

***State of New York
Court of Appeals***

Summaries of cases before the Court of Appeals are prepared by the Public Information Office for background purposes only. The summaries are based on briefs filed with the Court. For further information contact Gary Spencer at (518) 455-7711.

NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

Week of September 15 - 17, 2009

State of New York Court of Appeals

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To be argued Tuesday, September 15, 2009

No. 132 St. Lawrence Factory Stores v Ogdensburg Bridge and Port Authority

St. Lawrence Factory Stores, a partnership of Frank Arvay and Richard Lepine, entered into an option contract with the Ogdensburg Bridge and Port Authority (OBPA) in February 1990 for an option to buy 12 acres of land to develop a retail factory outlet center. The contract also provided, "Since the objective of [OBPA] in offering this option is not merely the sale of land but rather to encourage the development of this specific project, [Factory Stores] shall erect a retail factory outlet and related facilities on said TRACT and said TRACT shall not be used by [Factory Stores] for any other purpose or purposes." Arvay, who eventually held an 85 percent interest in the partnership, sought financing and tenants for the project and exercised the option in July 1991. OBPA sent a letter to the partners in October 1991 expressing "concern about the viability of your project and your ability to perform" and threatening to void the contract if they did not provide proof of adequate financing by the end of the month. The partnership responded that, under the contract, securing financing was not a condition precedent to closing, which was scheduled for January 1992. At the closing, Arvay tendered his 85 percent share of the \$298,000 purchase price, but Lepine refused to tender his share and walked out. Arvay then offered his personal check for the remaining 15 percent, but OBPA refused to accept it and declined to close.

The Factory Stores partnership sued for breach of contract seeking, among other things, reliance damages for recoupment of its investment costs. Supreme Court partially granted OBPA's summary judgment motion by dismissing the partnership's claims for reliance damages and lost profits. The Appellate Division, Third Department affirmed. Regarding reliance damages for costs incurred by Factory Stores in preparing to develop the site, the Appellate Division said, "The contract in question does not require plaintiff to engage in any of the preparatory tasks for which it seeks to be compensated. Simply put, this is a contract for the sale of land requiring plaintiff to tender defendant the sale price upon closing. Accordingly, plaintiff's reliance damages would encompass only those ordinarily incurred regarding such a contract, such as a title search, survey and attorney's closing fees."

After a bench trial, Supreme Court found that OBPA had breached the option contract in bad faith, but it awarded no damages. The Appellate Division affirmed.

Factory Stores argues that it should have been allowed to recover reliance damages because its expenses "were incurred in reliance upon the contract, they are ascertainable, and they arose naturally from defendant's breach in the ordinary course of things." It contends the Appellate Division mischaracterized the contract as one solely for the sale of land, saying the option contract "not only mandated the purchase and sale of the subject property, it also contractually obligated the plaintiff to develop/build, at its own cost, the very outlet center that plaintiff intended to develop/build anyway." Factory Stores also argues it is entitled to damages for lost profits and benefit of the bargain damages.

For appellant St. Lawrence Factory Stores: David C. Buran, Burlington, VT (802) 862-7070
For respondent OBPA: A. Paul Britton, Rochester (585) 232-6500

State of New York Court of Appeals

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To be argued Tuesday, September 15, 2009

**No. 133 Matter of Transitional Services of New York For Long Island, Inc.
v New York State Office of Mental Health**

Transitional Services of New York for Long Island, Inc. (TSLI), a not-for-profit corporation based in Brentwood, provides housing and support services for the mentally ill under contract with the State Office of Mental Health (OMH). As it does for other mental health providers, OMH determines TSLI's approved operating costs for each budget year and subtracts the provider's anticipated revenue from Medicaid, Supplemental Social Security Income, client fees, and private grants. OMH then covers the shortfall, if any, with state aid pursuant to Mental Hygiene Law § 41.44. In addition, Mental Hygiene Law § 41.38 authorizes OMH to reimburse providers "for the reasonable cost of rental of ... a community residence or a residential care center for adults."

In January 2004, OMH determined that it was entitled to recoup \$563,820 in excess Medicaid funds that TSLI had received from 1999 to 2002. The determination was based on guidelines OMH issued in 1996 allowing providers to retain just half of any Medicaid revenue they receive in excess of their "budgeted income expectation." In April 2004, OMH determined that two apartments TSLI rents for use by its staff, located adjacent to blocs of apartments housing TSLI clients, were not reimbursable as residential property under section 41.38, but should instead be treated as operating costs under section 41.44, which OMH declined to cover because the cost exceeded the cap set in the annual budget. TSLI brought this article 78 proceeding to challenge both determinations.

