday, October 17, 2017

No. 119 In re: World Trade Center Lower Manhattan Disaster Site Litigation (Faltynowicz et al v Battery Park City Authority and two others)

This federal case involves personal injury claims asserted by 18 asbestos handlers who developed serious respiratory illnesses after cleaning up toxic dust and debris spread by the collapse of the World Trade Center towers on September 11, 2001. The cleanup included several properties owned by the Battery Park City Authority (BPCA), which was created as a public benefit corporation by the State Legislature in 1968 to redevelop a 92-acre area on the lower west side of Manhattan. In 2009, U.S. District Court dismissed more than 600 such lawsuits against BPCA, and another 124 suits against other public entities, for failure to file a timely notice of claim. In response, the Legislature enacted General Municipal Law § 50-i(4)(a), known as "Jimmy Nolan's Law," which revived for one year all time-barred claims against public corporations by workers injured during the post-9/11 recovery and cleanup effort. In 2014, BPCA moved to dismiss revived claims on the ground that Jimmy Nolan's Law violated its due process rights under the State Constitution. The State intervened to defend the statute, arguing that BPCA lacked capacity as a public benefit corporation to challenge the law under New York's capacity-to-sue rule, which prohibits "municipalities and other local governmental corporate entities" from challenging the constitutionality of State legislation.

District Court agreed with BPCA that it must conduct a "particularized inquiry" to determine whether BPCA was sufficiently independent of the State that it would have capacity to assert its constitutional claim. Finding it did have capacity, the court said BPCA "was created to be independent of the State in performing primarily private functions, funded primarily by private means." On the merits, it ruled Jimmy Nolan's Law violated BPCA's State due process rights because the "serious injustice" or "exceptional circumstances" necessary to justify "the 'extreme exercise of legislative power' that a revival statute entails" were not present.

The U.S. Court of Appeals for the Second Circuit is asking this Court to resolve the key issues in a pair of certified questions:

"(1) Before New York State's capacity-to-sue doctrine may be applied to determine whether a State-created public benefit corporation has the capacity to challenge a State statute, must it first be determined whether the public benefit corporation 'should be treated like the State,' see Clark-Fitzpatrick, Inc. v Long Island R.R. Co. [70 NY2d 382 (1987)], based on a 'particularized inquiry into the nature of the instrumentality and the statute claimed to be applicable to it,' see John Grace & Co. v State Univ. Constr. Fund [44 NY2d 84 (1978)], and if so, what considerations are relevant to that inquiry?; and (2) Does the 'serious injustice' standard articulated in Gallewski v H. Hentz & Co. [301 NY 164 (1950)], or the less stringent 'reasonableness' standard articulated in Robinson v Robins Dry Dock & Repair Co. [238 NY 271 (1924)], govern the merits of a due process challenge under the New York State Constitution to a claim-revival statute?"

For appellants Faltynowicz et al: Gregory J. Cannata, Manhattan (212) 553-9205
For appellants Alvear and Curly: Luke Nikas, Manhattan (212) 446-2300
For intervenor-appellant State: Sr. Asst. Solicitor General Andrew W. Amend (212) 416-8022
For respondent Battery Park City Authority: Daniel S. Connolly, Manhattan (212) 508-6104

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 or gspencer@nycourts.gov.

To be argued Wednesday, October 18, 2017

No. 120 Matter of Mestecky v City of New York

In 2011 and 2012, the New York City Department of Buildings (DOB) issued a series of notices of violation to Frank Mestecky for undertaking construction work without permits at a rental property he owns in New Hyde Park, Queens. According to the affidavits of service, a DOB inspector in each case made one attempt to personally serve the notice on Mestecky by knocking on the door and ringing the bell, then posted the notice on the door and later mailed a copy to him at the New Hyde Park address. In three cases, copies were also mailed to his residence in Bayside, Queens. DOB, as well as the Fire Department and Department of Sanitation, are authorized to use the "affix and mail" method of service for notices of violation under City Charter § 1049-a(d)(2)(b), but only if "a reasonable attempt has been made to deliver such notice to a person in such premises upon whom service may be made as provided for by article three of the civil practice law and rules...."

An administrative law judge rejected Mestecky's claims that service was improper, and the Environmental Control Board sustained seven notices of violation against him. Regarding the four cases in which notices were not mailed to his Bayside home, the Board found that the City had only the New Hyde Park address on file at the time they were mailed. Mestecky brought this article 78 proceeding against the City to challenge the determinations.

