State of New York
Court of Appeals

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NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

Week of March 27 thru March 28, 2018

State of New York
Court of Appeals

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To be argued Tuesday, March 27, 2018

No. 45 Matter of Marine Holdings, LLC v New York City Commission on Human Rights

Irene Politis, who is paraplegic and has been confined to a wheelchair since 1979, filed a complaint with the New York City Commission on Human Rights against Marine Holding LLC, the owner of her Queens apartment complex, and its management company in 2010, alleging they had discriminated against her on the basis of her disability by denying her request to install a wheelchair ramp to her first-floor apartment. Because five steps lead up to the entrance, she had to be carried by her husband or son to enter or leave the apartment. The front entrance was too narrow for a ramp, but Commission staff proposed that a rear window be converted into a door and a ramp installed to give her access. Marine had previously converted an apartment in a similar building in the complex into a management office, a project that included turning a rear window into a doorway and building a ramp.

At an administrative hearing, Marine argued it did not discriminate against Politis because the accommodation would pose an undue hardship, claiming the conversion of the window into a door was structurally infeasible. Marine and the Commission presented conflicting expert testimony on the structural feasibility of the project. The administrative law judge found Marine did not discriminate and recommended that Politis's complaint be dismissed, saying Marine's expert testimony "was sufficient to prove that it was structurally infeasible to build a ramp" and the Commission's expert testimony was "insufficient to effectively rebut [Marine's] expert evidence." The Commission rejected the recommendation, saying Marine failed to prove undue hardship because none of the experts had said the project was impossible and Marine had successfully installed a similar doorway and ramp for its management office in the complex. It also said the ALJ improperly shifted the burden of proof from Marine to the Commission. It found Marine discriminated against Politis, awarded her $75,000 for mental anguish, imposed a $125,000 civil penalty on Marine, and ordered it to install the ramp.

Supreme Court reduced the mental anguish award to $60,000, but otherwise confirmed the determination, finding the Commission's decision was supported by substantial evidence.

The Appellate Division, Second Department reversed and annulled the determination. "[T]he record did not contain any substantial evidence rebutting [Marine's] showing that it would be structurally infeasible to install a handicapped accessible entrance to [Politis's] apartment," the court said.

The Commission argues, "The Appellate Division committed two fundamental errors that amplified one another. It began by adopting a mistaken view of the 'substantial evidence' standard: that standard doesn't permit a court to decide which of two competing interpretations of the evidence is *more* reasonable; it asks only whether the agency's interpretation was *a* reasonable one. The court then compounded that threshold error by creating a new obligation on the Commission [or tenant] to 'rebut' undue hardship claims in reasonable accommodation cases. In fact, the burden of proving undue hardship always remains with the landlords" under the City Human Rights Law.

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For respondents Marine and Wen Management: Avery S. Mehlman, Manhattan (212) 592-1400

State of New York
Court of Appeals

To be argued Tuesday, March 27, 2018

No. 46 People v Donald Odum

Donald Odum was arrested for driving while under the influence of alcohol and related offenses after allegedly striking a parked car in the Bronx in October 2014. More than two hours later, when a police officer asked Odum if he would take a breath test, he initially refused. The officer then informed him that if he refused to submit to the test, his driver's license would be suspended and the refusal "will be introduced as evidence against you in any trial proceeding resulting from the arrest." After the officer's warning, Odum agreed to take the breath test, which resulted in a BAC reading of .09 percent. Odum later moved to suppress evidence of his initial refusal to take the test and of the test result.

Criminal Court granted the motion to suppress. It said the prosecution failed to meet its burden of showing that Odum's consent to the test was voluntary and that the chemical test was administered in compliance with Vehicle and Traffic Law § 1194(2)(a), which provides that a driver is deemed to have consented to a chemical test administered "within two hours after such person has been placed under arrest." The court said the evidence "shows that consent was given only after [the police officer] gave the improper warnings.... In accordance with People v Atkins [85 NY2d 1007] and People v Rosa [112 AD3d 551 (1st Dept 2013)], such warnings given after a refusal by a defendant more than two hours after the arrest have been deemed improper and require proof that consent was voluntary to avoid suppression.... [T]he People failed to show that [Odum's] consent after the improper warnings was voluntary and not the result of coercive conduct by the officer."

