State of New York
Court of Appeals

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NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

SEPTEMBER 2018

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To be argued Wednesday, September 5, 2018

No. 93 Matter of LeadingAge New York, Inc. v Shah
Matter of Coalition of New York State Public Health Plans v New York State Department of Health

In January 2012, the Governor proposed legislation that would limit executive salaries and administrative expenses for private entities that receive funding from the state to provide services to needy New Yorkers. A day later he issued Executive Order No. 38, which directed the Department of Health (DOH) and other agencies to adopt regulations to curb "abuses in executive compensation and administrative costs and ensure that taxpayer dollars are used first and foremost to help New Yorkers in need." The order said the regulations must ultimately require that 85 percent of state payments be used "to provide direct care or services rather than to support administrative costs," and to "the extent practicable," prevent the use of state funding for executive salaries exceeding $199,000 per year. DOH responded by adopting 10 NYCRR part 1002, which imposed what is called a "hard cap" limiting administrative costs to 15 percent and annual executive salaries to $199,000 for certain health care providers that receive state funding, primarily Medicaid money. The regulations also included a "soft cap" that placed the same limits on certain health care providers that receive funding from all sources, including nontaxpayer funds, except under certain conditions. The regulations require providers to file annual disclosures of their allocation of state funds, and permits them to seek waivers of the restrictions.

In these cases -- one brought by a group of nursing homes, home-care agencies and their trade associations, including LeadingAge New York, and the other by the Coalition of New York State Public Health Plans and other representatives of managed health care plans -- the plaintiffs contend the regulations violate the separation of powers doctrine and are arbitrary.

Supreme Court declared the "hard cap" regulations were valid under Boreali v Axelrod (71 NY2d 1), but ruled DOH exceeded its authority in adopting the "soft cap" to regulate the use of private funds by providers.

The Appellate Division, Third Department affirmed on a 4-1 vote. Finding the hard cap portion of the regulations valid under Boreali, it said "in view of DOH's broad authority to regulate the use of public health funds and the underlying purpose of its enabling statutes to ensure that such funds will be used primarily on direct care and services to those in need, it cannot be said that DOH 'had "not been given any legislative guidelines at all for determining how the competing concerns of public health and economic cost are to be weighed"'...." The Second Department reached a similar conclusion in Agencies for Children's Therapy Servs., Inc. v New York State Dept. of Health (136 AD3d 122) in 2015, which also upheld the soft cap regulation. The Third Department disagreed with that court on the soft cap, saying DOH exceeded its authority: "by attempting to regulate executive compensation from all sources, DOH was acting on its own ideas of sound public policy."

In a partial dissent, one justice argued the hard cap violates the separation of powers. "DOH's authority to control its own expenditures cannot be reasonably interpreted as authority to control how providers spend earned revenues for past services...," he said. "Without legislative guidance, DOH reached its own conclusion that the measure was justified by what it describes as spiraling health care costs and past misuse of monies paid to certain providers."

For appellants-respondents Health Plans et al: Henry M. Greenberg, Albany (518) 689-1400
For appellants-respondents LeadingAge et al: David T. Luntz, Albany (518) 436-0751
For State respondents-appellants: Asst. Solicitor General Matthew W. Grieco (212) 416-8014

State of New York
Court of Appeals

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To be argued Wednesday, September 5, 2018
No. 94 Matter of Hon. Leticia D. Astacio

Rochester City Court Judge Leticia Astacio is challenging a determination of the State Commission on Judicial Conduct that she should be removed from office for conduct generally stemming from her arrest for drunk driving in February 2016. The Commission found that she repeatedly referred to her judicial position as she was being arrested and processed in an effort "to avoid the consequences of her arrest." Judge Astacio was convicted of misdemeanor DWI and sentenced to a conditional discharge, which required that she abstain from alcohol, install an ignition interlock device on her car, and submit to testing for alcohol or drugs. The Commission said she violated the terms of the sentence twice, first when she admittedly tried to start her car while "drunk" and was thwarted by the interlock device. The second violation occurred when she failed to comply with a court order to appear in court or immediately provide a urine sample for testing. She said she had been unable to comply because she was in the midst of a lengthy visit to Thailand, which she had undertaken without informing her administrative judge or the probation office. She was re-sentenced to 60 days in jail. The Commission also found that Judge Astacio engaged in misconduct on the bench by, among other things, failing to disqualify herself from arraigning a defendant she had previously represented as an attorney and asking her clerk not to transfer the case to a judge she viewed as harsh, and by suggesting to a deputy that an unruly defendant "needs a whoopin'."

