State of New York
Court of Appeals

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NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

October 13 thru 15, 2020

State of New York
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To be argued Tuesday, October 13, 2020 (arguments begin at 2 p.m.)

No. 73 People ex rel McCurdy v Warden *(papers sealed)*
No. 74 People ex rel Johnson v Superintendent
No. 75 People ex rel Ortiz v Breslin

These appeals were filed by level three sex offenders to challenge their indefinite detention in prison or prison-based residential treatment facilities (RTFs) after their prison terms expired or they were granted parole. All three offenders were subject to post-release supervision (PRS) and were held past their release dates by the Department of Corrections and Community Supervision (DOCCS) when they were unable to find housing that complied with the Sexual Assault Reform Act (SARA), which bars certain sex offenders from residing within 1,000 feet of any school grounds (Executive Law § 259-c[14]). DOCCS relied on Correction Law § 73(10), which authorizes it "to use any residential treatment facility as a residence for persons who are on community supervision."

In Case No. 73, Chance McCurdy argues that the authority conferred by Correction Law § 73(10) to place offenders in RTFs is limited by Penal Law § 70.45(3), which authorizes the Parole Board to place an inmate subject to post-release supervision in a residential treatment facility "for a period not exceeding six months immediately following release" from prison. Supreme Court agreed with McCurdy that Penal Law § 70.45(10) limits RTF detentions to a maximum of six months. It said DOCCS erred in relying on Correction Law § 73(10) because "that statute, unlike P.L. § 70.45(3), does not specifically apply to those sentenced to PRS. It is a black letter rule of statutory construction that where a general statute and a specific statute appear to be in conflict, the specific statute should govern over the general."

The Appellate Division, Second Department reversed, saying the six-month limitation imposed by the Penal Law "does not conflict with, or limit," DOCCS's authority under Correction Law § 73 to detain in RTFs "persons who are on community supervision," which is defined to include persons subject to PRS. Construing these statutes together with SARA, it said a sex offender who has served more than six months of PRS may be held in an RTF "in the event such offender is unable to locate SARA-compliant community housing."

In No. 74, Fred Johnson was sentenced to two years to life in prison in 2009 and was granted an open parole release date in 2017, but he was kept in prison for two more years because he could not find SARA-compliant housing. He argues the residency restriction imposed by SARA violates due process. The Appellate Division, Third Department denied his petition for a writ of habeas corpus, finding the restriction is rationally related to the legitimate state interest in protecting children "by keeping certain sex offenders at a distance from schoolchildren – thereby limiting opportunities for predation."

In No. 75, Angel Ortiz became eligible for conditional release in 2016, but he could not find SARA-compliant housing and DOCCS kept him in prison until his maximum sentence expired in 2018, then placed him on PRS in a residential treatment facility for eight more months. The Second Department rejected his claims that DOCCS's actions violated due process and constituted cruel and unusual punishment, saying Ortiz "has no fundamental right to be free from special conditions of PRS regarding his residence" and "DOCCS reasonably concluded" it could hold him in an RTF "to accomplish the aim of keeping such offenders at a distance from school children." It said DOCCS detained him to meet the goal of SARA "rather than to further punish" him.

No. 73 For appellant McCurdy: Elon Harpaz, Manhattan (212) 577-3281
For respondent Warden: Assistant Solicitor General Ester Murdukhayeva (212) 416-6279
No. 74 For appellant Johnson: Denise Fabiano, Manhattan (212) 577-3917
For respondent Superintendent: Assistant Solicitor General Brian D. Ginsberg (518) 776-2040
No. 75 For appellant Ortiz: Will A. Page, Manhattan (212) 577-3442
For respondent Breslin: Assistant Solicitor General Ester Murdukhayeva (212) 416-6279

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To be argued Tuesday, October 13, 2020 (arguments begin at 2 p.m.)

