SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

AUGUST 28, 2009

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

HON. ROBERT G. HURLBUTT

HON. SALVATORE R. MARTOCHE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. EUGENE M. FAHEY

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. SAMUEL L. GREEN

HON. ELIZABETH W. PINE

HON. JEROME C. GORSKI, ASSOCIATE JUSTICES

PATRICIA L. MORGAN, CLERK

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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CA 08-02560

PRESENT: SMITH, J.P., CENTRA, PERADOTTO, GREEN, AND GORSKI, JJ.

PATRICK MCHUGH, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

A.J. MARFOGLIA AND ARICA L. MARFOGLIA,
DEFENDANTS-RESPONDENTS.

CELLINO & BARNES, P.C., BUFFALO (BRIAN A. GOLDSTEIN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICE OF DANIEL R. ARCHILLA, BUFFALO (TIMOTHY R. HEDGES OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered October 29, 2008 in a personal injury action. The order denied the motion of plaintiff seeking partial summary judgment and seeking to dismiss the fourth affirmative defense.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted and the fourth affirmative defense is dismissed.

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained when the vehicle he was driving was rear-ended by a vehicle driven by defendant Arica L. Marfoglia and owned by defendant A.J. Marfoglia. We agree with plaintiff that Supreme Court erred in denying plaintiff's motion seeking partial summary judgment on the threshold issue whether he sustained a serious injury as a result of the accident under the permanent consequential limitation of use and significant limitation of use categories within the meaning of Insurance Law § 5102 (d) and seeking to dismiss the fourth affirmative defense, which alleges that plaintiff did not sustain a serious injury. Plaintiff met his burden with respect to those two categories by submitting objective evidence that he suffered a disc herniation at C6-C7 that required surgical intervention, and by submitting the affirmation of his treating neurosurgeon who concluded that, based upon his examination and treatment of plaintiff and his review of plaintiff's medical records, plaintiff's injuries were significant, permanent, and causally related to the accident (*see LaForte v Tiedemann*, 41 AD3d 1191, 1192; *see generally Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 353). Plaintiff also submitted the affirmed report of the neurosurgeon who examined him at defendants' request. That neurosurgeon quantified the degree of loss of range of motion in plaintiff's cervical spine, including a 66% loss of

extension and a 50% loss of right rotation, and correlated that loss to the normal range of motion in the relevant areas of plaintiff's cervical spine (*see Toure*, 98 NY2d at 350; *see also Harris v Carella*, 42 AD3d 915, 916-917; *Strong v ADF Constr. Corp.*, 41 AD3d 1209, 1210).

We further conclude that defendants failed to raise a triable issue of fact sufficient to defeat the motion with respect to the issue of serious injury or causation. Defendants submitted only an attorney's affirmation and a copy of an alleged surveillance videotape, which they concede was not authenticated and thus was properly disregarded by the court. It is well settled that, "where the moving party has demonstrated its entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action . . ., and the submission of a hearsay affirmation by counsel alone does not satisfy this requirement" (*Zuckerman v City of New York*, 49 NY2d 557, 560). Moreover, the neurosurgeon who examined plaintiff at defendants' request concurred with the conclusion of plaintiff's treating neurosurgeon that plaintiff's cervical spine injury and the resulting surgery were causally related to the accident (*see LaForte*, 41 AD3d at 1192; *Ellithorpe v Marion* [appeal No. 2], 34 AD3d 1195, 1196).

Finally, we note that the record establishes that defendants have expressly withdrawn their second affirmative defense, concerning the alleged failure of plaintiff to wear his seatbelt, having conceded that it lacks merit.

Entered: August 28, 2009 Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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KA 08-02556

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, CARNI, AND GREEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS EDWARDS, JR., DEFENDANT-APPELLANT.

SUSAN V. TIPOGRAPH, NEW YORK CITY, FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered April 3, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the first degree and assault in the third degree.

It is hereby ORDERED that the judgment so appealed from is reversed on the law, the plea is vacated, that part of the motion seeking to suppress tangible property is granted, the first through fourth counts of the indictment are dismissed, and the matter is remitted to Erie County Court for further proceedings on the fifth count of the indictment.

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of criminal possession of a controlled substance in the first degree (Penal Law § 220.21 [1]) and assault in the third degree (§ 120.00 [2]), defendant contends that his extended detention at a roadside traffic stop by Sheriff's Deputies (Deputies) was unconstitutional and that County Court therefore erred in refusing to suppress the evidence seized as a result thereof. Although defendant does not challenge the initial stop of the vehicle that he was operating, he contends that he was then detained for a period of time and purpose that exceeded constitutionally permissible limits. We agree with defendant that the People did not establish at the suppression hearing that the Deputies had reasonable suspicion to extend the traffic stop after its initial justification was exhausted and thus that the court erred in denying that part of his omnibus motion seeking suppression.

At the suppression hearing, the Deputies testified that, after completing the investigation of defendant's vehicle for excessively tinted windows in violation of Vehicle and Traffic Law § 375 (12-a) (b) (2), they had the information necessary for issuing a traffic

ticket based on that violation. The Deputies admitted that, at that point in time, they had not observed any indicia of criminality during the course of the encounter. Nevertheless, the Deputies testified that they chose not to issue the traffic ticket and instead detained defendant because they "wanted to further investigate" in view of defendant's nervous appearance, based upon a "gut" feeling and their experience as narcotics officers. During the course of the further detention and investigation, one of the Deputies allegedly observed crumbs of crack cocaine on defendant's right palm. The Deputies directed defendant to exit his vehicle and demanded that he surrender the keys to the vehicle. The Deputies did not advise defendant that he was under arrest, but they continued to demand that he surrender his keys and ordered him to step to the rear of the vehicle. When defendant refused to surrender his keys, the Deputies attempted to brace defendant up against his vehicle, and a struggle ensued. The Deputies and defendant fell to the ground, and one of the Deputies was injured. The Deputies admitted that defendant "never once tried to strike [them]." Defendant was arrested, and when his vehicle was impounded and an inventory search of the vehicle was conducted, 8.892 ounces of cocaine were found in the vehicle. Following the denial of that part of his omnibus motion seeking suppression, defendant entered his plea of guilty but did not waive his right to appeal. Thus, his challenge to the court's suppression ruling is properly before us (*cf. People v Kemp*, 94 NY2d 831, 833).