The Appellate Term, First Department affirmed. "'Because more than two hours had passed since defendant's arrest, the officer who administered the breathalyzer test should not have advised defendant that if he refused to take the test, his driver's licence would be suspended and the refusal could be used against him in court,'" it said, quoting Rosa. "Inasmuch as defendant agreed to take the test only after the officer gave the 'inappropriate warnings,' the court properly found that defendant's consent was involuntary...."

The prosecution says Rosa is based on "outdated law" and conflicts with the Second Department's ruling in People v Robinson (82 AD3d 1269 [2011]), which held, "The time limit set forth in Vehicle and Traffic Law § 1194(2)(a) was not intended by the Legislature to be an 'absolute rule of relevance, proscribing admission of [test] results [obtained] after [such a time] period' [quoting Atkins].... Where ... the person is capable, but refuses to consent, evidence of that refusal, as governed by Vehicle and Traffic Law § 1194(2)(f), is admissible into evidence regardless of whether the refusal is made more than two hours after arrest...." The prosecution says the warning to Odum that his license would be suspended was also accurate because the Department of Motor Vehicles changed its regulations in 2012 to authorize license suspensions for drivers who refused a test more than two hours after arrest. "[S]ince the administered warning was legally proper, it would not have coerced consent, but, rather, have given legitimate inducement for [Odum] to give consent, which is the purpose of the admonishment."

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To be argued Tuesday, March 27, 2018

No. 47 People v Sergey Aleynikov

Sergey Aleynikov was a computer engineer for Goldman Sachs, working on software for its high-frequency trading business until he left in June 2009 to develop high-frequency trading software for a start-up company, Teza Technologies. Just before he left Goldman, Aleynikov uploaded thousands of proprietary files from Goldman's source code repository, including components of its high-frequency trading platform, to a computer server in Germany. He then downloaded the files to his home computers and used some of the source code in his work at Teza. After Goldman detected his activities, Aleynikov was arrested by the FBI in July 2009 and convicted in federal court of violating the National Stolen Property Act. The U.S. Court of Appeals for the Second Circuit reversed the conviction in 2012, in United States v Aleynikov (676 F3d 71), ruling the source code was "intangible property" that did not constitute stolen "goods, wares, or merchandise" under the statute. Five months later, Aleynikov was indicted on state charges of unlawful use of secret scientific material (Penal Law § 165.07), which states that a person is guilty "when, with intent to appropriate to himself or another the use of secret scientific material, and having no right to do so and no reasonable ground to believe that he has such right, he makes a tangible reproduction or representation of such secret scientific material by means of writing, photographing, drawing, mechanically or electronically reproducing or recording such secret scientific material."

A jury found Aleynikov guilty, but Supreme Court granted his motion for a trial order of dismissal and set aside the verdict, ruling there was insufficient evidence that he made a "tangible" copy of the source code or that he acted with "intent to appropriate ... the use" of Goldman's code. Noting that "computers were at a very primitive stage of development" in 1967, when the statute was enacted, it said, "The electronic reproductions the drafters of the ... statute contemplated surely had little relationship to what is at issue here." It declined to apply "a non-physical definition to the word tangible" and said, "An electronic image can become tangible when it is printed on paper. But computer code does not become tangible merely because it is contained in a computer." It said the evidence did not satisfy the intent element because it showed only that Aleynikov "intended to derive a significant economic benefit from [the code]. But the evidence did not prove he intended to appropriate all or a major portion of the code's economic value or benefit for himself or Teza.... The uncontested evidence indicated Goldman was not deprived of any of its [high-frequency trading] profits because of Aleynikov's actions."

The Appellate Division, First Department reversed and reinstated the conviction. While the source code may have "remained in an intangible state," it said the relevant question is "whether defendant made a tangible reproduction of it, which he unquestionably did when he copied it onto the server's 'physical' hard drive where it took up 'physical space' and was 'physically present'.... The statute merely requires a 'tangible reproduction or representation' of the secret material, and is silent as to the medium upon which the reproduction or representation will reside. Thus, the fact that defendant made the reproduction onto a physical hard drive, rather than onto a piece of paper, is of no consequence." As for the intent element, it said the proof "permits a rational inference that defendant intended to exercise permanent control over the use of Goldman's source code, as opposed to a short-term borrowing," and the prosecution was not required prove that he "intended to deprive Goldman of the use of the source code."