No. 76 People ex rel Negron v Superintendent

Raymond Negron was convicted of first-degree sexual abuse in 1994 and was sentenced to one to three years in prison. He completed his sentence in 1997 and was designated a risk level three sex offender under the Sex Offender Registration Act. Negron was later convicted of attempted second-degree burglary twice – first in 1998 and again in 2005 – with the most recent conviction resulting in a prison term of 12 years to life. He was granted parole in 2016 on the condition that he comply with the Sexual Assault Reform Act (SARA), which bars certain sex offenders from "entering into or upon any school grounds" or residing within 1,000 feet of a school. Because he was unable to locate SARA-compliant housing, he continued to be held at the Woodbourne Correctional Facility for ten months past his release date.

During that period, Negron brought a proceeding seeking his immediate release on the ground that SARA's school grounds restriction, contained in Executive Law § 259-c(14), did not apply to him. The statute provides that the restriction applies "where a person serving a sentence for an offense defined in [Penal Law articles 130, 135 or 263 or Penal Law §§ 255.25, 255.26 or 255.27] and the victim of such offense was under the age of eighteen at the time of such offense or such person has been designated a level three sex offender" is released. Negron argued that the school restriction applies only where the inmate is serving a sentence for one of the enumerated sex crimes and, in addition, either the victim was under the age of 18 or the inmate was designated a level three sex offender. Since Negron was in prison for attempted burglary, he contended he was not bound by it.

Supreme Court dismissed the proceeding, agreeing with the Parole Board's interpretation that Executive Law § 259-c(14) applies to all level three sex offenders, regardless of whether they were serving a sentence for one of the statute's enumerated offenses.

The Appellate Division, Third Department reversed and ruled Negron is not subject to the school grounds restriction. It said the statute is unambiguous and the restriction "applies either to (1) an offender serving a sentence for one of the enumerated offenses whose victim was under 18 years old, or (2) an offender serving a sentence for one of the enumerated offenses who was designated a risk level three sex offender. Because [Negron] was not serving a sentence for an offense delineated in Executive Law § 259-c(14), the statute does not apply to him." It noted that the Fourth Department, in People ex rel Garcia v Annucci (167 AD3d 199), found Executive Law § 259-c(14) is ambiguous and concluded that the legislative history supported the Parole Board's interpretation, but the Third Department said "we respectfully disagree."

For appellant Superintendent: Assistant Solicitor General Brian D. Ginsberg (518) 776-2040
For respondent Negron: Elon Harpaz, Manhattan (212) 577-3281

State of New York
Court of Appeals

To be argued Wednesday, October 14, 2020 (arguments begin at noon)

No. 77 Jin Ming Chen v Insurance Company of the State of Pennsylvania

Jin Ming Chen was injured while working on a New York City construction site in 2007. He sued the general contractor, Kam Cheung Construction, Inc., which resulted in a personal injury judgment awarding the plaintiff $2,330,000 in damages and $396,994 in interest in 2013. The contractor had both primary and excess insurance coverage. The primary policy, issued by Arch Insurance Group, provided coverage up to $1,000,000 for "those sums that the insured becomes legally obligated to pay as damages because of bodily injury" and further stated "we will pay ... prejudgment interest awarded against the insured on that part of the judgment we pay [and] ... all interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid...." The primary policy said the interest payments "do not reduce the limits of insurance." The excess policy, issued by the Insurance Company of the State of Pennsylvania (ICSOP), provided coverage up to $4,000,000 in excess of the $1,000,000 primary policy and contained a "follow form" provision that said "the coverage provided by this policy shall follow the terms, definitions, conditions, and exclusions" of the primary policy. After the award of damages, the primary policy was declared void in a separate action by Arch due to misrepresentations made by Kam Cheung.

