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.

To be argued Wednesday, November 19, 2014

No. 225 Matter of Ford v New York State Racing and Wagering Board

The State Racing and Wagering Board adopted regulations in 2009 -- the "out-of-competition testing rules" -- that prohibit the use of certain performance enhancing substances in racehorses and permit the Board to conduct doping tests on all racehorses under the care or control of licensed trainers or owners when the horses are expected to compete at a New York track within 180 days. The rule establishes penalties for violations, allows the Board to test horses away from the track on farms where they are kept, and requires a trainer or owner to bring to a New York track any racehorse that is stabled out-of-state within 100 miles of the track. The Standardbred Owners Association and four licensed owners and trainers of harness racehorses brought this article 78 proceeding to challenge the regulations that apply to harness racing, alleging that the Board exceeded its statutory authority in adopting the testing rules and that the regulations authorize unreasonable searches and are arbitrary and capricious.

Supreme Court granted the petition to the extent of annulling the testing rules that apply to harness racing. It held the Board exceeded its authority under Racing, Pari-Mutuel Wagering and Breeding Law § 902(1), which provides that "equine drug testing at race meetings shall be conducted by a state college within this state with an approved equine science program." Finding the rules "stretch beyond the Board's enabling legislation," the court said, "Obviously, horses stabled 'off-track' on privately-owned farms as much as six months preceding a race are neither 'at race meetings' nor at facilities 'overseen' by the Board." It went on to find that the 180-day testing period and other provisions are arbitrary and capricious and that the rules regulating private horse farms "are overly intrusive and infringe upon the fundamental right to privacy."

The Appellate Division, Third Department largely reversed, saying section 902(1) mandates that on-track testing at race meetings "be conducted by an approved entity," but "does not define or otherwise limit [the Board's] authority to implement regulations to conduct drug testing." It cited section 101, which gives the Board "general jurisdiction over all horse racing activities and all pari-mutuel betting activities, both on-track and off-track, in the state and over the corporations, associations, and persons engaged therein;" and section 301, which directs the Board to "prescribe rules and regulations for effectually preventing the use of improper devices, the administration of drugs or stimulants or other improper acts for the purpose of affecting the speed of harness horses in races in which they are about to participate." It said, "Considering the plain language of [section] 101, as well as [the Board's] 'very broad power to regulate the harness racing industry' ... and 'the State's interest in assuring the integrity of racing carried out under its auspices'..., [the Board] did not exceed its statutory authority when it adopted regulations permitting off-track, out-of-competition drug testing." A rule prohibiting protein and peptide-based drugs was properly annulled because it conflicted with a rule allowing the use such drugs at certain times, the court said, but it found the other rules were neither arbitrary nor violated the rights of horse farm owners, who "have a reduced expectation of privacy due to the fact that horse racing is a highly regulated industry."

For appellants Ford et al: Andrew J. Turro, Garden City (516) 741-6565
For respondent Board: Assistant Solicitor General Kathleen M. Arnold (518) 474-3654

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To be argued Wednesday, November 19, 2014

No. 226 People v Dwight Giles

Dwight Giles was arrested on the Upper West Side of Manhattan in 2001 by two police officers who said they saw him trying to break into a medical office by picking the lock with a pocket knife. The Court of Appeals reversed his convictions for attempted burglary and possession of burglar's tools in 2008. At the retrial, the building superintendent testified for the prosecution that there were fresh scratch marks on the lock the morning after the arrest. Giles' defense attorney did not call as a witness a defense investigator who testified at the first trial that he saw no scratches when he examined the lock two days later. The jury found Giles guilty of second-degree attempted burglary and criminal possession of burglar's tools.