Supreme Court granted TSLI's petition and annulled the determinations. Regarding recoupment, it said, "There is neither a rational basis nor statutory authorization for the recovery of earned revenue from legitimately appropriated provider funds for allowable costs under the OMH Spending Plan Guidelines.... In the absence of a hearing demonstrating that the overage is in fact an excess Medicaid allocation and Medicaid exempt, the policy proposed condones overspending or underspending by the provider of necessary costs and expenses intended for the psychiatrically disabled to prevent recoupment by OMH." It also ruled that OMH's refusal to reimburse TSLI for rental of the staff apartments "without basis or a hearing" was "irrational, arbitrary, capricious and contrary to law."

The Appellate Division, Second Department modified by denying TSLI's challenge to the recoupment determination. It said, "[T]he recoupment policy was contained in OMH's guidelines, which were issued pursuant to Mental Hygiene Law § 41.44(c), and [TSLI] agreed to the guidelines. Furthermore, the recoupment policy serves a valid purpose, as it effectively allows OMH to recoup an overpayment of state funds." However, it held there was no rational basis for OMH's determination that the rental cost of the staff apartments was not reimbursable under section 41.38. It said "... those apartments were 'used to provide support services' for [TSLI's] clients, and thus, were used to provide services that an operator of an adult residential program is required to provide.... Accordingly, the cost of renting those apartments must be considered a part of the 'reasonable cost of rental' of a community residence.

For appellant-respondent OMH: Deputy Solicitor General Benjamin N. Gutman (212) 416-8014
For respondent-appellant TSLI: Roy W. Breitenbach, Great Neck (516) 393-2200

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To be argued Tuesday, September 15, 2009

No. 134 Matter of Save the Pine Bush, Inc. v Common Council of the City of Albany

This environmental case arose in 2003, when Tharaldson Development Company applied to the City of Albany to rezone a 3.6 acre site near the Pine Bush Preserve from single family residential to commercial use to permit construction of a 124-room hotel. The site is adjacent to Butterfly Hill, a protected area that maintains a population of endangered Karner blue butterflies and is separated from the main body of the preserve. One of the long-term goals of the preserve is to induce Karner blues to migrate from Butterfly Hill to the preserve.

The Albany Common Council assumed lead agency status for the State Environmental Quality Review Act (SEQRA) process and directed Tharaldson to prepare an environmental impact statement (EIS). The U.S. Fish and Wildlife Service, State Department of Environmental Conservation (DEC), and Albany Pine Bush Commission expressed concern that the EIS did not consider possible impacts on rare or threatened species other than the Karner blue. The Common Council adopted a resolution in December 2005 accepting the SEQRA findings statement that the project would have no significant environmental impact and rezoned the parcel for commercial use. Save the Pine Bush, Inc., a not-for-profit group dedicated to protecting the pine bush habitat, and nine individual members of the organization brought this article 78 proceeding to challenge the Council's SEQRA determination and rezoning decision.

Supreme Court denied the Common Council's motion to dismiss the suit for lack of standing, finding the petitioners had standing to sue based on their claims that the project "will diminish their use and enjoyment of the area." The court subsequently annulled the rezoning decision, ruling that while the Council had properly considered possible impacts on the Karner blue butterfly, it failed to take the required hard look at possible impacts on other rare species, including the frosted elfin butterfly, hognosed snake, worm snake, and eastern spadefoot toad.

The Appellate Division, Third Department affirmed, splitting 3-2 on the issue of standing to sue under Society of the Plastics Industry v County of Suffolk (77 NY2d 761 [1991]). The majority held that the individual petitioners "adequately alleged that their use and enjoyment of the Preserve, coupled with their historic involvement in its creation, protection and preservation, is so significant as to establish an injury greater than that suffered by the public at large. As a result, as at least one of its individual members has standing, Save the Pine Bush has standing that flows therefrom."

The dissenters argued the petitioners failed to establish standing, saying that "even where a proposed project will harm the petitioners' use and enjoyment of public resources -- such as lakes or public parks -- the petitioners must demonstrate that an alleged SEQRA violation 'will result in [their] suffering that harm to a greater degree' than the rest of the public due to, for example, the proximity of their property to the affected site...."