The plaintiff demanded that ICSOP pay the full personal injury judgment and, when the insurer disclaimed coverage, brought this action against it seeking full payment. Supreme Court granted partial summary judgment to the plaintiff in May 2016. It ruled that ICSOP must pay, but agreed with the insurer that its excess policy did not provide a "drop down in coverage" and ICSOP was not liable for the first $1,000,000 of the personal injury judgment. The court later granted ICSOP's motion for reargument to consider what, if any, liability it had for pre- and post-judgment interest. The plaintiff argued the excess insurer was liable for all interest awarded on the $2,330,000 injury judgment. ICSOP argued it was not liable for pre-judgment interest on the first $1,000,000 of the injury award or for any post-judgment interest, since the primary policy provided coverage for those costs. Supreme Court agreed with ICSOP and adopted the insurer's proposed judgment of $1,526,938 plus $159,628 in interest from May 2016.

The Appellate Division, First Department affirmed, rejecting the plaintiff's argument that ICSOP was liable for all interest that accrued on the personal injury judgment pursuant to the "follow form" provision of the excess policy. It said the terms and conditions of the primary policy "include, in its Supplementary Payments provision, Arch's agreement to cover prejudgment interest 'on the part of the judgment we pay,' i.e., the first $1 million, and 'all' postjudgment interest on the 'full amount of any judgment.'" Under the Maintenance of Underlying Insurance provision of the ICSOP policy, it said, "ICSOP's excess coverage would be triggered only upon exhaustion of the 'limits of insurance of the Underlying Insurance...,' which 'limits,' in turn, were not reduced by, and thus included, the interest payments set forth in the Supplementary Payments provision." It also rejected the plaintiff's argument that ICSOP waived its interest-related claims by failing to raise them at the summary judgment stage.

For appellant Jin Ming Chen: Kenneth J. Gorman, Manhattan (212) 406-4993
For respondent ICSOP: Elizabeth F. Ahlstrand, Manhattan (212) 653-8861

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To be argued Wednesday, October 14, 2020 (arguments begin at noon)

No. 78 DiLorenzo v Windermere Owners LLC

In October 2009, Laura DiLorenzo leased a Manhattan apartment from Windemere Chateau, Inc. (Chateau), at a market-rate monthly rent of $2,300. Chateau had registered the apartment with the Department of Housing and Community Renewal (DHCR) as rent stabilized from 1984 until June 2009, when the most recent stabilized monthly rent was $1,450.70. In July 2010, Chateau filed a registration with DHCR declaring the apartment exempt from rent stabilization due to high rent vacancy, and four months later sold the building to Windermere Owners LLC (Owners). Owners and Chateau claim the apartment was legally deregulated because Chateau spent $82,015 on renovations to the apartment in 2009, which allowed it to raise the legal monthly rent well over the $2,000 threshold for high rent deregulation at that time. DiLorenzo brought this rent overcharge action against Owners and Chateau in 2011, alleging that her apartment did not qualify for deregulation because the amounts the defendants claimed were spent on renovations in 2009 were not spent on qualifying individual apartment improvements (IAIs), were not spent at all, or merely duplicated improvements made to the apartment in 1995 and 1998. The parties agreed the defendants would have to show they spent at least $21,972 on qualifying IAIs to reach the $2,000 deregulation threshold.

Supreme Court ruled the defendants deregulated the apartment illegally, finding they failed to substantiate the bulk of their claimed expenses because they produced no witnesses with personal knowledge that the work was performed and failed to show the work did not duplicate prior IAIs that had not exceeded their useful life. It said they substantiated only $5,650 spent on electrical work, which would entitle them to a monthly rent increase of $141.25 and raise the last legal rent in 2009 to $1,591.25. The court ruled DiLorenzo was entitled to a stabilized lease with monthly rent of $1,591.25. It found she was overcharged $77,700 and, because the defendants "failed to ... rebut the presumption of willfulness," awarded her treble damages of $233,100.

The Appellate Division, First Department reversed on a 3-2 vote. The majority, after de novo review of the evidence – including invoices from contractors, checks made to the contractors, and photos of the apartment – found the defendants had substantiated $78,901.95 worth of renovations, which "well exceeded the $21,972 threshold needed" to deregulate the apartment. Regarding the defendants' failure to show the 2009 improvements were not made during the useful life of the improvements made in 1995 and 1998, it said they "were not required ... to adhere to a useful life schedule in performing the IAI's" and, in any case, DiLorenzo waived the claim by failing to raise it in her complaint.