"A traffic stop constitutes a limited seizure of the person of each occupant" (*People v Banks*, 85 NY2d 558, 562, *cert denied* 516 US 868). Furthermore, such a seizure and detention must be reasonably related in scope, including length, to the circumstances that justified the seizure and detention in the first instance (*see United States v Sharpe*, 470 US 675, 682). In other words, "[t]he scope of the detention must be carefully tailored to its underlying justification" (*Florida v Royer*, 460 US 491, 500). Here, although the initial seizure was justified, we conclude that the length and circumstances of the ensuing detention were not (*see Banks*, 85 NY2d at 562). Indeed, according to the testimony of the Deputies at the suppression hearing, they delayed their issuance of the traffic ticket to defendant for the specific purpose of further investigating defendant and his vehicle in the hope that the initial traffic stop would escalate into a drug investigation. The alleged observation of crumbs of crack cocaine on defendant's right palm by one of the Deputies occurred during the course of the extended detention, and the inventory search of defendant's vehicle that led to the discovery of the narcotics "was the product of an inseparable illegal detention of defendant" (*id.* at 561). The Deputies' observation that defendant appeared to be nervous did not, by itself, provide the requisite reasonable suspicion of criminality to justify the extension of the initially valid traffic stop (*see People v Milaski*, 62 NY2d 147, 156).

Because the Deputies' detention of defendant was unlawful by the time of the alleged assault, they were not engaged in the performance of a lawful duty to support the second count of the indictment, charging defendant with assault in the second degree (Penal Law § 120.05 [3]). That count therefore should have been dismissed (*see*

People v Voliton, 190 AD2d 764, 767, *affd* 83 NY2d 192). In addition, the fourth count of the indictment, charging defendant with resisting arrest, should have been dismissed because it is well settled that an essential element of the crime of resisting arrest is that the arrest be "authorized" (§ 205.30; *see Matter of Iyona G.*, 60 AD3d 1403). Where, as here, a defendant's arrest is not authorized, the defendant cannot be guilty of resisting arrest (*see People v Peacock*, 68 NY2d 675).

Similarly, a defendant may not be convicted of obstructing governmental administration in the second degree (Penal Law § 195.05) unless it is established that the public servants in question, here, the Deputies, "were engaged in authorized conduct" (*People v Lupinacci*, 191 AD2d 589), and that was not the case herein. Thus, the third count of the indictment, charging defendant with obstructing governmental administration in the second degree, also should have been dismissed.

All concur except SCUDDER, P.J., and PERADOTTO, J., who dissent and vote to affirm in the following Memorandum: We respectfully dissent and would affirm because we do not agree with the majority's conclusion that the cocaine crumbs were observed by the police after the completion of the vehicle and traffic investigation (*see People v Banks*, 85 NY2d 558, 562-563, *cert denied* 516 US 868).

The Sheriff's Deputies testified at the suppression hearing that they stopped defendant's vehicle because it appeared that the front driver and passenger windows were more darkly tinted than allowed by statute (Vehicle and Traffic Law § 375 [12-a] [b]). After pulling defendant's vehicle over, one Deputy (hereafter, first Deputy) approached the driver's window of the vehicle, while the second of the two Deputies (hereafter, second Deputy) approached the front passenger window. Defendant rolled down both windows, and the first Deputy asked to see defendant's license and registration. The first Deputy noticed that defendant's right hand was trembling and shaking when defendant handed those documents to him, while the second Deputy noticed that defendant's legs were shaking, that defendant's voice was cracking, and that defendant's breathing was heavy. The first Deputy explained to defendant why his vehicle had been stopped, and that he was going to his police vehicle to retrieve a tint meter to measure the light transmittance of defendant's windows. The first Deputy then noticed that defendant's chest was rising and falling at a rapid pace, and that defendant's right leg was bouncing at a constant rate. Both Deputies testified that defendant's nervousness was excessive, far greater than that usually exhibited by individuals who are stopped for a vehicle and traffic violation. The first Deputy further testified that, in his experience, nervousness can reach a point where it is alarming, "and the end result is the person had a gun or drugs or something. So you have to be conscious of that." That Deputy retrieved the tint meter from his vehicle and measured the tint of the front windows, both of which had a visible light transmittance far below that required by law. He then walked back to the police vehicle to put the tint meter away, conferring with his fellow Deputy en

route, and they both agreed that defendant was excessively nervous for a mere vehicle and traffic investigation. Consequently, after replacing the tint meter in the police vehicle, the first Deputy approached defendant's vehicle for a third time, to conduct further questioning. Before he had the opportunity to do so, he observed that defendant had cocaine crumbs, known as "shake," on his lower right palm. He then directed defendant to exit his vehicle, explaining that there were some issues concerning his license that the Deputies wanted to address. Defendant ultimately exited the vehicle, but when he was asked for his car keys, a standard request employed to prevent keys from being used as a weapon, defendant refused to let go of the keys. A struggle ensued, the first Deputy was injured, and defendant was arrested.

Based on these facts, the majority concludes that, because the Deputies had all of the information they needed to issue a traffic ticket at the conclusion of the second approach, the vehicle and traffic investigation was completed as of that point in time. The majority thus concludes that the Deputies' subsequent conduct constituted an illegal detention in violation of *Banks*. We cannot agree.

In *Banks*, the Court of Appeals held that, where the police stop a defendant for violating a provision of the Vehicle and Traffic Law, the defendant may be detained with respect to that traffic violation only for as long as is necessary to complete an investigation into the traffic charge (*id.* at 562-563). However, neither *Banks* nor the Fourth Amendment provide that a traffic investigation is completed immediately after the police first obtain probable cause to issue a traffic summons (*see generally Hoffa v United States*, 385 US 293, 310, *reh denied* 386 US 940; *People v Middleton*, 54 NY2d 474, 481). Notably, in *Banks*, it was the continued detention of the defendant after the Trooper had already concluded the traffic investigation and decided to issue a traffic ticket that was found unconstitutional. His investigation prior to that point in time was neither challenged nor found objectionable even though the Trooper, who had personally observed the defendant not wearing a seat belt, would have been warranted in issuing a traffic ticket based on the defendant's failure to wear a seat belt as soon as he stopped the defendant's vehicle.