The Commission said it has only once before sought to remove a judge for drunk driving offenses, but in this case it said, "The totality of [Judge Astacio's] misbehavior as shown in the record before us -- her operation of a vehicle while under the influence of alcohol, resulting in her conviction for Driving While Intoxicated; her assertion of her judicial position in attempting to avoid the consequences of her arrest; her repeated, willful violations of the terms of her conditional discharge; and her improper conduct on the bench -- demonstrates her unfitness for judicial office and requires the sanction of removal."

Judge Astacio says she "has acknowledged that her conduct was inappropriate and that she should be disciplined," but she argues that she should be censured, not removed. She says the Commission proceeding was unfair because, at her hearing, the chairman brought up news reports of critical comments she had made about the Commission, which "introduced highly prejudicial information to the other Commission members that was not in evidence" and "created a toxic environment in which [she] could not effectively argue for mitigation and demonstrate remorse...." She says she "has not demonstrated a pattern of corruption and deceit, nor bias against racial or ethnic groups. She was a new Judge who exercised poor judgment in the Courtroom and in her personal life. She has demonstrated very poor judgment at a time when she has been barred from the Courthouse, ignored by the system, but followed and bullied and pestered by the press. While her choices have been poor, we respectfully argue they are not at a level where the harsh remedy of removal should be imposed."

For petitioner Astacio: Robert F. Julian, Utica (315) 797-5610
For respondent Commission: Edward Lindner, Albany (518) 453-4613

State of New York Court of Appeals

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To be argued Wednesday, September 5, 2018

No. 95 Matter of Lacee L., an infant (Stephanie L., appellant) *(papers sealed)*

The primary issue here is whether the federal Americans with Disabilities Act (ADA), which requires agencies to provide accommodations for persons with disabilities, applies to child neglect proceedings under Family Court Act article 10, which requires agencies to make "reasonable efforts ... to make it possible for the child to safely return home."

Stephanie L., a young mother with mental disabilities, gave birth to a daughter, Lacee, in June 2014. Days later, the New York City Administration for Children's Services (ACS) removed Lacee from her care and filed an article 10 neglect petition based on her failure to participate in mental health and drug treatment programs as ordered by Family Court in a prior proceeding involving an older child. Before the permanency hearing was held for Lacee, Stephanie moved for an order finding that ACS had not made "'reasonable efforts' toward the permanency goal of 'return to parents' ... based on [ACS's] failure to accommodate [Stephanie] as required by the Americans with Disabilities Act (ADA)."

After the hearing, Bronx Family Court denied the motion, saying the ADA did not apply, and found ACS made reasonable efforts to reunite Lacee with her mother. It said, "In Matter of La'Asia Lanae S., 23 AD3d 271 (1st Dept 2005), the First Department explicitly held that the ADA 'has no bearing' on an Article 10 proceeding in Family Court.... While the Appellate Division did not provide any detail or rationale behind this holding, the holding is clear.... However, the law makes clear -- and all parties in this case agreed -- that the agencies' efforts towards a permanency plan must be tailored to the particular circumstances and individuals in a given case.... Accordingly, I am required to consider the [parents'] special needs when determining if the efforts were reasonable in this case." It said, "Here, the agency surely should have done further and more regular follow-up with both the service providers and the parents. The very nature of the parents' apparent disabilities likely contributed to [parents'] failure to follow through with recommended services and requirements.... Nevertheless..., I find that the agency's efforts were not below the minimum required under the 'reasonableness' standard."