The dissenters said they would have affirmed the trial court's decision in full, contending "the majority usurps Supreme Court's authority to make factual findings," the court they said "was in the best position to assess the evidence and credibility of the witnesses." They said the invoices, checks and photos were inadequate, by themselves, to establish that the renovation work was actually done and "no legal conclusions could be drawn from the documents in the record without witness testimony connecting them to the work allegedly performed" in the apartment. They said DiLorenzo did not waive the useful life issue because she "did not have the burden to establish useful life;" and said the useful life schedule does apply to the types of kitchen and bathroom upgrades involved in this case.

For appellant DiLorenzo: Marc Bogatin, Manhattan (212) 406-9065
For respondents Chateau and Owners: Kevin D. Cullen, Manhattan (212) 233-9772

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To be argued Wednesday, October 14, 2020 (arguments begin at 2 p.m.)

No. 79 People v Everett D. Balkman

Everett Balkman was the front-seat passenger in a car that was stopped by an officer of the Rochester Police Department in August 2014. The officer had run the vehicle's plate number and his computer returned a "similarity hit" indicating that some personal information of the car's registered owner – such as name, birth date, or aliases – was similar to that of someone subject to an active arrest warrant. He later testified that this was the only reason he stopped the vehicle. He said the similarity notification involved a warrant issued by Rochester City Court instead of an out-of-state warrant, so he gave it heightened attention, but he did not take time to read the message because he was concerned the occupants of the car might flee. He immediately approached the driver, who said she was the owner's sister, checked her license, then stepped forward to examine the registration and inspection stickers. At that point, he spotted a chrome-plated handgun on the floor between Balkman's feet and arrested him for weapon possession. After the scene was secured, the officer checked the similarity hit and found there was no warrant for the owner or driver of the car.

Balkman moved to suppress the hand gun, arguing that the mere fact that the officer's computer run returned a similarity hit did provide the reasonable suspicion of criminality needed to justify the stop. County Court denied the motion, finding "the computer notification of a City warrant and the owner of the car" provided reasonable suspicion for the stop. When the officer "within seconds of speaking to the driver" saw the handgun "in plain view," it said, he had probable cause for the arrest. Balkman then pled guilty to criminal possession of a weapon in the second degree and was sentenced to 3½ years in prison.

The Appellate Division, Fourth Department affirmed, saying the officer "had reasonable suspicion that there was a warrant for the arrest of the registered owner of the vehicle." It said, "'Reasonable suspicion ... does not require absolute certainty'.... Rather, we must uphold an automobile stop as having been based upon reasonable suspicion as long as the officer who initiated the stop can point to 'specific and articulable facts which, along with any logical deductions, reasonably prompted th[e] intrusion.'"

Balkman argues, "The fact that there was no warrant for the registered owner rendered the officer's actions unlawful as there is no 'good faith' exception in New York to police action taken upon the authority of a document that does not exist.... [E]ven if there was such an exception, given the People's failure to present any evidence showing either the specific content of the computer-generated communication, or the supposed similarity between the registered owner and the wanted person..., there is no basis to conclude that the officer reasonably suspected that a warrant existed for the registered owner of the car. And because the officer had, literally at his fingertips, information indicating that there was no warrant..., but failed to look at it until after he had arrested Mr. Balkman..., the stop and seizure" violated constitutional standards.

For appellant Balkman: Janet C. Somes, Rochester (585) 753-4329
For respondent: Monroe County Assistant District Attorney Lisa Gray (585) 753-4591

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To be argued Wednesday, October 14, 2020 (arguments begin at 2 p.m.)

No. 49 Matter of Marian T. (Lauren R.)