In an amicus curiae brief, the DEC urges the Court to affirm the Appellate Division's ruling on standing, saying it "has become increasingly concerned that some lower court decisions have misapplied [the Plastics Industry case] in a manner that deprives appropriate petitioners of judicial review of the merits of their SEQRA claims."

For appellants Common Council: Jeffery V. Jamison, Albany (518) 434-5050

For respondents Save the Pine Bush et al: Stephen F. Downs, Selkirk (518) 767-0102

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To be argued Tuesday, September 15, 2009

No. 135 IDT Corp. v Tyco Group, S.A.R.L.

IDT Corp. and affiliates of Tyco Telecommunications entered into a settlement agreement in October 2000 to resolve litigation over a failed fiber optic communications venture. The settlement required Tyco to provide fiber optic capacity to IDT on a network Tyco was building to connect North America, Asia and Europe, and it specified the amounts of capacity, the times, the price, the configuration and the endpoints of the service. The settlement also required the parties to negotiate additional agreements, including an indefeasible right of use (IRU) agreement for IDT's use of the fiber optic network that was to be "consistent with" the standard agreements Tyco was developing for use with other customers "and, in any event, containing terms and conditions consistent with those described herein."

In June 2001, Tyco proposed an IRU that would have allowed it to shut down the network after five years, requiring IDT to relinquish its right under the settlement to use the network free of charge for 15 years, and another provision that would have required IDT to forgo its damage remedies in the event Tyco breached the settlement agreement. Negotiations continued, off and on, until March 2004. Two months later, IDT commenced this action for breach of the settlement agreement. In 2007, Supreme Court granted IDT's motion for summary judgment on the issue of liability.

The Appellate Division, First Department reversed the order and dismissed the suit, finding there was no breach. The settlement agreement was not fully enforceable when the parties entered into it because essential terms remained indeterminate until Tyco devised its standard customer agreements, the court said. Once those standard agreements were completed, the settlement "would have been fully enforceable if either side insisted that the open terms be as set forth in [Tyco's] standard agreements," it said, but IDT never made such a demand. The court also said Tyco did not breach the settlement with its June 2001 proposal containing terms that IDT contends were inconsistent with the settlement, nor was the proposal "'the sort of definite and final communication' of 'an intent to forgo [their] obligations' that is 'necessary to justify a claim of anticipatory breach.'"

IDT argues that the Appellate Division, relying on federal cases, erred in finding the settlement was a non-binding preliminary agreement. "Controlling New York law requires enforcement of settlement agreements absent fraud, collusion, or mistake," IDT says, and had the court properly applied state law, "it would have concluded that the settlement agreement is a complete, binding contract -- just as the contract itself recites." IDT argues Tyco's June 2001 proposal constituted a breach because the settlement "was clear that the IRU document must be consistent with the settlement agreement" and because "Tyco did not merely 'propose' contrary terms; it insisted on them." Alternatively, IDT argues that summary judgment is precluded by disputed issues of fact.

For appellant IDT: Stephen P. Younger, Manhattan (212) 336-2000

For respondent Tyco: Thomas E. L. Dewey, Manhattan (212) 943-9000

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To be argued Wednesday, September 16, 2009

No. 136 Matter of Gomez v Stout

Valerie Gomez began working for the Westchester County Department of Parks, Recreation and Conservation in 1979 and became an assistant games manager at the County's Playland amusement park in January 2001. In May 2002, she was served with a notice of multiple charges of misconduct including discourteous treatment of patrons, failure to follow procedures for supervision of the skating rink, and failure to comply with the time and attendance policy. One of the discourteous treatment charges arose from the complaint of John and Susan Evangelista, the brother- and sister-in-law of Joseph Stout, Commissioner of the Parks Department. At Gomez's disciplinary hearing, which was held on various dates from November 2002 to April 2005, Stout, his wife, and the Evangelistas were called to testify as witnesses. The hearing officer found the misconduct charges were supported by substantial evidence and recommended termination of Gomez's employment.