The touchstone of Fourth Amendment analysis has always been the reasonableness of the search or seizure in issue (*see Illinois v Rodriguez*, 497 US 177, 185-186; *Pennsylvania v Mimms*, 434 US 106, 108-109; *People v Hall*, 10 NY3d 303, 308, *cert denied* ___ US ___, 129 S Ct 159; *People v Batista*, 88 NY2d 650, 653). The holding of *Banks* was also based on principles of reasonableness. Thus, in *Banks* the Court held that, for a traffic stop to pass constitutional muster, "the officer's [or Deputies'] action in stopping the vehicle must be justified at its inception and the seizure must be reasonably related in scope, including its length, to the circumstances which justified the detention in the first instance" (*id.* at 562). It clearly was reasonable for the Deputies in this case to obtain an objective measurement of the tint level of the windows before issuing a traffic

ticket, instead of relying only on their visual observations. It was also reasonable for the first Deputy to return the tint meter to the police vehicle before issuing a traffic ticket, and to approach defendant's vehicle again after putting the tint meter away. Even if that Deputy had all of the information he needed to issue a traffic ticket prior to the third approach, he still could not complete the investigation without approaching defendant's vehicle one last time, either to issue a ticket or to allow defendant to leave the scene. That Deputy observed the cocaine crumbs as soon as he reached defendant's vehicle on the third approach, before he had a chance to say or do anything. Thus, his observations were made during the course of the vehicle and traffic investigation, not after that investigation was completed. Of course, as soon as the first Deputy observed the cocaine crumbs on defendant's palm, he had probable cause to arrest defendant for possession of a controlled substance (*see generally People v Mizell*, 72 NY2d 651, 656; *People v Rives*, 237 AD2d 312, 313, *lv denied* 90 NY2d 1013).

The majority concludes that defendant was detained after the traffic investigation was completed because the Deputies never intended to issue a traffic ticket when they approached the vehicle on the third occasion, but instead intended to question defendant further based on his excessive nervousness. The validity of police conduct is not measured by the subjective intentions of the law enforcement officers, however (*see Brigham City, Utah v Stuart*, 547 US 398; *People v Cooper*, 38 AD3d 678; *People v Bandera*, 204 AD2d 340, *lv denied* 83 NY2d 1002). Rather, it is measured by the objective circumstances, determined pursuant to a reasonable person standard (*see People v Hicks*, 68 NY2d 234, 240; *see also People v Ellerbe*, 265 AD2d 569, 570, *lv denied* 94 NY2d 903; *People v Jones*, 172 AD2d 265, 266, *lv denied* 78 NY2d 923; *People v Hunt*, 155 AD2d 957, 958, *lv denied* 75 NY2d 814). The first Deputy never relayed his intentions to defendant in this case. Thus, from a reasonable person's viewpoint, the only actions of the first Deputy were to approach defendant's vehicle the first time to advise defendant why he had been stopped and to inform defendant that he intended to measure defendant's windows with a tint meter; to approach defendant's vehicle a second time to measure the windows using the tint meter; and to approach defendant's vehicle a third time after putting away the tint meter to complete the traffic investigation by either issuing a traffic ticket or allowing defendant to leave. Such conduct does not constitute anything more than a routine investigation pursuant to Vehicle and Traffic Law § 375 (12-a) (b).

Nor does the frank testimony of the Deputies that they used traffic violations as a tool for investigating possible narcotics violations render the third approach of defendant's vehicle unconstitutional. Even if the underlying motive of the Deputies throughout this vehicle and traffic investigation was to uncover the possibility that defendant possessed drugs, that motivation does not render their conduct unconstitutional (*see People v Johnson*, 1 NY3d 252, 257; *People v Robinson*, 97 NY2d 341, 349). The fact of the matter is that defendant was lawfully stopped for a suspected violation of Vehicle and Traffic Law § 375 (12-a) (b), and that the

Deputies' subsequent conduct was completely in accord with an investigation pursuant to that statute. The subjective intentions of the Deputies during the course of the ensuing traffic investigation are therefore irrelevant (*see Robinson*, 97 NY2d at 349).

Finally, even if the subjective intent of the first Deputy to question defendant further upon his third approach of the vehicle was somehow relevant to the determination of whether defendant's arrest was lawful, we conclude that there was nothing improper about such additional questioning. Both Deputies testified that they wanted to question defendant further because he was excessively nervous, entirely out of proportion with respect to a vehicle and traffic violation. That excessive nervousness constituted an articulable reason for asking defendant further questions independent from the Vehicle and Traffic Law charge, if for no other reason than to ensure defendant's well-being (*see People v Faines*, 297 AD2d 590, *lv denied* 99 NY2d 558). Because that articulable reason was lawfully obtained during the course of the vehicle and traffic investigation, the Deputies were well within their rights to question defendant commensurate with an articulable reason inquiry as set forth in *People v De Bour* (40 NY2d 210; *see Faines*, 297 AD2d at 593-594; *see generally People v Noonan*, 220 AD2d 811, 812-813).

We respectfully disagree with the majority to the extent that the majority asserts that the continued investigation of an individual following the completion of a traffic investigation must in every case be supported by a reasonable suspicion of criminality. As with any police-citizen encounter, the scope of police conduct following the completion of a traffic stop is determined by weighing the degree of the police intrusion against the known level of criminality (*see generally De Bour*, 40 NY2d 210; *People v Nelson*, 266 AD2d 730, 731-732, *lv denied* 94 NY2d 865). Thus, if the police conduct following the completion of the traffic investigation constitutes a detention, the police must have a reasonable suspicion of criminality independent from the traffic violation in order to render that detention lawful (*see Banks*, 85 NY2d at 562; *People v May*, 52 AD3d 147, 151-152). However, if the police conduct following the completion of the traffic violation constitutes something less than a detention, reasonable suspicion is not required. If the police conduct is commensurate with a common-law inquiry pursuant to the second level of *De Bour*, the conduct is lawful provided that the police have a founded suspicion of criminality (*see People v Kelly*, 37 AD3d 866, 867, *lv denied* 8 NY3d 986; *People v Leiva*, 33 AD3d 1021, 1023). If the police conduct is commensurate with an approach to inquire pursuant to the first level of *De Bour*, the conduct is lawful so long as the police have an articulable reason for making such inquiry (*see Faines*, 297 AD2d at 593-594). In this case, the police conduct that in the majority's view was objectionable consisted of the approach by the first Deputy on the third occasion to ask defendant further questions. Even assuming, arguendo, that such conduct occurred after the completion of the traffic investigation, we conclude that it at most constituted only an approach to inquire pursuant to the first level of *De Bour*, for which only an articulable reason for the inquiry was necessary.