Marian T., a woman with profound intellectual disabilities and extremely limited verbal ability, was 61 years old and had been living for 12 years in a licensed family care home in Worcester, Otsego County, when the married couple that operate the home, Lauren R. and Gregg H. (petitioners), commenced this proceeding to adopt her in 2015. Marian had no known living relatives. Surrogate's Court appointed Mental Hygiene Legal Service (MHLS) to represent Marian and ordered a psychological evaluation to determine her capacity to consent to the adoption. Two psychologists agreed her mental disabilities were profound and she was largely nonverbal, but they split on whether she understood what it meant to be adopted and had the capacity to consent. The court also appointed a guardian ad litem for Marian, who concluded the adoption was in her best interests and should be approved.

A key issue in the proceeding was whether Marian's consent was required by Domestic Relations Law § 111(1)(a), which provides that "consent to adoption shall be required ... [o]f the adoptive child, if over fourteen years of age, unless the judge or surrogate in his discretion dispenses with such consent." The petitioners argued that, because Marian was over the age of 14 and the adoption was in her best interests, the court could dispense with the need for her consent. MHLS argued the statute requires an adult's consent to be adopted and that, because Marian lacked the capacity to understand the consequences of adoption, she could not consent.

Surrogate's Court granted the adoption petition, finding it was "clearly" in Marian's best interests. "The court finds [petitioners] are absolutely sincere in their affection for Marian and their desire to care for her as a member of their family," it said, and the adoption would provide "stability and structure in her living arrangements." As for consent, it said "in light of the similarities between this situation and adult guardianship proceedings, the court finds that Marian's Guardian ad Litem had the implied authority to consent to the adoption on her behalf."

The Appellate Division, Third Department affirmed "for different reasons," saying the surrogate erred in finding the guardian had implied authority to consent. Based on the language of section 111(1)(a), it said, "because [Marian] is over the age of 14, the court had express statutory authority to dispense with her consent. This conclusion is well-grounded in sound statutory construction and avoids categorically prohibiting adoptions of those who are over the age of 14 but are incapable of giving consent, including an entire class of adoptees who are so severely disabled that they simply lack the ability to communicate such consent." In view of the surrogate's "thorough best interests analysis," Marian's "consent was properly dispensed with."

MHLS argues that, based on its legislative history, the statute "was meant to apply only to child adoptees between 14 and 17" and was "intended to give court's discretionary authority to dispense with the child adoptee's consent only in the limited circumstance where knowledge that the proposed adoptive parents are not the child's natural parents would harm the child." It argues the Appellate Division "failed to strictly construe" the statute and both lower courts erred "by failing to treat the question of consent as a threshold consideration before moving on to determine whether adoption is in [Marian's] best interests."

For appellant Marian T.: Cailin Connors Brennan, Albany (518) 451-8710
For respondents Lauren R. et al (petitioners): Douglas A. Eldridge, Delmar (518) 475-0393

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To be argued Thursday, October 15, 2020 (arguments begin at 11 a.m.)

No. 80 Sutton 58 Associates LLC v Pilevsky

In June 2015, Sutton 58 Associates LLC loaned $147.25 million to BH Sutton Mezz LLC and its subsidiary Sutton 58 Owner LLC (the Borrowers) to build a tower at Sutton Place and 58th Street in Manhattan. The loan agreements included provisions in which the Borrowers agreed not to file a petition for bankruptcy, not to have assets or businesses unrelated to the tower project, and "to remain a special purpose bankruptcy remote entity," among other things. When the loans matured in January 2016, the Borrowers defaulted and Sutton 58 Associates sought to foreclose on the tower project and conduct a secured party sale. To prevent this, the Borrowers filed voluntary bankruptcy petitions in U.S. Bankruptcy Court for the Southern District of New York in February and April 2016. The Bankruptcy Court ultimately approved a liquidation plan through which the project site was sold to the lender at auction in December 2016.