Prior to sentencing, Giles made a pro se motion for appointment of new counsel on the ground that his trial counsel provided ineffective assistance by failing to call the defense investigator as a witness, among other things. Supreme Court appointed new defense counsel, who filed a motion to set aside the verdict under CPL 330.30(1) based, in part, on the ineffective assistance of counsel claim. The prosecution submitted an affirmation by Giles' trial counsel explaining his decision not to call the investigator: "[T]he credibility of this possible defense witness was undermined by his failure to take reliable photographs in support of his claimed observations. The investigator produced photographs at the first trial that were too blurry or out-of-focus to support his claimed observations. Put another way, a paid defense witness at the first trial admitted that his own photographs did not support his testimony." The court denied the motion, saying trial counsel was "quite plainly effective" and "I see no reason to have a hearing on what appears on its face to be a credible explanation from a credible respective member of the bar." On the attempted burglary count, which ordinarily carries a maximum term of seven years, the court adjudicated Giles a persistent felony offender and sentenced him to 20 years to life.

The Appellate Division, First Department modified by reducing the sentence to 15 years to life and otherwise affirmed. "Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters of strategy not reflected in the record...," it said. Giles' CPL 330.30(1) motion "was procedurally defective, and '[t]o the extent the motion could be deemed a de facto or premature motion to vacate judgment pursuant to CPL 440.10, the issues raised in the motion are unreviewable since defendant failed to obtain permission from this Court to appeal'...." Citing People v Battles (16 NY3d 54), it also rejected his claim that his sentencing as a persistent felony offender, based on non-jury findings, is unconstitutional under Apprendi v New Jersey (530 US 466).

Giles argues his ineffective assistance claim may be reviewed on direct appeal. Although a CPL 330.30 motion "is limited to grounds which appear 'in the record,' the ineffectiveness claim as to the failure to call the investigator was fully litigated below. [Trial counsel] provided his reasons for failing to call the investigator and the court addressed the merits of the claim. Proceedings which occur post-verdict, but pre-sentencing, are clearly part of the record on appeal.... Appellant's claim raises a ground appearing on the record which requires reversal as a matter of law, and thus, was reviewable on direct appeal." He also asserts his Apprendi challenge to his enhanced sentence, asking the Court to reconsider Battles.

For appellant Giles: Jan Hoth, Manhattan (212) 577-2523
For respondent: Manhattan Assistant District Attorney Sheryl Feldman (212) 335-9000

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To be argued Wednesday, November 19, 2014

No. 227 People v Sean Hawkins *(papers sealed)*

Charged in Brooklyn with sex offenses involving an 11-year-old girl in 2008 and 2009, Sean Hawkins was convicted at a Criminal Court bench trial of 10 counts each of second- and third-degree sexual abuse and one of endangering the welfare of a child. Prior to sentencing, Hawkins moved to set aside the verdict under CPL 330.30(1) on the ground that he was denied his constitutional right to a public trial. In support of his motion, Hawkins submitted the affirmations of two attorneys who said they tried to enter the courtroom during the trial, but stopped when they saw a "Do Not Enter" sign posted on the door. One of them said he was also told by a court officer not to enter the courtroom. Criminal Court granted the motion and ordered a new trial, finding there had been a clear violation of the public trial guarantee.

The Appellate Term, 2nd, 11th and 13th Judicial Districts, reversed on a 2-1 vote. It said the trial court improperly granted the motion under CPL 330.30(1), which permits a defendant to move, before sentencing, to set aside a verdict on "[a]ny ground appearing in the record" that would require a reversal or modification by an appellate court. "Defendant's CPL 330.30(1) motion should have been denied ... because the motion was procedurally defective as it was based on a ground which did not appear in the record.... We note that the Criminal Court did not treat the motion as a 'de facto CPL 440.10 motion'.... Defendant should have waited until after sentencing before making an appropriate CPL 440.10 motion, in which matters may be raised which do not appear in the record.... Even if the motion had been treated as a 'de facto CPL 440.10 motion' it is not properly before this Court, since defendant did not seek leave to appeal from the denial of the motion...."