Defendant's excessive nervousness constituted an articulable reason justifying that inquiry (*see id.*).

We therefore conclude that the Deputies' conduct prior to discovering the cocaine crumbs on defendant's palm was neither unconstitutional nor in violation of *Banks*. Once the first Deputy observed the cocaine crumbs, the Deputies had probable cause to arrest defendant based on his possession of narcotics, justifying their subsequent conduct in asking defendant to exit the vehicle and in forcibly placing him under arrest.

Entered: August 28, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

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CA 08-01231

PRESENT: HURLBUTT, J.P., CENTRA, PERADOTTO, CARNI, AND GORSKI, JJ.

CHRISTOPHER OURSLER, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF JULIE OURSLER, DECEASED, PLAINTIFF-APPELLANT,

V OPINION AND ORDER

ROBERT E. BRENNAN, DEFENDANT-APPELLANT, AND MALBEAT, INC., DOING BUSINESS AS MALLWITZ'S ISLAND LANES, DEFENDANT-RESPONDENT.

PAUL WILLIAM BELTZ, P.C., BUFFALO (DEBRA A. NORTON OF COUNSEL), FOR PLAINTIFF-APPELLANT.

DAMON & MOREY LLP, BUFFALO (JOSEPH W. DUNBAR OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAW OFFICES OF DOUGLAS COPPOLA, BUFFALO (PATRICIA STROMAN WALKER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered February 14, 2008. The order, insofar as appealed from, granted those parts of the motion of defendant Malbeat, Inc., doing business as Mallwitz's Island Lanes, for summary judgment dismissing the fourth cause of action and the cross claim of defendant Robert E. Brennan against it.

It is hereby ORDERED that the order insofar as appealed from is reversed on the law without costs, the motion of defendant Malbeat, Inc., doing business as Mallwitz's Island Lanes, is denied in part and the fourth cause of action and the cross claim of defendant Robert E. Brennan against it are reinstated.

Opinion by PERADOTTO, J.: The primary issue to be determined on this appeal is what actions constitute "guilty participation" on the part of a plaintiff so as to preclude recovery under General Obligations Law § 11-101 (Dram Shop Act). More specifically, we must determine whether plaintiff is unable to state a cause of action under that statute as a matter of law because he purchased two alcoholic beverages for his wife (decedent). We conclude that defendant Malbeat, Inc., doing business as Mallwitz's Island Lanes (Malbeat), did not meet its burden of establishing, as a matter of law, that plaintiff is precluded from recovering under the Dram Shop Act based on the fact that he bought decedent two drinks on the night that she was killed.

Factual Background

On October 26, 2002, plaintiff and decedent attended a Halloween costume party at Mallwitz's Island Lanes in Grand Island (Island Lanes), an establishment owned by Malbeat. Decedent was dressed as a witch and was clad entirely in black. The couple arrived at the party at approximately 10:30 P.M. Plaintiff purchased decedent's first drink of the night, a beer, shortly after the couple's arrival. For much of the party, decedent sang Karaoke in the bar area of the bowling alley while plaintiff played pool and shuffleboard in the back room. Plaintiff testified at his deposition that he purchased a second beer for decedent sometime prior to the costume contest, which occurred at approximately 12:30 A.M. Island Lanes also offered its patrons free "Jell-O shots" containing alcohol, and plaintiff testified that decedent consumed at least two of those shots. Throughout the evening, decedent purchased additional drinks for herself, and the couple's friends also took turns purchasing drinks for decedent. Plaintiff estimated that decedent consumed approximately six beers at the party.

After the winner of the costume contest was announced, decedent began to argue with another contestant. Plaintiff and decedent left Island Lanes, but the altercation continued in the parking lot and plaintiff was injured. The police arrived on the scene at approximately 1:45 A.M. and concluded that decedent was intoxicated. Plaintiff was taken to the hospital in an ambulance and an officer drove decedent to her mother's house.

Approximately an hour after the police left decedent with her mother, decedent departed on foot in search of her husband, whom she erroneously believed had been taken to the police station. As decedent was walking along the unlit shoulder of Whitehaven Road, still dressed entirely in black, defendant Robert E. Brennan struck decedent with the driver's side mirror of his vehicle as he was entering his driveway. Brennan continued into his driveway and called 911 from his home. Minutes later, an officer responding to calls concerning a suspicious person walking down Whitehaven Road ran over decedent in his patrol vehicle as she lay on the side of the road. Decedent's injuries were fatal.

Procedural History

Plaintiff commenced this action, individually and as the administrator of decedent's estate, seeking damages resulting from decedent's death. As administrator of decedent's estate, plaintiff asserted causes of action for negligence against Brennan and Malbeat. Both in his individual capacity and as administrator of decedent's estate, plaintiff asserted causes of action for violations of the Dram Shop Act against Malbeat. In his answer, Brennan interposed a cross claim for contribution.

Malbeat moved for summary judgment dismissing the complaint and all cross claims against it, and Supreme Court granted the motion.

Although the court concluded that a jury could find that Malbeat violated the Dram Shop Act, it further concluded that an intoxicated person does not have a cause of action under the statute. With respect to Brennan's cross claim, the court concluded that, because "there cannot be a finding against Malbeat, there can be no right to contribution."

Plaintiff contends on appeal only that the court erred in dismissing his fourth cause of action, asserted in his individual capacity, for loss of support pursuant to the Dram Shop Act. Brennan contends that the court erred in dismissing his cross claim for contribution against Malbeat. We agree.

"Guilty Participation" Under the Dram Shop Act

Under the Alcoholic Beverage Control Law, it is unlawful to sell, deliver or give away alcoholic beverages to "[a]ny visibly intoxicated person" (§ 65 [2]). New York's Dram Shop Act affords a person injured "by reason of the intoxication" of another person a right of action against the party that unlawfully purveyed the alcohol (General Obligations Law § 11-101 [1]; *see Mitchell v The Shoals, Inc.*, 19 NY2d 338, 340-341). The Dram Shop Act is remedial in nature and serves the dual purposes of deterring bar owners and their employees from selling alcoholic beverages to intoxicated persons and of compensating individuals injured as a result of the unlawful sale of alcohol (*see Bartlett v Grande*, 103 AD2d 671, 672).