The Appellate Division, First Department affirmed, saying, "The Family Court here acknowledged that it was required to consider the mother's special needs when determining if the agency's efforts were reasonable in this case.... In precluding litigation of ADA claims during the permanency hearing, but considerate of its purpose to guide the reasonable efforts analysis, the Family Court properly complied with the requirements as set forth by the court in the La'Asia case."

Stephanie L. argues that "ACS violated the ADA by failing to reasonably accommodate [her] disabilities." She says the First Department's decision "is clearly inconsistent with state law." Article 10 requires Family Court to "determine if ACS has taken reasonable efforts towards reunification," which it cannot do "in cases involving parents with disabilities without determining whether ACS complied with the ADA. The Family Court is fully empowered under state law to make that determination, and exercise of that power is necessary to effectuate the Legislature's preference for family reunification in article 10 proceedings." In any case, she says, the federal Supremacy Clause "would still require the Family Court to address Stephanie's ADA arguments."

For appellant Stephanie L.: Alan E. Schoenfeld, Manhattan (212) 230-8800
For respondent ACS: Assistant Corporation Counsel Scott Shorr (212) 356-0838
For the child Lacee L.: Andrew J. Baer, Manhattan (212) 233-0318

State of New York Court of Appeals

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To be argued Thursday, September 6, 2018 (arguments begin at noon)

No. 96 Deutsche Bank National Trust Company v Flagstar Capital Markets Corporation

Quicken Loans, Inc. originated mortgage loans that it sold in 2006 to the sponsor of an investment pool for eventual sale to investors in residential mortgage-backed securities (RMBS). In a mortgage loan purchase and warranties agreement, Quicken Loans made representations and warranties to the sponsor regarding the quality and risk profile of the loans, which were made effective as of the closing date for the sale of each package of loans. Those sales were completed between December 2006 and May 2007. In the event of a breach of the warranties, the agreement required Quicken to cure the breach or, if it could not, to repurchase the defective loan or substitute a conforming loan in its place. The agreement also contained a provision that would delay the accrual of a breach of contract claim, and thus the running of the statute of limitations, until three conditions were met. The provision stated that any cause of action against Quicken arising from a breach of warranties "shall accrue as to any Mortgage Loan upon (i) discovery of such breach..., (ii) failure by [Quicken] to cure such breach [or repurchase or substitute a qualified loan] ... and (iii) demand upon [Quicken] by the Purchaser for compliance with this agreement." The loan pool was ultimately conveyed to a trust, along with the sponsor's rights under the purchase agreement. They were securitized and the RMBS were sold to investors.

One of the investors, the Federal Home Loan Mortgage Corporation (Freddie Mac), hired an underwriting firm in 2013 to conduct a forensic review of some of the underlying loans. The review found many loans breached Quicken's representations and warranties, and Freddie Mac informed the loan trust's trustee, Deutsche Bank National Trust Company. After Quicken was notified of the breaches and a demand was made for compliance with the repurchase protocol, Deutsche Bank commenced this breach of contract action against Quicken on August 30, 2013.

Supreme Court granted Quicken's motion to dismiss the suit as untimely because it was commenced more than six years after the representations and warranties were made -- on or before May 31, 2007. It said the accrual provision could not extend the statute of limitations.

The Appellate Division, First Department affirmed, saying, "We find that dismissal of the action is mandated by the Court of Appeals' decision in <u>ACE Sec. Corp., Home Equity Loan Trust, Series 2006-SL2 v DB Structured Prods., Inc.</u> (25 NY3d 581 [2015]), which sets forth a clear rule that a breach of contract claim in an RMBS put-back action accrues on the date the allegedly false representations and warranties were made. Notwithstanding the parties' sophistication and their assent to a contract provision specifying a set of conditions that would have delayed the cause of action's accrual, we find that the accrual provision is unenforceable as against public policy, because it is tantamount to extending the statute of limitations based on an imprecise 'discovery' rule, which the Court of Appeals has consistently rejected in the commercial sphere...."