Stout disqualified himself from acting on the matter and designated Ralph Butler, Commissioner of the Westchester County Department of Public Works, to review the hearing officer's report and render a final determination. Butler adopted the hearing officer's findings of fact and recommended penalty and left the termination date up to Stout. Stout notified Gomez on November 2, 2005 that her termination was effective immediately. Gomez brought this article 78 proceeding against Stout, Butler and the County (collectively County) to overturn the determination, contending, among other things, that Stout's designation of Butler was improper under Civil Service Law § 75, which generally requires that disciplinary hearings "be held by the officer or body having the power to remove the person against whom such charges are preferred, or by a deputy or other person designated by such officer or body...."

The Appellate Division, Second Department granted Gomez's petition, annulled the determination, and remitted the matter to Stout "for the appointment of a duly-qualified individual authorized to review the recommendation of the hearing officer." The court said Stout "properly disqualified himself from reviewing the [report] and acting on any of the charges because of his personal involvement with the case. However, the Deputy Commissioner [of Parks] is the only individual authorized to act in the Commissioner's absence (see Westchester County Charter § 134.41)."

The County argues that Stout's designation of Butler was proper under a judicial exception to Civil Service Law § 75, applying to cases in which the official with power to remove the charged employee has a conflict. The County says the Appellate Division's ruling "that Stout could only designate a Deputy Commissioner (a subordinate subject to ... Stout's supervision), as opposed to the Commissioner of another County Department (a peer not subject to ... Stout's supervision), as his agent to render a final determination undermines the public policy supporting the exception -- which is to insure the fairness of such a final determination."

In her cross-appeal, Gomez argues that she is entitled to be reinstated to her job, with back pay and benefits, until a "lawful" determination is rendered.

For appellants-respondents County et al: Thomas G. Gardiner, White Plains (914) 995-3652
For respondent-appellant Gomez: Jonathan Lovett, White Plains (914) 428-8401

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To be argued Wednesday, September 16, 2009

**No. 138 Matter of Joan Hansen & Company, Inc. v
Everlast World's Boxing Headquarters Corp.**

Joan Hansen & Company began serving as a non-exclusive licensing agent for Everlast World's Boxing Headquarters Corp. in 1983, receiving commissions on license agreements it secured for Everlast. The parties continued the arrangement by entering into a new agreement in January 1994. The agreement provided that it would expire on December 31, 2004, unless it was terminated earlier by either party for cause. Section VI(3)(e) of the agreement provided that Hansen would receive royalty payments "for so long as licensees [it had secured] remain licensees of EVERLAST, except that: ... In the event of a termination of this Agreement, HANSEN shall continue to receive consultation fees on existing agreements for the earlier of two (2) years after the termination or the end of the license agreements then in [e]ffect."

Everlast terminated the agreement in January 2003, alleging cause on various grounds, and Hansen demanded arbitration. In April 2005, a panel of AAA arbitrators determined that Everlast "lacked any valid ground" for early termination, that the termination notice was "void, invalid and of no effect," and that Everlast must make royalty payments "as though no termination notice was given." Supreme Court confirmed the award. Everlast made payments to Hansen through December 31, 2006, two years after the agreement's expiration date, then refused to make further payments. Hansen moved in Supreme Court to hold Everlast in contempt, contending that because the agreement was not terminated early for cause, it was entitled to royalties under section VI(3)(e) for so long as its licensees remain licensees of Everlast. Supreme Court denied the contempt motion, saying the arbitrators had not ruled on the meaning of "termination" in the section nor determined how long Everlast was obligated to pay.

Hansen sought to re-open the arbitration proceeding, asking the arbitrators to "clarify the Award to make plain" that their determination obligated Everlast to pay royalties for so long as its licensees remained with Everlast. Everlast moved to permanently stay the arbitration, arguing that "modification" of the award was barred by CPLR 7509, which requires a party seeking modification from the arbitrators to apply within 20 days of receipt of the award, or CPLR 7511, which requires that a party applying to a court to modify or vacate an award must act within 90 days of receipt of the award. Supreme Court denied Everlast's motion to stay the proceeding.

The Appellate Division, First Department affirmed, saying Hansen was seeking "a clarification, rather than a modification" of the arbitration award and, therefore, "the time limitations of CPLR 7509 and 7511 do not bar [Hansen's] application." The court also rejected Everlast's claim that Hansen's application improperly raised a new issue that the arbitrators had not considered, since Everlast's defense in the original proceeding "was based on the very provision" that Hansen seeks to clarify.