It is well settled that an intoxicated person or his or her estate cannot maintain a cause of action under the Dram Shop Act for injuries sustained as a result of that person's own intoxication (*see Mitchell*, 19 NY2d at 340-341; *Armstrong v Petsche*, 172 AD2d 1079; *Powers v Niagara Mohawk Power Corp.*, 129 AD2d 37, 41). Thus, as plaintiff correctly concedes on appeal, the court properly dismissed the Dram Shop Act cause of action against Malbeat on behalf of decedent's estate. Plaintiff, however, may maintain a cause of action in his individual capacity for loss of support as decedent's surviving spouse (*see Coughlin v Barker Ave. Assoc.*, 202 AD2d 622, 623). Indeed, "[o]ne of the salutary purposes of the Dram Shop Act is 'to protect the [spouse] . . . of an intoxicated person when [he or she was] deprived of [his or her] means of support as a result of the intoxication" (*Adamy v Ziriakus* [appeal No. 1], 231 AD2d 80, 86, *affd* 92 NY2d 396).

Malbeat contends that plaintiff does not have a valid cause of action under the Dram Shop Act as a matter of law because he procured alcohol for decedent. We reject that contention. Pursuant to the decision of the Court of Appeals in *Mitchell* (19 NY2d at 341), the relevant inquiry is not whether plaintiff procured one or more drinks for decedent during the course of the evening but, rather, whether plaintiff caused or procured decedent's *intoxication*. In our view, Malbeat's contention that the purchase of even a single drink for decedent forecloses plaintiff's recovery under the Dram Shop Act strays from the principles articulated by the Court in *Mitchell* and

improperly restricts the remedial aims of the statute.

In *Mitchell*, the Court of Appeals concluded that, as long as the injured third party "does not himself [or herself] *cause or procure the intoxication* of the other, there is no basis, under the statute, for denying him [or her] a recovery from the party unlawfully purveying the liquor" (19 NY2d at 341 [emphasis added]). Thus, in determining whether a plaintiff may recover under the statute, the ultimate issue is whether his or her conduct constitutes "guilty participation in [the] intoxication" (*id.*). According to the Court of Appeals, a plaintiff "must play a much more affirmative role than that of drinking companion to the [intoxicated person] before [the plaintiff] may be denied recovery against the [establishment that] served" the intoxicated person (*id.*).

Malbeat cites several cases to support its contention that the purchase of even a single drink for the intoxicated person in question precludes a plaintiff's recovery under the Dram Shop Act as a matter of law (*see e.g. Bregartner v Southland Corp.*, 257 AD2d 554, 555-556; *Dodge v Victory Mkts.*, 199 AD2d 917, 920). Those cases, however, involve the provision of alcohol to minors or rely on precedent established in that context. In fact, many of those cases cite *Vandenburg v Brosnan* (129 AD2d 793, *affd* 70 NY2d 940). In *Vandenburg*, the Second Department held that the plaintiff, who purchased the beer consumed by the minor driver of the vehicle in which he was a passenger at the time of the accident, had no cognizable cause of action under the Dram Shop Act because he "procured the alcoholic beverage for the person whose intoxication allegedly caused the accident" (*id.* at 794). In our view, the rule set forth in *Vandenburg* is appropriate in cases involving minors, for whom the purchase of even a single alcoholic beverage is unlawful (*see* Alcoholic Beverage Control Law § 65 [1]). Thus, purchasing a drink for a minor or contributing money toward the purchase of alcohol for a minor alone constitutes "guilty participation" in the minor's intoxication (*see Schrader v Carney*, 198 AD2d 779, 780, *lv dismissed* 83 NY2d 801). The purchase of alcohol for minors, however, is wholly distinguishable from the facts of this case as well as the facts before the Court of Appeals in *Mitchell* inasmuch as the purchase of an alcoholic beverage for an adult is not, in and of itself, an illegal act.

In our view, the appropriate rule in cases that do not involve minors is one that balances the dual purposes of the Legislature in enacting the Dram Shop Act, i.e., to deter the sale of alcoholic beverages to visibly intoxicated persons and to compensate those injured as a result of the unlawful sale of alcohol, with the fundamental common law principle that a person may not profit from his or her own wrongdoing (*see generally Barker v Kallash*, 63 NY2d 19, 24-25). It is in accordance with the latter principle that an intoxicated person is precluded from recovery under the Dram Shop Act for injuries occasioned by his or her own intoxication (*see generally Mitchell*, 19 NY2d at 340-341). We thus conclude by the same reasoning that a person who affirmatively causes or encourages the intoxication of another person should not be permitted to assert a cause of action

under the Dram Shop Act for injuries sustained as a result of that person's intoxication, because his or her conduct constitutes "guilty participation" under *Mitchell* (19 NY2d at 341; *see also Conrad v Beck-Turek, Ltd.*, 891 F Supp 962, 970).

While the act of purchasing drinks for the intoxicated person may be sufficient to preclude recovery under the Dram Shop Act, we conclude that the mere act of purchasing drinks for a companion prior to his or her visible intoxication, without more, is insufficient to constitute "guilty participation" as a matter of law. As the Michigan Court of Appeals reasoned in *Arciero v Wicks* (150 Mich App 522, 529, 389 NW2d 116, 120):

> "Were we to hold that the mere act of buying drinks for a person prior to visible intoxication of that person is sufficient to render the drink-buyer, as a matter of law, an active participant and a noninnocent party, anyone who bought a drink for another would automatically be precluded from recovery under the [Michigan] dramshop act for injuries caused by the recipient of the drink. For example, a party who bought drinks for a sober or apparently sober person early in the evening, parted ways with that person, and later that evening was somehow injured by that person (who had independently become very drunk) would be precluded from recovery. We cannot agree with this result."

Here, although plaintiff admits that he purchased two drinks for decedent during the course of the evening, there is also evidence that decedent obtained her own drinks, that the couple's friends purchased alcohol for decedent, that the bar provided Jell-O shots directly to decedent, and that plaintiff and decedent were apart for much of the party. It is undisputed that plaintiff purchased decedent her first drink of the night. It is not clear, however, at what point plaintiff purchased the second drink, nor does the record establish decedent's state of intoxication or sobriety at the time of that purchase. We thus conclude that there is a triable issue of fact whether plaintiff caused or procured decedent's intoxication (*see Baker v John Harvards Brew House, LLC*, 43 AD3d 840), and that the court therefore erred in dismissing the Dram Shop Act cause of action asserted by plaintiff in his individual capacity against Malbeat.