Deutsche Bank argues the accrual clause should be enforced. "It is a basic principle of New York law that agreements are to be enforced as written to effectuate the contracting parties' intent. Where the language of an agreement is clear and unambiguous, the contract is interpreted and applied in accordance with its plain terms.... The Appellate Division was wrong ... in thinking that the Accrual Clause jeopardizes any public policies. A contractually agreed-upon accrual date <u>enhances</u> 'certainty and predictability;' there is no surer way for the parties to know when a cause of action accrues than to agree upon it in their contract. And the policy of finality is not undermined when a claim is allowed to exist for no more than the statutory limitation period ... from a contractually-chosen moment." Under the accrual clause, the trustee says, "a cause of action accrues not on discovery, but after 'demand upon [Quicken] by the Purchaser for compliance with [the agreement]' -- a date that is easily, and precisely, ascertainable."

For appellant Deutsche Bank: Zachary D. Rosenbaum, Manhattan (212) 262-6700
For respondent Quicken Loans: Howard F. Sidman, Manhattan (212) 326-3939

State of New York
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To be argued Thursday, September 6, 2018 (arguments begin at noon)

No. 99 Matter of Hon. Terrence C. O'Connor

Queens Civil Court Judge Terrence C. O'Connor is challenging a determination of the State Commission on Judicial Conduct that he should be removed from office for misconduct on the bench and for refusing to cooperate with the Commission's investigation. It said he "was belligerent, rude and condescending to attorneys" in his courtroom. "Quick to chastise lawyers for perceived discourtesy, sarcasm and unprofessional behavior, [O'Connor] himself engaged in such conduct, subjecting lawyers to harsh personal criticism and insults in front of their clients, peers and others in the courtroom." At bench trials in two landlord-tenant cases, the Commission said Judge O'Connor accused two attorneys of trying to lead their witnesses by saying "okay" after the witnesses answered questions, struck the testimony of those witnesses, and then dismissed the cases for lack of evidence." It said this was "an abuse of judicial power that penalized the litigants, subjecting them to undue litigations costs and unnecessary delays." It said he deprived plaintiffs of due process and failed to comply with "court-mandated procedures" in nine no-fault insurance cases when, after granting defense motions for dismissal or summary judgment, he awarded counsel fees sua sponte without permitting attorneys to address whether fees should be awarded or in what amount. As for cooperation, the Commission said that on March 7, 2017, when the judge was scheduled to testify before the referee, he appeared without counsel and refused to be sworn in the absence of counsel. The proceeding was adjourned to March 29, 2017, and he was warned that his failure to appear "may be found to be a failure to cooperate" with the investigation. He did not appear and instead sent a letter that said, "Based on the blatant lies in your most recent letter, it is clear that nothing you are involved with would be remotely fair and thus I decline your invitation to appear on the 29th." Judge O'Connor, whose term expires on December 31 and who reaches the mandatory retirement age on December 29, is not seeking reelection.

The Commission said in its determination, "The extensive record before us, based on an evidentiary hearing before a referee in which [O'Connor] willfully refused to participate, establishes that [he] violated well-established ethical standards by mistreating attorneys, abusing his judicial power and failing to follow the law in numerous cases and that his misconduct was significantly compounded by his failure to cooperate with the Commission's investigation.... [A] judge's willful refusal to cooperate in the disciplinary process is a breach of the public trust."

Judge O'Connor asks the Court to vacate the determination "on the ground that the [referee's] hearing was a nullity and remand to the Commission for further proceedings" because the emailed notice of the hearing that he received did not satisfy the Judiciary Law's requirement that a judge be given written notice "either personally ... or by certified mail." He says his alleged misconduct on the bench "constituted at most errors of law rather than judicial misconduct" and, even if it were misconduct, it "did not warrant the drastic sanction of removal." He concludes, "In light of the adversarial nature of Commission investigations, this Court's admonition against using the investigative process to generate more serious sanctions, and the fact that noncooperation is its own punishment, Judge O'Connor's alleged failure to cooperate is an insufficient aggravating factor to justify removal."