For appellant Aleynikov: Kevin H. Marino, Chatham, NJ (973) 824-9300
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To be argued on Wednesday, March 28, 2018

No. 48 People v Matthew Kuzdzal *(papers sealed)*

Matthew Kuzdzal was accused of sexually assaulting and fatally injuring his girlfriend's five-year-old son, who had been left in his care at their Buffalo home in September 2013. Before the jury began deliberating, one of Kuzdzal's friends, who was attending the trial, reported that she had overheard two of the jurors during a break describe Kuzdzal as a "scumbag." Supreme Court called the spectator to the witness stand, where she testified that she saw the jurors "outside smoking a cigarette talking about Matthew's a scumbag." She also said she had seen them "in the back row [of the jury box] laughing and making faces." Defense counsel asked the court to conduct a Buford inquiry of both jurors to determine whether they were capable of rendering an impartial verdict. The prosecutor opposed an inquiry and asked the court to first determine whether the spectator's account was credible. The court denied defense counsel's request, saying, "I don't believe that an inquiry of the juror is necessary or appropriate here ... [b]ased on what I heard." Kuzdzal was convicted of depraved indifference murder and predatory sexual assault against a child and sentenced to consecutive terms of 25 years to life in prison.

The Appellate Division, Fourth Department reversed and granted a new trial on a 3-2 vote. It said the trial court "erred in failing to make a proper inquiry of two jurors who allegedly were overheard making disparaging comments about defendant during a recess.... Not only does the court's failure to hold an inquiry under such circumstances constitute reversible error, but its failure to place the reasons for its ruling on the record also constitutes reversible error.... The court's ruling that an inquiry was not 'necessary or appropriate' was conclusory and ... did not constitute an implied determination that the observer's testimony was incredible.... Based on the record before us, we are compelled to conclude that the jurors' alleged reference to defendant as a 'scumbag' indicated the possibility of juror bias, and thus that the court should have granted defendant's request to make an inquiry of the jurors."

The dissenters said, "[A] court may not simply intrude on the jury and begin questioning a member or members thereof unless there is some credible information indicating that a juror may have made a comment or taken an action that raises a question regarding that juror's ability to be impartial. Here, we agree with the [trial] court that no such credible information was presented and that no personal inquiry of the jurors at issue was necessary or proper.... [T]he court, by stating that it was basing its ruling on what it had heard, determined that the spectator's testimony was not sufficiently credible to warrant disrupting the normal trial procedure or further inquiring into the actions of the two jurors in question. The record fully supports that determination. The spectator's testimony was riddled with inconsistencies, and it did not comport with the chronology of the proceedings in court as they are reflected in the record."

For appellant: Erie County Assistant District Attorney Matthew B. Powers (716) 858-2424
For respondent Kuzdzal: Lyle T. Hajdu, Lakewood (716) 488-1178

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To be argued on Wednesday, March 28, 2018

No. 49 People v Akeem Wallace

Akeem Wallace carried a .22 caliber handgun in his pocket in June 2013 when he arrived for work at a McDonald's restaurant in Buffalo, where he was employed as a manager. As he stood up from a table in the dining area, the gun went off and wounded him in the leg. Wallace handed the gun, which was unlicensed, to a cousin, who left through the back door. Wallace was charged with a felony count of criminal possession of a weapon in the second degree. Prior to his trial, he moved to reduce the charge pursuant to Penal Law § 265.01(1), which provides that possession of an illegal firearm in one's "home or place of business" is only a misdemeanor. Supreme Court denied the motion. Wallace was convicted of the felony charge after a bench trial and was sentenced to three and a half years in prison.