Causation

Malbeat further contends that, in any event, dismissal of the complaint was warranted because there is no causal connection between Malbeat's alleged violation of the Dram Shop Act and decedent's death. Specifically, Malbeat contends that several intervening events broke the chain of causation between the alleged unlawful sale of alcohol and decedent's death several hours later. We reject that contention. At the outset, we note that, in an action to recover under the Dram Shop Act, "there must be 'some reasonable or practical connection'

between the sale of alcohol and the resulting injuries; proximate cause, as must be established in a conventional negligence case, is not required" (*McNeill v Rugby Joe's, Inc.*, 298 AD2d 369, 370; *see Adamy*, 231 AD2d at 88; *Bartkowiak v St. Adalbert's R. C. Church Socy.*, 40 AD2d 306, 310).

Thus, provided that there is a reasonable or practical connection between the unlawful sale and the resulting injuries, the presence of intervening acts or independent wrongdoing does not eliminate liability under the Dram Shop Act (*see generally Bertholf v O'Reilly*, 74 NY 509, 524; *Daggett v Keshner*, 284 App Div 733, 737-738). In *Bartkowiak*, for example, this Court concluded that there was sufficient evidence of a violation of the Dram Shop Act to create an issue of fact for the jury where the intoxicated person consumed beer at a party, went home, obtained a kitchen knife, concealed the knife in his pants, returned to the party, purchased additional beer, and stabbed the plaintiff's decedent (*see* 40 AD2d at 308-310). Also, in *Church v Burdick* (227 AD2d 817), the intoxicated defendant returned to his home after an afternoon of drinking and fell asleep. He had been sleeping for 10 to 15 minutes when the plaintiff's decedent arrived and the two became involved in an argument, whereupon the intoxicated defendant pointed a firearm at the decedent, the weapon discharged, and the decedent was killed. Despite the intervening events between the unlawful sale of alcohol and the decedent's death, the Third Department concluded that there was a triable issue of fact with respect to causation (*id.* at 818; *see Etu v Cumberland Farms*, 148 AD2d 821, 822-823 [the decedent's parents had a cause of action under the Dram Shop Act where the underage decedent purchased beer from the defendant, consumed it with his friends, returned home, obtained his mother's car keys from her purse, took the car without permission, and was then involved in a fatal car accident]).

Here, it cannot be said as a matter of law that there was no reasonable or practical connection between Malbeat's alleged unlawful sale of alcohol to decedent and her subsequent death. Decedent's mother and police witnesses testified at their respective depositions that decedent was intoxicated when she arrived at her mother's house. There is nothing in the record to suggest, let alone establish, that decedent was no longer intoxicated when she set off on foot 45 to 60 minutes later in a fatal quest to find her husband. To the contrary, the unreasonableness of decedent's insistence on walking to the police station to find her husband, despite having watched him being taken away in an ambulance earlier in the evening and having been informed by the police that he was being transported to the hospital, suggests that the conduct of decedent was the result of her continued intoxication. Thus, Malbeat failed to meet its burden of establishing its entitlement to judgment as a matter of law, and the issue of causation should be resolved by the jury (*see Bartkowiak*, 40 AD2d at 310).

Brennan's Cross Claim for Contribution

We further conclude that the court erred in dismissing Brennan's

cross claim for contribution against Malbeat. CPLR 1401 provides that

> "two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought." The right to contribution "applies regardless of the theory or consistency of theory upon which liability may be imposed either as to the claims between them or the main claim" (*Smith v Guli*, 106 AD2d 120, 123).

Brennan and Malbeat are both subject to liability for the same injury, i.e., the death of plaintiff's decedent. The fact that Brennan is subject to liability for damages under New York's wrongful death statute, while Malbeat is subject to liability for plaintiff's loss of support pursuant to the Dram Shop Act, does not render the cross claim for contribution invalid. As we recognized in *Fox v Mercer* (109 AD2d 59),

> "[D]ram [S]hop defendants and other alleged tort-feasors responsible for the same personal injury or wrongful death may claim contribution among themselves as to compensatory damages awarded to the injured party . . . This right of contribution reflects a consensus that in a [D]ram [S]hop action, the vendor of alcohol and other alleged tort-feasors are 'subject to liability for damages for the same personal injury, injury to property or wrongful death' " (109 AD2d at 64-65, quoting CPLR 1401).

It is well settled that the vendor of alcohol and an intoxicated tortfeasor may seek contribution from each other (*see e.g. Cresswell v Warden*, 164 AD2d 855, 856-857; *Herrick v Second Cuthouse*, 100 AD2d 952, *affd* 64 NY2d 692), and that co-vendors may also seek contribution from each other (*see Smith*, 106 AD2d at 123). We see no reason to distinguish cases where, as here, a tortfeasor seeks contribution for injuries he or she caused to an intoxicated pedestrian from the establishment that unlawfully served alcohol to the pedestrian. The right of contribution "requir[es] only that the party seeking contribution and the party from whom contribution is sought be liable, in whole or in part, for the same injury" (*Anderson v Comardo*, 107 Misc 2d 821, 823). In this case, there is an issue of fact whether Brennan and Malbeat "jointly caused plaintiff's injuries, thereby requiring an apportionment of their respective fault" (*Strassner v Saleem*, 156 Misc 2d 768, 771). "The critical requirement for apportionment under . . . CPLR [a]rticle 14 is that the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought" (*Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.*, 71 NY2d 599, 603).

Here, there is an issue of fact whether the alleged breach by Malbeat of its statutory duty not to provide alcohol to a visibly intoxicated person contributed to the presence of decedent on the roadway when she was struck by Brennan's vehicle, thereby contributing to the chain of events that resulted in her death.

Conclusion

Accordingly, we conclude that the order insofar as appealed from should be reversed, Malbeat's motion for summary judgment denied in part and the fourth cause of action, asserted in plaintiff's individual capacity pursuant to the Dram Shop Act, and Brennan's cross claim for contribution against Malbeat reinstated.