The Appellate Division, First Department found that service was proper and dismissed the suit, saying, "We find that the inspector's one attempt at personal service satisfies the 'reasonable attempt' requirement set forth in section 1049-a(d)(2)(b). The reference to CPLR article 3 in the City Charter's affix and mail provision merely prescribes the class of individuals whom [the City] must try to personally serve, and does not import the 'due diligence' requirement of CPLR article 3.... This interpretation of the City Charter is supported by the statutory language as a whole, and by the legislative history showing a legislative intent to make service under section 1049-a(d)(2) of the City Charter less onerous than service under CPLR article 3."

Mestecky argues that "the plain language of the Charter and applicable legal precedent require service of [notices of violation] to comply with the same due process requirements established for service of process under the CPLR." He says the Second Department adopted the "due diligence" standard of CPLR article 3 for service of violation notices in First Horizon Home Loans v NYC Environmental Control Board (118 AD3d 875), and requires multiple attempts at personal service before the affix and mail method is used. He says this Court should require "more than one attempt at service..., the first being an attempt at personal service and, at a minimum, another for the purpose of 'affixing and mailing.'" He also argues that his due process rights were violated when he was not permitted to cross-examine the inspectors about their attempted service, and that the notices should have been mailed to him at his Bayside residence.

For appellant Frank Mestecky: Christopher F. Mestecky, Farmingdale (516) 694-3000
For respondent City: Assistant Corporation Counsel Richard Dearing (212) 356-0838

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 or gspencer@nycourts.gov.

To be argued Wednesday, October 18, 2017

No. 47 Carlson v American International Group, Inc.

After his wife was killed in a 2004 collision with a commercial van owned by MVP Delivery and Logistics, Inc. in Niagara County, Michael Carlson obtained a $7.3 million wrongful death judgment against MVP and its van driver. MVP's insurer paid its policy limit of $1.1 million, the only money Carlson has so far recovered.

DHL Express (USA), Inc. had a freight delivery contract with MVP at the time of the accident and Carlson argued MVP and its driver were insured under the "hired auto" provisions of DHL's insurance policies. He sued DHL and its insurers -- American Alternative Insurance Co. (AAIC), National Union Fire Insurance Company of Pittsburgh, and American International Group (AIG) -- to recover the unpaid portion of the judgment under Insurance Law § 3420(a)(2), which permits a prevailing plaintiff to sue a responsible insurer to satisfy a judgment if the insurer's policy was "issued or delivered in this state." The "hired auto" provisions of DHL's policies defined an insured as anyone "using with your permission a covered auto you own, hire or borrow," or similar language.

Supreme Court denied AAIC's motion to dismiss the suit, rejecting its argument that Carlson could not assert a direct claim under Insurance Law § 3420 because its policy was not issued or delivered in New York. The court said, "The law is clear that the location of the insured and the risk to be insured are the determinative factors rather than where a policy is actually delivered or issued.... Here, it is undisputed that the accident took place in New York State while the named insured was doing business within the state." In a separate decision, it rejected the insurers' claims that the MVP van was not a "hired auto" under DHL's policies. "[T]he record reflects a substantial amount of supervision and control exerted by DHL over the operations of MVP; including but not limited to, the fact that MVP's office was located inside a DHL facility; all of MVP's vehicles were garaged in DHL's facility; and DHL's managers provided daily instructions to employees of MVP," it said.

The Appellate Division, Fourth Department reversed and dismissed the suit, saying Carlson "may not recover against AAIC pursuant to section 3420(a)(2) because the policy was not 'issued or delivered in this state.' The parties and the court have improperly conflated the phrase 'issued or delivered' with 'issued for delivery,' which was used in the former version of Insurance Law § 3420(d), and therefore the definition of 'issued for delivery' is not relevant here.... The policy here was issued in New Jersey and delivered in Seattle, Washington, and then in Florida." In a separate decision, it ruled the insurers could not be sued under the "hired auto" provision because the delivery contract "does not show that DHL had sufficient control over the MVP vehicle in order for it to be deemed a 'hired' automobile. Rather, it showed that DHL hired MVP as an independent contractor to provide delivery services.... Moreover, inasmuch as DHL did not have control over the MVP vehicle, 'it cannot be said in any realistic sense that ... [DHL] could grant [MVP] permission to use it,'" the court said, quoting Dairylea Coop. v Rossal (64 NY2d 1).