For petitioner O'Connor: Jonathan I. Edelstein, Manhattan (212) 871-0571
For respondent Commission: Edward Lindner, Albany (518) 453-4613

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To be argued Wednesday, September 12, 2018

No. 100 Expressions Hair Design v Schneiderman

Expressions Hair Design and four other retailers brought this federal lawsuit against the New York Attorney General and three district attorneys to challenge the constitutionality of General Business Law § 518, which provides, "No seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means." Violators may be charged with a misdemeanor. The plaintiffs argued the statute violated their First Amendment rights because it prohibits them from advertising or marking their products with a single sticker price for cash transactions and noting next to the cash price that credit card users would be charged an additional amount. They said this improperly regulated how they can communicate their prices to customers.

U.S. District Court ruled in favor of the merchants, holding that the statute burdens commercial speech, but the U.S. Court of Appeals for the Second Circuit reversed. It said section 518 prohibits the "single-sticker-price scheme," and held that as applied to that scheme the statute is a price regulation that prohibits retailers from charging credit card users more than the sticker price. As a price regulation, it said the statute regulates conduct, not speech.

The U.S. Supreme Court vacated the judgment, saying section 518 "is not like a typical price regulation.... The law tells merchants nothing about the amount they are allowed to collect from a cash or credit card payer.... What the law does regulate is how sellers may communicate their prices.... Accordingly, while we agree with the [Second Circuit] that § 518 regulates a relationship between a sticker price and the price charged to credit card users, we cannot accept its conclusion that § 518 is nothing more than a mine-run price regulation. In regulating the communication of prices rather than prices themselves, § 518 regulates speech." It remanded the case for the Second Circuit to consider whether the statute could be upheld as "a valid commercial speech regulation" under Central Hudson Gas & Elec. Corp. v Public Serv. Comm'n of N.Y. (447 US 557) or as "a valid disclosure requirement" under Zauderer v Office of Disciplinary Counsel of Supreme Court of Ohio (471 US 626).

Before addressing the First Amendment issues, the Second Circuit is asking this Court to clarify "how section 518's restrictions operate in practice," which will determine whether the intermediate scrutiny required by Central Hudson or the "less-exacting standard" of Zauderer applies. The statute "has never been understood to bar differential pricing schemes in their entirety," it said, and the State has not argued that it "bars sellers from offering discounts on their advertised prices to consumers willing to pay in cash." Section 518 "could potentially be understood, from a First Amendment perspective, to do nothing but compel the truthful disclosure of an item's credit-card price" and might "permit merchants to post the cash price alongside the credit card price." If so, it said, the statute might be a disclosure rule subject to Zauderer. In a certified question, the Second Circuit asks, "Does a merchant comply with New York's General Business Law § 518 so long as the merchant posts the total-dollars-and-cents price charged to credit card users?"

For appellant Attorney General et al: Sr. Asst. Solicitor General Judith N. Vale (212) 416-6274
For respondent Expressions et al: Deepak Gupta, Washington DC (202) 888-1741

State of New York Court of Appeals

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To be argued Wednesday, September 12, 2018

No. 101 International Union of Painters & Allied Trades v New York State Department of Labor

The plaintiffs -- District Council No. 4 (DC4) of the International Union of Painters & Allied Trades, its Glazier Apprenticeship Program, and several contractors, among others -- brought this action for a declaration that Labor Law § 220(3-e) permits contractors to pay apprentices employed on public works projects at the apprentice wage rate even if the kind of work they are performing is not in the same trade or occupation as their apprenticeship. The statute provides, "Apprentices will be permitted to work as such only when they are registered, individually, under a bona fide program registered with the New York State Department of Labor." The Department of Labor (DOL) has interpreted the statute as allowing contractors to pay apprentice-level wages only to apprentices who perform work that DOL has classified as being within their own trade. In this case, DOL said workers registered in the DC4 Glazier Apprenticeship Program were performing work it had classified as within the ironworkers' trade and, therefore, contractors were required to pay them at the much higher journeyman rate.

Supreme Court ruled in favor of DOL and dismissed the suit, saying "it was appropriate for the [DOL] to classify the work done to determine the appropriate wage to be paid." DOL's "determination that the work in question is that of the ironworkers and not the glaziers is not unreasonable or arbitrary or capricious."