HURLBUTT, J.P., CENTRA and GORSKI, JJ., concur with PERADOTTO, J.; CARNI, J., dissents and votes to affirm in the following Opinion: I respectfully dissent. I agree with the majority that there is a triable issue of fact whether plaintiff caused or procured the intoxication of his wife (decedent) (*see Baker v John Harvards Brew House, LLC*, 43 AD3d 840). I nevertheless conclude, however, that Supreme Court properly granted those parts of the motion of defendant Malbeat, Inc., doing business as Mallwitz's Island Lanes (Malbeat), for summary judgment dismissing the fourth cause of action, asserted in plaintiff's individual capacity, for a violation of the Dram Shop Act (General Obligations Law § 11-101), as well as the cross claim of defendant Robert E. Brennan against Malbeat. In my view, based on the undisputed facts as set forth herein, the majority is incorrect in concluding that it cannot be said as a matter of law that there was no "reasonable or practical connection" between the alleged unlawful sale of alcohol by Malbeat to decedent and the inconceivable and unimaginable confluence of circumstances and intervening actions giving rise to decedent's tragic death (*see Barry v Gorecki*, 38 AD3d 1213, 1215-1216; *see generally Bartkowiak v St. Adalbert's R. C. Church Socy.*, 40 AD2d 306, 310).

On the evening in question, plaintiff and decedent were attending a Halloween party at Mallwitz's Island Lanes (Island Lanes). Decedent was dressed entirely in black, as a witch. Following the altercation in the parking lot described by the majority, decedent was safely transported from Island Lanes to her mother's home by a Sheriff's Deputy at approximately 1:30 A.M.[1] Decedent's mother was awakened upon decedent's arrival. Approximately one hour later decedent's mother went to use the bathroom and decedent, still dressed in her black witch costume, left the home on that moonless October night and began to walk on an unlit road to the police station in an effort to

[1]On the night in question, the change from Daylight Savings Time (DST) to Eastern Standard Time (EST) was effectuated within the Sheriff's Department as of 2:00 A.M. DST. Thus, the Sheriff's Department dispatch records reflect that the call related to the altercation at Island Lanes came in at "1:41:28 DST" and decedent was transported to her mother's home at "1:33:57 EST." This of course would have been recorded as "2:33:57 DST" had DST remained in effect.

find plaintiff.

Decedent's mother realized that decedent had left the home and drove along Whitehaven Road, where she found her daughter walking on the shoulder of the road in the direction of the police station. Decedent's mother attempted to pull decedent into the vehicle but was unable to do so. Decedent's mother then returned home in her vehicle, called 911 and waited for the police to bring decedent home. The 911 call log indicates that the call from decedent's mother was received at 3:18 A.M. Decedent's mother did not drive alongside decedent with her lights flashing, nor did she attempt to provide any other protective measures as decedent walked along the dark road in her black witch costume.

Coincidentally, Brennan, an early riser, was simultaneously returning to his home on Whitehaven Road after having driven to the store to buy a newspaper. At approximately 3:25 A.M., Brennan approached his home on Whitehaven Road and attempted to back into his driveway. During that maneuver, Brennan's left side mirror hit decedent and knocked her down. Brennan got out of his vehicle and observed decedent on the ground at the "fog line" on the eastbound lane of the road. According to Brennan, decedent was moving and moaning. Without moving decedent to a place of safety or otherwise providing her with any assistance, Brennan reentered his vehicle and decided to drive rather than walk the remaining 100 yards to his house, whereupon he called 911. Brennan did not leave his vehicle at the scene with its lights flashing, nor did he take any measures to protect decedent from further injury when he left the scene to call 911. The 911 call log indicates that Brennan's call was received at 3:28 A.M.

At 3:29 A.M., the same Sheriff's Deputy who had delivered decedent to the safety of her mother's home earlier that morning responded to a 911 call reporting that a woman was walking in the center of Whitehaven Road. While en route to Whitehaven Road, that Sheriff's Deputy, followed by another Sheriff's Deputy, received another dispatch to respond to a 911 call reporting that a pedestrian had been struck by a vehicle on Whitehaven Road.

While driving along Whitehaven Road at approximately 3:30 A.M., the Sheriff's Deputy who had driven decedent to her mother's home drove his patrol vehicle over decedent as she lay in the eastbound lane. Decedent died as a result of the injuries she sustained when she was run over by the patrol vehicle.

In my view, the majority's conclusion that these undisputed facts do not establish as a matter of law that there was no "reasonable or practical connection" between Malbeat's alleged unlawful sale of alcohol to decedent and her death has effectively stripped the limiting phrase "reasonable or practical connection" of any meaning or boundary.

Although it is well settled that, with respect to a cause of action pursuant to the Dram Shop Act, "[p]roximate cause, as must be

established within the context of a conventional common-law negligence action, is not required" (*Church v Burdick*, 227 AD2d 817, 818), there must still be "some reasonable or practical connection between the unlawful sale" of alcohol and the injury or death (*Adamy v Ziriakus* [appeal No. 1], 231 AD2d 80, 88, *affd* 92 NY2d 396 [internal quotation marks omitted]). Indeed, this Court has found the absence of a "reasonable or practical connection" in circumstances less extraordinary than those here. In *Barry*, we concluded that there was " 'no reasonable or practical connection between the alleged unlawful sale of alcohol' " and the injuries sustained by the plaintiff's 18-year-old son as a matter of law, where the alcoholic beverage vendor sold beer to a 20 year old who hosted a party at which the plaintiff's son became intoxicated (*id.* at 1215-1216). When the police were called to the party, the plaintiff's son fled and fell from a cliff at the edge of the backyard (*id.* at 1215). In my view, the extraordinary circumstances presented here far exceed those in *Barry* in determining whether there was a "reasonable or practical connection" between the unlawful sale of alcohol and decedent's death.

The cases relied upon by the majority are distinguishable from this case for the simple reason that they involve circumstances readily embraced by the "reasonable or practical connection" standard. *Bertholf v O'Reilly* (74 NY 509, 511) involved a horse that died as a result of being overdriven by the plaintiff's intoxicated son. *Bartkowiak* involved an individual who was stabbed to death by an intoxicated 15-year-old boy who had purchased his last beer five minutes before the stabbing (*id.* at 307-308). *Etu v Cumberland Farms* (148 AD2d 821) involved the sale of beer to a 15-year-old boy who, upon becoming intoxicated, drove his family's car without permission and died in a one-car accident. Lastly, *Church* involved the unlawful sale of alcohol to a defendant who returned home in an intoxicated condition and shot and killed the plaintiff's decedent when he stopped by the defendant's home (*id.* at 817). The common element in those cases is that the intoxicated person directly inflicted some injury upon himself or a third party or, in the *Bertholf* case, a horse.