Everlast contends that once an arbitration award has been confirmed by the courts and the time to appeal has expired, arbitrators have no power to issue subsequent rulings. It argues that CPLR 7509 and 7511 govern requests for clarification and, therefore, Hansen's request is time-barred. It also argues that Hansen's request raises a new issue before the arbitrators.

For appellant Everlast: Jed R. Schlacter, Manhattan (212) 695-2000

For respondent Hansen: George Berger, Manhattan (212) 977-9700

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To be argued Wednesday, September 16, 2009

No. 139 People v Quentin Abney

No. 140 People v Gregory Allen

The common question in these appeals is whether the trial courts abused their discretion in denying defense requests to present expert testimony on factors that could impair the reliability of eyewitness identifications.

In Case No. 139, Quentin Abney was convicted of first-degree robbery and sentenced to 20 years to life in prison for the mugging of a 13-year-old girl in a subway station at Essex and Delancey Streets in Manhattan. The victim said the robber asked her for change, walked on past, then came back in front of her, put a knife to her throat, and demanded her gold necklace. She screamed "no" three or four times before he snatched the necklace. She said the incident lasted a few seconds. Less than an hour later, she identified Abney in a police photo array; and 20 days later, she picked him out of a line-up.

At trial, after the prosecution rested, the defense sought to admit expert testimony on factors that could impair the victim's identification, including the brevity of the incident, the violent circumstances and the victim's fear, and the increased likelihood of mistakes in cross-racial identifications. There was no physical evidence against Abney. The judge denied the motion. Later, as Abney presented his alibi defense, two witnesses testified that nearly three weeks before his arrest Abney had obtained a school sign-out sheet that he used to document his alibi, possibly undermining his defense.

The Appellate Division, First Department affirmed in a 3-2 decision. The majority said expert testimony on the identification was not mandated under People v LeGrand (8 NY3d 449 [2007]), which requires the admission of such testimony in cases hinging on eyewitness identification where "there is little or no corroborating evidence connecting the defendant to the crime." In this case, the majority said, the testimony about the school sign-out sheet provided "sufficient corroborating evidence" of Abney's guilt. The dissenters argued the trial court abused its discretion because, at the time it denied Abney's motion, "there was not a scintilla of 'corroborating evidence connecting the defendant to the crime.'"

In Case No. 140, Gregory Allen was convicted of first-degree robbery and lesser charges and sentenced to 15 years in prison for an armed hold-up at a Queens barber shop in March 2004. The gunmen wore masks, but the shorter man's mask was open from the top of his upper lip to his eyebrows, and one of the victims told police that he recognized him as a neighborhood man nicknamed "Junior or J.R." The witness picked Allen out in a photo array and, four months later, he and a second witness identified Allen in a line-up. Before trial, the court denied Allen's motion to allow expert testimony on the identifications, including testimony about "unconscious transference," in which a witness misidentifies a familiar but innocent person as the perpetrator.

The Appellate Division, Second Department affirmed, saying sufficient corroborating evidence was provided by the fact that the first witness to describe Allen also knew his nicknames and by Allen's statements prior to the line-up that the robbers wore masks, which the police had not told him. Allen argues that neither the nicknames nor his statements about masks made the eyewitness identifications any more reliable and, therefore, the trial court denied his rights to due process, to present a defense, and to a fair trial.

No. 139 For appellant Abney: Brian H. Polovoy, Manhattan (212) 848-4000

For respondent: Manhattan Assistant District Attorney Patrick J. Hynes (212) 335-9000

No. 140 For appellant Allen: Karen M. Kalikow, Manhattan (212) 577-3300

For respondent: Queens Assistant District Attorney Daniel Bresnahan (718) 286-5837

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To be argued Thursday, September 17, 2009

No. 141 People v J.W. Hardy, Jr.

J.W. Hardy, Jr., is serving two to four years in prison on his conviction of second-degree escape. Hardy argues that he was not in "custody" when he fled the Orleans County Courthouse and, therefore, he cannot be guilty of escape.

Hardy had pleaded guilty to a felony drug charge and was free on bail when he appeared in County Court in February 2005. The judge adjourned the case for two weeks and doubled Hardy's bail to \$20,000, but did not orally commit him to the sheriff's custody. The judge informed Hardy that, if he posted bail and failed to appear as required, "I will proceed without you and get a warrant for your arrest and consider forfeiting your bond." Deputies handcuffed Hardy behind his back and seated him in a public hallway while they waited for the court clerk to prepare a securing order committing him to custody. Minutes later, Hardy walked down to the basement, held the back door open for an employee of the County Clerk's Office to enter, and left the courthouse. He was apprehended in a nearby apartment about 20 minutes later.