The Appellate Division, Fourth Department reversed on a 4-1 vote, saying "we agree with plaintiffs that Labor Law § 220(3-e) permits an apprentice to work as such if he or she is registered in any bona fide apprentice program. Defendants would have us limit the application of Labor Law § 220(3-e) to apprentices who are performing work within the trade that is the subject of the apprenticeship program in which the apprentice is registered. The statute, however, contains no such limitation, and nothing in the remaining sentences of section 220(3-e) provides any basis to interpret that section any differently.... We thus conclude that Labor Law § 220(3-e), by its terms, permits glazier apprentices who are registered, individually, under a bona fide glazier apprenticeship program to work and be paid as apprentices even if the work they are performing is not work in the same trade or occupation as their apprenticeship program."

The dissenter said, "The DOL reasonably concluded that ... an employee may be paid at the lower rate for apprentices only for work within the trade classification of his or her apprenticeship program. Any employee who is working outside the trade classification of his or her apprenticeship program is not working 'as such,' i.e., as an apprentice, under the statute.... The DOL's interpretation ensures that workers receive appropriate wages based upon the work they perform, and that they receive appropriate training in their trade classification when they are in fact working as apprentices.... The language of the statute is ambiguous and lends itself to either of the competing interpretations offered by the parties. Because the agency responsible for implementing section 220(3-e) gave the statute a rational interpretation that is not inconsistent with its plain language, that interpretation must be upheld...."

For appellants DOL et al: Assistant Solicitor General Owen Demuth (5118) 776-2053
For respondents DC4 et al: Joseph L. Guza, Buffalo (716) 849-1333

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To be argued Wednesday, September 12, 2018

No. 27 People v Raymond Crespo (reargument)

Raymond Crespo was arrested in January 2013 after he allegedly stabbed a man during a street fight in East Harlem in January 2013. Prior to the start of jury selection for his trial, Crespo's attorney moved to withdraw, telling Supreme Court that Crespo would no longer speak with him. The court denied the motion. During jury selection, Crespo told the court that he did not want his appointed lawyer to represent him and that he wanted to defend himself. The court denied his request, saying it was "too late to make that request." A short time later, Crespo again told the court that he wanted to represent himself, and the court again denied the request as untimely. Crespo was convicted of first-degree assault and weapon possession, and was sentenced to 20 years to life in prison.

The Appellate Division, First Department reversed and remanded for a new trial, ruling the trial court violated Crespo's right to self-representation. "Contrary to the trial court's finding, defendant's requests to proceed pro se, made during jury selection, were timely asserted" because they were made before the prosecution's opening statement, it said, citing People v McIntyre (36 NY2d 10 [1974]. "We reject the People's argument that the request to proceed pro se must be made before jury selection...."

The prosecution says McIntyre held only that requests to proceed pro se "are timely if they are made 'before the trial commences.'" The trial in McIntyre was held under the former Code of Criminal Procedure, which provided that a trial commenced with the prosecution's opening statement. The prosecution argues that the adoption of the Criminal Procedure Law to replace the Criminal Code in 1971 changed the meaning of the term "trial" to include jury selection, and thus a request to proceed pro se must be made prior to jury selection in order to be timely.

For appellant: Manhattan Assistant District Attorney Stephen J. Kress (212) 335-9000
For respondent Crespo: Molly Schindler, Manhattan (212) 577-2523

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To be argued Thursday, September 13, 2018

No. 102 Matter of Haug v State University of New York at Potsdam *(papers sealed)*

Benjamin Haug was a freshman at the State University of New York at Potsdam in September 2014. As he was returning to his dorm room after a night of drinking, he encountered a female student (the complainant) that he knew from high school. She invited him up to her room, where they had sexual intercourse. Shortly afterward, the complainant reported to campus police that she had been sexually assaulted. The officer who took her report later testified at a hearing that the complainant "didn't want any evidence collected" and did not want her assailant "to be necessarily in trouble." She told the officer that she "froze" and "didn't tell the person no, didn't have any gesture saying that it wasn't welcome." She refused to name her assailant, but an anonymous tip four days later identified Haug. A SUNY Potsdam official, Annette Robbins, contacted the complainant, who told her that she was "making out" with Haug on the bed and, when he suggested they have sex, she took off her shirt. Haug then removed her pants and his own clothes and they had intercourse. She said she "froze" and "let things happen." Haug was charged with sexual misconduct under the school's code of conduct, which requires affirmative consent to sexual activity, defined as "spoken words or behavior that indicates, without doubt to either party, a mutual agreement to participate." The complainant did not appear at his hearing, where testimony was given by the campus officer, Robbins, and Haug. The hearing board found Haug guilty of sexual misconduct and recommended that he be suspended for the remainder of the semester. Haug appealed. The school's appellate board upheld the finding of misconduct, but recommended that the penalty be increased to immediate expulsion, a penalty the school's president imposed.