The dissenter agreed CPL 330.30(1) was not the proper vehicle to set aside the verdict, but said, "[I]n the interest of judicial economy, I would treat defendant's motion as a motion to vacate the conviction pursuant to CPL 440.10.... Although the majority opines that a CPL 440.10 motion cannot be made where, as here, defendant has not been sentenced, I disagree. Judiciary Law § 2-b(3) authorizes a court 'to devise and make new process and forms of proceedings, necessary to carry into effect the powers and jurisdiction possessed by it.' Thus, a court may consider a CPL 330.30 motion as one made under CPL 440.10 'where fairness and judicial economy are not sacrificed'.... For this court to reverse the Criminal Court's order at this stage only to have defendant's conviction ultimately vacated on a subsequent CPL 440.10 motion would defeat the interest of judicial economy.... Such a result, particularly in this case where the verdict was obtained in clear violation of defendant's right to a public trial, is patently unfair."

For appellant Hawkins: Michael W. Warren, Brooklyn (718) 230-9790
For respondent: Brooklyn Assistant District Attorney Sholom J. Twersky (718) 250-2537

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To be argued Wednesday, November 19, 2014

No. 228 172 Van Duzer Realty Corp. v Globe Alumni Student Assistance Association, Inc.

In 2006, the Globe Alumni Student Assistance Association leased a building in Staten Island from 172 Van Duzer Realty Corp. for use as a dormitory for students of the Globe Institute of Technology. The lease term, as extended, ran to September 2016. Globe Institute guaranteed full performance of the Association's lease obligations, including payment of rent. In January 2008, Van Duzer sent the Association a notice to cure lease violations, based on city citations for failing to maintain the property. Rather than cure the violations, the Association vacated the building in February 2008 and stopped paying rent. Van Duzer terminated the lease in March 2008 and obtained a judgment of possession in Civil Court. Van Duzer brought this breach of contract action against the Association and Globe Institute in September 2009, seeking the balance of rent due for the entire lease term as liquidated damages under an acceleration provision in the lease.

The acceleration clause states that, upon termination of the lease or repossession by Van Duzer, "Landlord shall be entitled to recover, as liquidated damages a sum of money equal to the total of ... (iv) the balance of the rent for the remainder of the term, (v) any other sum of money and damages reasonably necessary to compensate Landlord for the detriment caused by Tenant's Default.... In the event of Lease termination Tenant shall continue to be obligated to pay rent and additional rent for the entire Term as though this Lease had not been terminated."

Supreme Court granted Van Duzer's motion for summary judgment on liability, saying the Association's default was uncontested. "As to the Association's liability for the remaining rents due after termination of the Lease, although the termination of the Lease ends the landlord-tenant relationship, the parties clearly contracted to make the defaulting tenant liable for rent after such termination...." Decisions from other departments, holding acceleration clauses are not enforceable where the landlord is not required to mitigate its losses by re-renting the premises, "conflict with controlling First Department caselaw," it said. Van Duzer "is within its rights under New York law to do nothing and collect the full rent due under the lease." After a hearing, the court awarded a judgment of $1,488,604.66 to Van Duzer.

The Appellate Division, First Department affirmed, saying Van Duzer "made a prima facie showing of its entitlement to accelerated rent, pursuant to the express terms of the lease, which also provided that the obligation to pay rent was to continue in the event of termination of the lease.... In opposition, defendants failed to raise a triable issue of fact as to whether the liquidated damages provision was an unenforceable penalty...."

The Association and Globe Institute argue, "[T]he confluence of three factors makes the acceleration clause here unenforceable: (1) plaintiff terminated the lease and took possession of the building; (2) the lease does not provide for the landlord's accounting for mitigation upon re-leasing the premises; and (3) plaintiff nevertheless has obtained a judgment providing payment up front of all rent payments due under a multi-year lease, which is grossly disproportionate to the landlord's probable loss. Having terminated the lease, obtained possession of the property and having no contractual duty to mitigate, the landlord can rent out the property at will to others without having to make any accounting to defendants for the rent obtained. The ability to 'double dip' ... is not just compensation, it is a windfall which renders the acceleration a penalty."

For appellants Globe Alumni and Globe Institute: Linda M. Brown, Manhattan (212) 471-8514
For respondent Van Duzer: Noah B. Potter, Manhattan (212) 953-6633