In September 2016, Sutton 58 Associates (the lender) brought this action for tortious interference with the loan agreements in State Supreme Court against Prime Alliance Group, LTD., Sutton Opportunity LLC, and the owners of the companies, Philip Pilevsky and his two sons, "for willfully causing the borrowers to breach their contractual obligations to plaintiff." It claims the defendants "conspired" with the Borrowers to frustrate its contractual rights by facilitating their bankruptcy filings, in part by Prime Alliance loaning $50,000 to Sutton Mezz in February 2016 to retain bankruptcy counsel. It says a separate act of interference occurred around the same time, when Sutton Opportunity transferred three co-op apartments in Lynbrook to Sutton 58 Owner, allegedly to avoid the obstacles that can arise for single-asset real estate companies seeking bankruptcy protection. It claims the "scheme has required plaintiff to incur substantial attorney's fees and costs, and the Project – rather than being put up for auction in February 2016 – was left undeveloped and at a standstill in a falling real estate market." The site was rezoned in 2017, it says, and as a result the project "was indefinitely suspended."

The defendants moved to dismiss the action on the ground it was preempted by the U.S. Bankruptcy Code. Supreme Court denied the motion, saying, "There's no federal preemption here.... This case does not involve the bankruptcy itself. It involves separate contractual agreements which [defendants] clearly knew about and were involved in.... [O]n this record, there is a good chance they aided and abetted in these breaches and were involved in tortious interference."

The Appellate Division, First Department reversed and dismissed the action. "Plaintiff's claims, in which the sole damages plaintiff claims are losses resulting from the delay of a real estate project due to the bankruptcy filing of two nonparty entities, are preempted by federal law," it said, citing Astor Holdings, Inc. v Roski (325 F Supp 2d 251), which held that "no authorized proceeding in bankruptcy can be ... used as the basis for the assertion of a tort claim in state court against any defendant."

For appellant Sutton 58 Associates: Ronald S. Greenberg, Manhattan (212) 715-9100
For respondents Pilevsky et al: Robert S. Smith, Manhattan (212) 833-1100

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To be argued Thursday, October 15, 2020 (arguments begin at 11 a.m.)

No. 40 The Trustees of Columbia University v D'Agostino Supermarkets, Inc.

D'Agostino Supermarkets, Inc. entered into a lease with The Trustees of Columbia University to rent space for a supermarket in a university-owned building in Manhattan beginning in August 2003. The 15-year lease was to expire in August 2018. D'Agostino stopped paying rent in 2016 due to financial difficulties and it asked Columbia to release it from the final two years of the lease. In May 2016, when D'Agostino's arrears totaled nearly $262,000, the parties entered into a Surrender Agreement which required D'Agostino to make two surrender payments of $43,000 each followed by 11 monthly payments of $15,977.43. The Surrender Agreement provided that if D'Agostino failed to make any of the payments within five days after receiving a past due notice, the aggregate amount of all fixed rent, additional rent and other charges owed under the original lease would immediately become due and payable. D'Agostino made the two surrender payments, but failed to make the monthly payments. Columbia re-let the store property to another tenant in June 2016 and then filed this breach of contract action against D'Agostino in November 2016, seeking fixed rent of $1,029,969.54 plus interest, as well as $295,000 in additional rent and charges.

Supreme Court denied Columbia's summary judgment motion, saying "the liquidated damages clause of the Surrender Agreement constitutes an impermissible penalty" that cannot be enforced. Instead of the $1.3 million sought by Columbia, the court awarded it $175,751.73, the remaining amount due under the Surrender Agreement. It said Columbia's "damages at the time of the Surrender Agreement were ascertainable. The Surrender Agreement's liquidated damages clause, which is not related in any way to the total amount due under the Surrender Agreement, was therefore plainly a penalty aimed at ensuring D'Agostino's performance via threat of an outsized damages award." Columbia's proper remedy was payment of "the agreed upon sum for the Monthly Surrender Payments, which will put ... Columbia in the exact position it would have been had D'Agostino fully performed under the Surrender Agreement."

The Appellate Division, First Department affirmed, saying "damages at the time of the Surrender Agreement were ascertainable. Columbia's attempt to enforce the liquidated damages provision sought to 'secure performance by threat of a large payment rather than to provide a reasonable assessment of probable damages'...." It also ruled the provision "is unenforceable as 'unreasonable and confiscatory,' since it would result in an award 7½ times the amount that Columbia would have received if the Surrender Agreement had been fully performed...."