The Appellate Division, Third Department annulled the determination for lack of substantial evidence on a 3-2 vote and ordered the records expunged. "The complainant's account was set forth by others who had conversed with her.... It is not clear to us that a reasonable person could find from these hearsay accounts an absence of 'behavior that indicate[d], without doubt to either party, a mutual agreement to participate in sexual intercourse,' as to do so would require overlooking the complainant's admission that she removed her shirt when sex was suggested.... [W]hile the broad contours of [Haug's] account matched those of the complainant, their accounts differed on the critical issue of consent. [He] specifically stated that they began kissing after talking and that ... the complainant took off both of their shirts. [He] then removed the rest of their clothing and asked the complainant if she had any condoms, to which she replied that she did not but that it was 'fine' and no reason to worry. The complainant then straddled [Haug] from above while they had sex and, after it was over, asked [him] if he had fun." It said this testimony "seriously controverted the hearsay evidence" that the complainant did not consent.

The dissenters said, "The complainant reported that [Haug] 'began making out with her' and suggested that they have sex, but that [he] did not ask for, nor did she give, her consent. Although the complainant acknowledged that she took off her shirt, she stated that [he] took off her pants and that she thereafter 'froze' and '"let things happen" from that point on.' This evidence reasonably demonstrated that the complainant did not affirmatively consent, verbally or through her actions, to sexual intercourse. To be clear, taking off one's own shirt is not, in and of itself, consent to sexual intercourse.... Moreover, [Haug's] own testimony revealed that he had doubts as to whether the complainant consented to engaging in sexual intercourse. [He] testified that, after receiving a campus-wide rape alert, he sent the complainant a text message about the alert because he was 'worried' and 'didn't know if she had reported [him].' [His] testimony in this regard was indicative of a consciousness of guilt...." In a case with "competing versions of events...," they said, "the duty of weighing the evidence and 'making the choice' between conflicting inferences lies exclusively within the province of SUNY...."

For appellant SUNY Potsdam: Assistant Solicitor General Brian D. Ginsberg (518) 776-2040
For respondent Haug: Lloyd G. Grandy, Ogdensburg (315) 393-1111

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To be argued Thursday, September 13, 2018

No. 103 People v Jakim Grimes

Jakim Grimes pled guilty in 2012 to criminal possession of a controlled substance in the third and fourth degrees in Supreme Court, Onondaga County. He had been arrested after police stopped the car in which he was a passenger, searched him and found narcotics. He was sentenced as a second felony offender. The Appellate Division, Fourth Department affirmed his conviction in November 2015, rejecting his claims that the police did not have probable cause for the traffic stop or the search, and that he was improperly sentenced. Grimes's attorney wrote to him in prison to inform him of the affirmance and said, "I am in the process of drafting the leave application to the Court of Appeals and you should receive it shortly." Counsel drafted the application for leave to appeal, but neglected to file it. Counsel discovered the error in January 2017, when Grimes wrote him to ask about the status of his appeal. The 30-day period for filing a criminal leave application (CLA) and the one-year statutory grace period for seeking permission to file a late application for leave had expired in December 2016.

Grimes moved at the Appellate Division for a writ of error coram nobis, seeking permission to file a late application for leave to appeal to this Court. In an affirmation in support, his former counsel said that, in November 2015, "I drafted an application for leave to appeal to the Court of Appeals. Unfortunately, due to law office failure and my lack of oversight, that application was never timely filed and served and the case was later mistakenly marked as closed. Mr. Grimes was nevertheless informed that such an application would be filed on his behalf. Relying upon our representation, he could not have reasonably discovered within a one-year period that his appellate rights were not preserved...." The Appellate Division denied the coram nobis motion without opinion.