Hardy was convicted of second-degree escape under Penal Law § 205.10(2), which states that a person is guilty of the crime when, "[h]aving been ... convicted of a ... class D ... felony, he escapes from custody." Penal Law § 205.00(2) defines "custody" as "restraint by a public servant pursuant to an authorized arrest or an order of a court."

The Appellate Division, Fourth Department affirmed, saying, "We conclude that defendant was in custody for the purposes of section 205.10(2) at the time that he escaped from the courthouse because, even though the securing order had not yet been signed by the court, he was under 'restraint by a public servant pursuant to ... an order of a court' (§ 205.00(2))."

Hardy argues the evidence is legally and factually insufficient to support his conviction, citing CPL 510.40, which provides that "If the bail fixed is not posted ... the court must order that the principal be committed to the custody of the sheriff," and CPL 500.10(4), which provides that "A court commits a principal to the custody of the sheriff when ... it orders that he be confined in the custody of the sheriff during the pendency of the criminal action...." Hardy says, "[I]t is clear that no securing order, oral or written, had been made by the court **prior to** Mr. Hardy's departure from the courthouse" and, therefore, "he was not in custody and ... cannot be guilty of escape in the second degree."

For appellant Hardy: James S. Hinman, Rochester (585) 325-6722

For respondent: Orleans County District Attorney Joseph V. Cardone (585) 590-4130

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To be argued Thursday, September 17, 2009

No. 142 People v Nasin Arafet

In July 2006, a Xerox cargo trailer containing more than \$1 million worth of copy machines, printers, and accessory equipment was stolen from a tractor trailer parking lot at Thruway exit 25A in the Town of Rotterdam, Schenectady County, and driven south on the Thruway. The empty trailer was found abandoned two days later along a roadway in northern New Jersey. Nasin Arafet was convicted at trial of first-degree grand larceny and criminal possession of stolen property and sentenced to concurrent prison terms of 8 to 16 years.

Circumstantial evidence against Arafet included a toll ticket, bearing his fingerprint, for a five-axle vehicle that traveled from exit 25A to exit 15 at the relevant time. The evidence also included cell phone records showing that one of Arafet's phones traveled from New Jersey to the Albany area and back on the day of the theft and that it was used to contact Nelson Quintanilla and a warehouse leased by Jose Gotay, both of whom had been previously charged or convicted of stealing trailers and receiving stolen goods. The trial court also allowed the prosecution to present evidence of four other hijackings, only two of which allegedly involved Arafet. The two uncharged crimes involving Arafet were admitted under exceptions to Molineux and Ventimiglia for evidence that identifies the perpetrator by his unique modus operandi or shows a common scheme or plan.

The Appellate Division, Third Department affirmed on a 3-2 vote, splitting on the admissibility of the uncharged crimes. The majority said, "While the hijacking of a large tractor trailer may be considered by some a 'common occurrence,' the fact is that the theft of such a large vehicle and the disposition of its cargo is a complicated criminal undertaking requiring numerous accomplices, extensive planning and significant coordination. Defendant's prior participation in such extraordinary criminal behavior under the circumstances presented is relevant to determine whether he was in fact the perpetrator of the hijacking at issue." The court said the allegation in one of the uncharged crimes -- that Arafet "admitted being recruited by Quintanilla to hijack a trailer and deliver its cargo to a predetermined location in northern New Jersey" -- shows "the same distinctive and unique modus operandi" as the Rotterdam hijacking.

The dissenters said, "Essentially, the People have demonstrated only that defendant specializes in a particular type of crime. Since there are more differences than similarities among these trailer thefts, and the method used was common to the type of crime, defendant's modus operandi cannot be said to be 'sufficiently unique to make the evidence of the uncharged crimes "probative of the fact that he committed the one charged...."' While there was evidence that Arafet "may have communicated with Nelson Quintanilla, his accomplice in two uncharged thefts, and Jose Gotay, who was not shown to have any prior relationship with defendant," the dissenters said, the prosecution "presented no evidence as to the content of these calls or the actual roles, if any, played by Quintanilla or Gotay in the charged theft" and therefore failed to "convincingly prove a unique or distinctive modus operandi."