The Appellate Division, Fourth Department affirmed in a 4-1 decision. "Although the 'place of business' exception is not statutorily defined, it has been 'construed narrowly by the courts in an effort to balance "the State's strong policy to severely restrict possession of any firearm" ... with its policy to treat with leniency persons attempting to protect certain areas in which they have a possessory interest and to which members of the public have limited access'...," the majority said. "Inasmuch as the evidence at trial established that defendant was prohibited from bringing a gun to work, we conclude that to permit defendant to be subjected only to a misdemeanor 'would certainly controvert the meaning and intent of the statute'...."

The dissenter said the conviction should be reduced to fourth-degree weapon possession, a class A misdemeanor, because Wallace "possessed the weapon at his 'place of business' inasmuch as he undisputedly worked at the restaurant." In the cases the majority relied on, he said, the courts "determined, in essence, that the legislature could not possibly have meant that 'place of business' literally means 'place of business,' and they therefore adopted a limited definition of that phrase, which is not defined in the statute. In my view, the statute is clear and unambiguous on its face, and there is thus no need to discern the legislature's intent.... Finally, although McDonald's employees may have been prohibited by their employer from bringing firearms to work, that would merely be grounds for terminating defendant's employment or otherwise disciplining him; it would not make his conduct illegal. The legality of an employee's conduct cannot and should not be determined by reference to an employee handbook."

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State of New York
Court of Appeals

To be argued on Wednesday, March 28, 2018

No. 50 People v Twanek Cummings

In March 2012, a gunman stepped out of a minivan and shot three men who were standing together at the corner of 129th Street and St. Nicholas Terrace in Manhattan. The victims survived, but none of them could identify the shooter, who fled in the van. Soon after the shooting, one of the victims called 911 to ask for help. In a recording of that call, an unidentified man can be heard in the background exclaiming, "Yo, it was Twanek, man! It was Twanek, man!" Twanek Cummings was arrested 10 weeks later and indicted for attempted murder, assault, and related charges.

At Cummings' first trial, Supreme Court denied the prosecution's motion to admit into evidence the 911 tape, including the statement of the unidentified man, under the excited utterance exception to the hearsay rule. The trial ended with a deadlocked jury. His retrial began before a different judge, who also denied the prosecution's motion to admit the statement of the unidentified man, saying it did not qualify as an excited utterance because there was no way to know whether he witnessed the incident himself "or whether someone else reported the facts to him and he was just parroting what he was told." The judge fell ill during jury selection and was replaced by a third judge, who admitted the statement under the excited utterance exception. Cummings was acquitted of attempted murder, but convicted of first-degree assault and lesser charges. He was sentenced to 18 years in prison.

The Appellate Division, First Department affirmed. "The court providently admitted, as an excited utterance, the statement of an unidentified bystander, audible on the 911 call made by one of the victims, that implicated defendant. All of the circumstances -- most significantly that the statement was made immediately after the shooting -- established a strong likelihood that the declarant observed the shooting...," it said. "Although a contrary ruling on the excited utterance issue had been made by a previous judge, who presided over part of jury selection but was unable to continue because of illness, this circumstance did not foreclose the successor judge's ruling by operation of the law of the case doctrine. The ruling was evidentiary and did not fall within the ambit of that doctrine...."

Cummings argues the statement is not admissible as an excited utterance because there is no evidence that the declarant spoke from personal knowledge. Admissibility "requires evidence from which the trial court reasonably may infer that the declarant 'had an opportunity to observe personally the event described in the declaration,'" he says, and "[n]o evidence showed that the person who uttered 'it was Twanek, man,' however excited he may have been, in fact saw the shooting.... The words themselves -- employing the past tense -- ascribed no conduct to 'Twanek,' ongoing or otherwise, which might have bespoken the declarant's personal observation...." Because one to three minutes elapsed between the shooting and the 911 call, he says, "the declarant may have simply uttered a rumor he had heard in the neighborhood, or, harboring a personal grudge against Twanek, seized the moment to falsely accuse him." Cummings also argues the judge who admitted the statement violated the law of the case doctrine. While prior evidentiary rulings may not bind a court conducting a retrial, the substituted judge lacked authority to overrule the judge he replaced in the same proceeding, he says. "He overruled her in the course of the same trial, after he was substituted for her; her ruling had been on the merits; and the parties had enjoyed a full and fair opportunity to litigate the issue...."

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