For appellant Carlson: Edward J. Markarian, Buffalo (716) 856-3500
For respondent DHL Express: Patrick J. Lawless, Manhattan (212) 490-3000
For respondents AIG and National Union: Kevin D. Szczepanski, Buffalo (716) 856-4000
For respondent AAIC: Paul Kovner, Manhattan (212) 953-2381

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 or gspencer@nycourts.gov.

To be argued Wednesday, October 18, 2017

No. 56 Matter of Friedman v Rice *(papers sealed)*

In 1988, 18-year-old Jesse Friedman pled guilty to multiple charges that he sexually abused children taking after-school computer classes that he taught with his father, Arnold, at their home in Great Neck. His father also pled guilty and died in prison in 1995. Jesse Friedman was sentenced to 6 to 18 years in prison. He was released in 2001 and designated a level 3 sex offender. After the release in 2003 of "Capturing the Friedmans," a documentary film that raised questions about the techniques used to question child witnesses in the case, Friedman petitioned federal court for a writ of habeas corpus. The Second Circuit Court of Appeals denied the writ as untimely in 2010, but two judges criticized the investigative techniques used by the Nassau County District Attorney's Office and said the evidence "suggests a reasonable likelihood that Jesse Friedman was wrongfully convicted." They said "a further inquiry by a responsible prosecutor's office is justified despite a guilty plea entered under circumstances which clearly suggest that it was not voluntary." Later in 2010, the District Attorney assigned a review team of senior prosecutors to reinvestigate the case, assisted by an advisory panel of independent experts. In its 2013 report, the review team concluded that Friedman "was not wrongfully convicted."

In 2012, while the review was underway, Friedman made a Freedom of Information Law (FOIL) request to the District Attorney for all documents provided to the advisory panel. The District Attorney denied his request based, in part, on Public Officers Law § 87(2)(e)(iii), which exempts from FOIL disclosure records that would "identify a confidential source or disclose confidential information relating to a criminal investigation." Friedman filed this suit to challenge the determination. He also sought the entire case file and, pursuant to CPL 190.25(4), release of the grand jury minutes.

Supreme Court ordered the District Attorney to turn over "all documents, records of all kinds including the Grand Jury minutes, redacting only the names of the complaining witnesses" who asked for confidentiality. It clarified that it meant to disclose "every piece of paper that has been generated in the matter of People against Jesse Friedman."

The Appellate Division, Second Department reversed on a 3-1 vote, saying the District Attorney demonstrated that "documents containing information provided ... during the criminal investigation by witnesses who did not testify at trial were exempt from disclosure" under section 87(2)(e)(iii) of FOIL. That Friedman "pleaded guilty and forfeited his right to a trial does not warrant a different conclusion. Under this Court's jurisprudence, the statements of nontestifying witnesses are confidential, and that 'cloak of confidentiality' is removed 'once the statements have been used in open court'.... The entry of [Friedman's] plea of guilty did not remove the 'cloak of confidentiality'...." The court said Friedman "did not establish a compelling and particularized need for disclosure of the grand jury materials" under CPL 190.25 because he did not show how those records "will support his claim of actual innocence."

The dissenter argued that other Appellate Division departments, and federal courts construing FOIL's federal counterpart, "have held that an agency invoking the confidentiality exemption under FOIL must show facts and circumstances indicative of either an express or implied promise of confidentiality to the witnesses.... The unduly broad construction of [section 87(2)(e)(iii)] given by this Department is inconsistent with the Court of Appeals' holdings that reject 'blanket exemptions for particular types of documents'...." She said "circumstances suggest" that no promises of confidentiality were made to complainants in this case "since their trial testimony would have been required to prove the numerous charges" and the prosecutor gave Friedman's attorney their names as potential witnesses at trial. She said Friedman's effort to determine whether "flawed interviewing techniques were used to produce a flood of allegations" demonstrated a compelling need for release of the grand jury minutes."

For appellant Friedman: Ronald L. Kuby, Manhattan (212) 529-0223
For respondent District Attorney: Nassau County Asst. District Atty. Judith R. Sternberg (516) 571-3800