Grimes, now with new counsel, argues that the Court of Appeals, in <u>People v Andrews</u> (23 NY3d 605), "expressly left open the question whether the failure to file a CLA constitutes ineffective assistance of appellate counsel as a matter of New York State constitutional law, warranting coram nobis relief (<u>see</u> 23 NY3d at 616). This appeal provides the Court with the opportunity to adopt such a rule, both narrow in scope and limited to situations where, as here, counsel's error was not reasonably discoverable within the one-year grace period set forth in CPL 460.30 and defendant exercised due diligence in identifying such error. The adoption of such a rule would be consistent with this Court's longstanding recognition that New York State's constitutional standard for the effective assistance of counsel '"offers greater protection than the federal test"'...."

The prosecution argues that the Appellate Division's order is not appealable to this Court. The prosecution also argues the Appellate Division "did not err as a matter of law when it denied defendant's coram nobis motion.... Defendant did not contend in his coram nobis motion, and thus did not preserve for this Court's review, a claim that CPL 460.30(1) is constitutionally deficient in providing defendants with the opportunity to seek to extend the time to make a CLA (<u>see</u> CPL 470.05[2])."

For appellant Grimes: Joseph Perry, Manhattan (212) 408-2500
For respondent: Onondaga County Chief Asst. District Atty. James P. Maxwell (315) 435-2470

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 Thursday, September 13, 2018

No. 104 People v Steven Baisley

Steven Baisley was charged in June 2014 with multiple misdemeanor counts of criminal contempt in the second degree and non-support of a child in the second degree for his alleged willful failure to make child support payments in the Village of Goshen. The Orange County Office of Child Support Enforcement reported that he owed more than $20,000 in support. Baisley moved to dismiss the charges on the ground that Village Court lacked jurisdiction over the matter.

Village Court dismissed the charges for lack of subject matter jurisdiction, saying, "Family Court has exclusive original jurisdiction over support or maintenance proceedings" under Family Court Act § 411, and has authority to impose sanctions for violations of support orders under section 454 and to "punish for contempt of court" under section 156 where no remedy for a violation is specified. "As such, a Justice Court lacks subject matter jurisdiction over support proceedings. It necessarily ... also lacks jurisdiction over allegations of contempt in support proceedings.... [T]he Family Court Act establishes that contempt is not appropriate for a violation of a support order. It is illogical that a justice court, not of record, would have the power to punish for contempt in a matter in which the Family Court holds exclusive jurisdiction and even it lacks contempt power." It said "this logic" also applies to the charges of non-support of a child in the second degree. "These charges, although a more detailed and specified version of the Criminal Contempt charge, nonetheless arise[] from the same Support Order that led to the Criminal contempt Charges."

The Appellate Term for the 9th and 10th Judicial Districts reversed and reinstated the charges for the reasons stated in its 2016 decision in People v Moody (53 Misc3d 31). The court said in Moody, "The jurisdiction of the Justice Court over criminal matters is regulated by the Criminal Procedure Law (see UJCA 2001[1]). Justice Courts are local criminal courts which possess 'trial jurisdiction of all offenses other than felonies' (CPL 10.30[1]).... Consequently, the Justice Court had jurisdiction to dispose of the charges of nonsupport of a child in the second degree and criminal contempt in the second degree. Although Family Court Act § 411 grants the Family Court 'exclusive original jurisdiction over proceedings for support or maintenance...,' such grant of exclusive jurisdiction has no bearing on the issue of the Justice Court's jurisdiction to prosecute criminal charges.... We note that Family Court Act § 156 does not preclude the prosecution of a criminal contempt charge in a local criminal court, since that section specifically provides that the Family Court has jurisdiction to hear violations of orders of the Family Court 'unless a specific punishment or other remedy for such violation is provided in this act or any other law,' such as is the case with Penal Law § 215.50(3)."

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For respondent: Orange County Assistant District Attorney Andrew R. Kass (845) 291-2050