Columbia argues the Surrender Agreement, "which was negotiated by sophisticated commercial parties represented by counsel..., bears none of the hallmarks of a penalty. The Agreement was designed to realign the parties' rights under the Lease to account for the risks both parties faced as a result of [D'Agostino's] default under the Lease and [its] request to be relieved of its past and future financial obligations under the Lease prior to its expiration, not to coerce compliance. Further, the University's actual damages are neither disproportional to the amount ultimately owed under the Agreement, nor were the damages capable of being ascertained at the time the Agreement was executed."

For appellant Columbia: Evan H. Krinick, Uniondale (516) 357-3000
For respondent D'Agostino: Bruce H. Lederman, Manhattan (212) 564-9800

State of New York
Court of Appeals

To be argued Thursday, October 15, 2020 (arguments begin at 11 a.m.)

No. 81 People v Benito Lendof-Gonzalez

Benito Lendof-Gonzalez was arrested on felony domestic violence charges brought by his wife and was remanded to the Niagara County Jail in April 2016. About three weeks later, he passed a note to the inmate in an adjacent cell, Michael Shepherd, offering to "give you a house ... if you do two things for me." He explained in subsequent notes that he wanted Shepherd to kill his wife and her mother, who was a witness in the domestic violence case, by injecting them with heroin mixed with poison at his wife's house in Lockport. He also asked Shepherd to take his two sons from the house and give them to a friend. After Shepherd agreed, Lendof-Gonzalez told him when to kill the women, how to arrange the crime scene, and told him where to find a spare key to his wife's house. He also gave him a map of where to take his sons. Lendof-Gonzalez had known Shepherd was soon to be released on bail and was facing eviction from his home in Niagara Falls. Shepherd, who was being held on charges of petit larceny and attempting to smuggle cigarettes into the jail, immediately informed authorities of Lendof-Gonzalez's proposal, handed over the notes, and agreed to cooperate with investigators. The two men continued to pass notes about the plan and discussed it in person and by phone after Shepherd was released. Two days later, Shepherd told Lendof-Gonzalez that he had killed the women.

Lendof-Gonzalez was charged with two counts of first-degree attempted murder (murder-for-hire), two counts of second-degree attempted murder, and one of second-degree criminal solicitation. At trial, he moved to dismiss the attempted murder counts on the ground that the prosecution presented insufficient evidence under Penal Law § 110.00, which requires proof a defendant engaged in conduct that "tends to effect the commission of such crime." County Court denied the motion, although it said the issue of legal sufficiency was "dangerously close." The jury found Lendof-Gonzalez guilty on all counts.

The Appellate Division, Fourth Department modified the judgment by reversing all four attempted murder convictions. It said the evidence "establishes only that defendant planned the crimes, discussed them with the inmate in the next cell and with that inmate's girlfriend, and exchanged notes about them. Thus, inasmuch as '"several contingencies stood between the agreement in the [jail] and the contemplated crime[s]," defendant[] did not come "very near" to accomplishment of the intended crime[s]'.... Where, as here, the evidence fails to establish that defendant took any action that brought the crime close to completion, no matter how slight..., the evidence is not legally sufficient to support a conviction of attempt to commit that crime...."

The prosecution argues the defendant engaged in "conduct that came dangerously near completion of the murders.... Promising to deed a house to Shepherd, writing a fake suicide note, showing the suicide note to Shepherd so he could memorize it and make the wife write it out, telling Shepherd where the key was hidden to get into the house if it was locked, providing Shepherd with a map and a location to take the children after the crime, all constitute more than mere planning for murder. They are acts taken by defendant towards completion of the crime.... The only single contingency was Shepherd being true to his word to defendant and executing the crime."

For appellant: Niagara County Assistant District Attorney Thomas H. Brandt (716) 439-7085
For respondent Lendof-Gonzalez: Robert M. Graff, Lockport (716) 433-1551