In contrast, this case involves the intervening actions of three sober individuals who directly altered the course of events beyond any "reasonable or practical connection" to Malbeat's alleged unlawful sale of alcohol to decedent. The Sheriff's Deputy drove decedent from Island Lanes to her mother's home and thus placed her in a position of safety. Decedent's mother permitted decedent to leave the home, dressed in her black witch costume, and to walk along Whitehaven Road on a moonless night. Brennan struck decedent in the roadway and decided to leave her there, injured, unattended and with no indicators that she was there, while he drove from the scene to call 911. The Sheriff's Deputy returned to the scene with the knowledge that a pedestrian was walking on the roadway on a moonless night, and he drove over her in the location where she had been left after being hit by Brennan's vehicle.

Accordingly, I would affirm the order granting those parts of the motion of Malbeat for summary judgment dismissing the fourth cause of

action, asserted in plaintiff's individual capacity, for a violation of the Dram Shop Act, and Brennan's cross claim against it on the ground that, under the circumstances presented here, there is no reasonable or practical connection between the alleged unlawful sale of alcohol to decedent and her death (*see Barry*, 38 AD3d at 1215-1216).

Entered: August 28, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

952

KA 08-00142

PRESENT: MARTOCHE, J.P., CENTRA, PERADOTTO, GREEN, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TODD A. KENDALL, DEFENDANT-APPELLANT.

GARY A. HORTON, PUBLIC DEFENDER, BATAVIA (BRIDGET L. FIELD OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (WILLIAM G. ZICKL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered November 1, 2007. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by amending the order of protection and as modified the judgment is affirmed, and the matter is remitted to Genesee County Court for further proceedings in accordance with the following Memorandum: Defendant appeals from a judgment revoking the sentence of probation imposed upon his conviction of sexual abuse in the first degree (Penal Law § 130.65 [3]) and sentencing him to a determinate term of imprisonment of four years. County Court also issued a final order of protection with an expiration date of November 4, 2016. We agree with defendant that "the duration of the order of protection is invalid inasmuch as the expiration date of the order does not comply with the provisions of CPL [530.12 (5)] in effect at the time the judgment" convicting defendant of sexual abuse in the first degree was rendered (*People v Goins*, 45 AD3d 1371, 1372). We therefore modify the judgment by amending the order of protection, and we remit the matter to County Court to specify in the order of protection an expiration date in accordance with CPL 530.12 (former [5]), the version of the statute in effect on May 31, 2006, the date on which the judgment convicting defendant of sexual abuse in the first degree was rendered. Finally, the sentence is not unduly harsh or severe.

Entered: August 28, 2009

Patricia L. Morgan
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

965

CA 09-00501

PRESENT: SMITH, J.P., FAHEY, PINE, AND GORSKI, JJ.

IN THE MATTER OF DANIEL JOHNSON,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

NEW YORK STATE DIVISION OF PAROLE,
RESPONDENT-RESPONDENT.

THOMAS J. EOANNOU, BUFFALO, FOR PETITIONER-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (KATE H. NEPVEU OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Christopher J. Burns, J.), entered December 17, 2008 in a proceeding pursuant to CPLR article 78. The judgment dismissed the amended petition.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the amended petition is granted, the determination is annulled, and the matter is remitted to respondent for a de novo hearing before a different panel within 60 days of the date of service of the order of this Court with notice of entry.

Memorandum: Petitioner appeals from a judgment dismissing his amended petition pursuant to CPLR article 78 seeking to annul the determination of respondent, New York State Division of Parole (Parole Board), in December 2007 denying him parole release for the third time. As we noted on the appeal by petitioner from the judgment dismissing his petition seeking to annul the determination in December 2005 denying him parole release for the second time (*Matter of Johnson v Dennison*, 48 AD3d 1082), petitioner was convicted of murder in the second degree (Penal Law §§ 20.00, 125.25 [1]) in 1989 on a theory of accessorial liability and received the minimum sentence, i.e., 15 years to life imprisonment (*see* § 70.00 [2] [a]; [3] [a] [i]). We agree with petitioner that Supreme Court should have granted his amended petition, which sought to annul the determination and to direct respondent to conduct a de novo hearing before a different panel.

It is of course well settled that parole release determinations are discretionary and entitled to deference (*see* Executive Law § 259-i [5]; *see generally Matter of Silmon v Travis*, 95 NY2d 470, 476). The

Parole Board is required, however, "to give fair consideration to each of the applicable statutory factors as to every person who comes before it, and where the record convincingly demonstrates that the [Parole] Board did in fact fail to consider the proper standards, the courts must intervene" (*Matter of King v New York State Div. of Parole*, 190 AD2d 423, 431, *affd* 83 NY2d 788; *see also Matter of Mitchell v New York State Div. of Parole*, 58 AD3d 742; *see generally* § 259-i [1] [a]; [2] [c] [A]). Although the Parole Board need not expressly refer to the relevant statutory factors in its determination (*see King*, 190 AD2d at 431), we conclude that the determination of the Parole Board in this case fails to comply with the requirement of Executive Law § 259-i (2) (a) that the reasons for denial of parole be "given in detail and not in conclusory terms." Indeed, the only reason for the Parole Board's denial of parole that is discernable from the perfunctory reference to "[t]he violence associated with this terrible crime" is that the determination was based solely upon the seriousness of the crime. "The Legislature, however, has not defined 'seriousness of [the] crime' in terms of specific categories of either crimes or victims and it is apparent that in order to preclude the granting of parole exclusively on this ground there must have been some significantly aggravating or egregious circumstances surrounding the commission of the particular crime" (*King*, 190 AD2d at 433). Here, the mere reference to the violence of the crime, without elaboration, does not constitute the requisite "aggravating circumstances beyond the inherent seriousness of the crime itself" (*id.*).

Further, the record is devoid of any indication that the Parole Board in fact considered the statutory factors that weighed in favor of petitioner's release, such as petitioner's exemplary institutional record and the favorable remarks of County Court at the time of sentencing. In fact, during the notably truncated hearing, the Parole Board focused on matters unrelated to any statutory factor. We therefore conclude on the record before us that the Parole Board failed to weigh all of the relevant statutory factors (*see Mitchell*, 58 AD3d at 743), and that there is "a strong indication that the denial of petitioner's application was a foregone conclusion" (*King*, 190 AD2d at 431-432).

Entered: August 28, 2009 Patricia L. Morgan
Clerk of the Court