For appellant Arafet: Cynthia Feathers, Saratoga Springs (518) 691-0088

For respondent: Schenectady County Chief Asst. District Atty. Philip W. Mueller (518) 388-4364

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To be argued Thursday, September 17, 2009

No. 143 People v Guiseppe D'Alessandro

Guiseppe D'Alessandro immigrated from Italy in 1978 and was granted permanent resident status in 1981. He was managing a Manhattan restaurant owned by his father-in-law in 1989, when he accused an employee of stealing \$3,000. Denying the theft, the employee told police that D'Alessandro had confined him in the basement of the restaurant and threatened him with a gun and nightstick to compel him to return the money. D'Alessandro turned down a plea offer of probation, was convicted at trial of first-degree kidnapping and assault, among other charges, and was sentenced to 15 years to life in prison. The Appellate Division, First Department affirmed his conviction in 1996. D'Alessandro was paroled in 2007 and has since been held by federal immigration authorities pending deportation based on his criminal conviction.

Among other post-conviction proceedings, D'Alessandro filed a pro se application for a writ of error coram nobis in 1999, alleging that he had been denied effective assistance of appellate counsel by, among other things, his counsel's failure to raise a speedy trial issue.

The Appellate Division denied the application in May 2000, citing People v Bienvenido de la Hoz (131 AD2d 154, 158).

With new counsel in May 2008, D'Alessandro again moved for a writ of error coram nobis, arguing that his counsel on direct appeal had been ineffective in failing to claim that the prosecution's unexplained six-month delay in turning over grand jury minutes resulted in a speedy trial violation under People v McKenna (76 NY2d 59 [1990]).

The Appellate Division treated the second application as a motion "for reargument" and denied it without opinion in August 2008.

Although denial of a motion for reargument is not appealable to the Court of Appeals, D'Alessandro contends the Court has jurisdiction because the Appellate Division erred in labeling his second coram nobis application as one for reargument "when the application was not brought as a reargument motion and it raised entirely new legal issues that were not addressed in the prior application." He argues that under CPL § 450.90(1), "there is no procedural bar to the Court hearing the appeal of a successive error coram nobis application and the Court has accepted and decided appeals from a second application," citing People v Turner (5 NY3d 476).

The prosecution argues, "The Appellate Division properly treated defendant's second coram application as a motion to reargue because it raised the same claim as the prior application. As such, the order denying it is not appealable to this Court, and the appeal must be dismissed. In any event, whether dubbed a reargument motion or a successive coram nobis petition, the Appellate Division acted well within its discretion in denying it."

For appellant D'Alessandro: Brian Gardner, Manhattan (212) 687-5900

For respondent: Manhattan Assistant District Attorney Hilary Hassler (212) 335-9000

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To be argued Thursday, September 17, 2009

No. 144 People v Rashad McNair

Rashad McNair pleaded guilty to a felony charge of second-degree forgery in full satisfaction of an indictment charging that, with intent to defraud, he had falsely completed an application for a joint checking account, in the names of himself and his brother, at a Manhattan branch of Banco Popular in December 2004. During his plea allocution, McNair said he had signed his brother's name on the application with his brother's permission. Upon further inquiry by Supreme Court, McNair said he signed his brother's name on a couple of his brother's checks that he deposited into the joint account, that he deposited his own money into the account as well, and that he used it to pay rent on an apartment he shared with his brother, who never paid his half. Near the end of the allocution, the court said, "You know, you are acting like you are doing me a big favor." McNair replied, "I don't know. I am trying to do myself a favor because we keep coming back and forth to the court. If I just get it over with, I can get back to class." The court said, "Whatever." The court ultimately accepted his guilty plea and imposed the promised sentence of 90 days in jail.

The Appellate Division, First Department affirmed. It said, "Since defendant did not move to withdraw his guilty plea, and since this case does not come within the narrow exception to the preservation requirement (see People v Lopez, 71 NY2d 662 [1988]), his challenge to the validity of the plea is unpreserved and we decline to review it in the interest of justice."

McNair argues that the trial court "erred when it accepted appellant's guilty plea despite his repeated assertions of innocence," and the Appellate Division erred in concluding that the Lopez exception did not apply. Although McNair "did not make a post-allocution motion to withdraw the plea, his repeated statements negated the intent to defraud, an essential element of forgery, and cast 'significant doubt upon the defendant's guilt,'" he said, quoting Lopez.

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