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, September 17, 2014

No. 164 People v Genna Turner

Genna Turner was arrested in March 2010 for allegedly chasing another woman with a butcher knife in the Town of Greece, Monroe County. She offered to show the arresting officer where she left the knife. After recovering the weapon, the officer took her to the home of the complaining witness, who identified Turner as her assailant. Turner was given Miranda warnings at the police station, then made a videotaped confession. County Court suppressed the knife and Turner's initial statements to the arresting officer on the ground that the officer lacked probable cause for the arrest, but it refused to suppress the stationhouse confession, finding it was attenuated from the illegal arrest.

After the suppression ruling, Turner agreed to plead guilty to second-degree attempted murder, first-degree burglary, and criminal contempt with a promise that she would be sentenced to 15 years in prison. She also faced a mandatory term of post-release supervision (PRS), but there was no mention of PRS prior to her guilty plea or at any time during the plea allocution. When Turner appeared for sentencing two weeks later, the prosecutor told the court, "I can't recall if the post-release supervision period was discussed at the time of plea. I think we should probably make a record of that now so it is clear." The court said it would impose a five-year term of PRS. The prosecutor asked Turner if she "had a chance to talk about that with your attorney," and she said, "Yes." He asked, "Do you understand that[] that's part of your plea, at the end of your prison sentence you will be on parole supervision for a period of five years?" She said, "Correct." The prosecutor asked, "You still wish to go through with sentencing today?" She said, "Yes." The court imposed the promised sentence and five years of PRS.

The Appellate Division, Fourth Department affirmed in a 3-2 decision, saying Turner failed to preserve her claim that her guilty plea was not knowing, voluntary and intelligent under People v Catu (4 NY3d 242) because she was not told she would face a term of PRS prior to the plea. Although, generally, preservation of a Catu error is not required, the court said preservation is required here because Turner was informed of the PRS component before the sentence was imposed. "In our view, the record is clear that 'defendant could have sought relief from the sentencing court in advance of the sentence's imposition,' and thus 'Louree's rationale for dispensing with the preservation requirement is not presently applicable'.... In any event, we conclude that defendant waived her right to assert the Catu error inasmuch as 'there is ample evidence in the record supporting the ... conclusion that defendant agreed to the bargain and did so voluntarily with a full appreciation of the consequences'...."

The dissenters said Turner's plea was not voluntary and she was not required to preserve the claim. "It is undisputed that there was no mention of PRS at the plea proceeding and, based on our review of the record, we conclude that defendant was not 'advised of what the sentence would be, including its PRS term, at the outset of the sentencing proceeding'.... Rather, defendant did not learn that PRS would be imposed until 'moments before imposi[tion of] the sentence'.... Significantly, the brief reference to PRS by the prosecutor at sentencing 'cannot substitute for [County Court's] duty to ensure, at the time the plea is entered, that the defendant is aware of the terms of the plea'...." They said Turner did not waive the claim. "The prosecutor told defendant incorrectly just before the court imposed sentence that PRS was 'part of [her] plea,' and she was offered no option other than to proceed to sentencing.... As a result, defendant said nothing ... that amounted to a waiver, i.e., 'an intentional relinquishment or abandonment of a known right or privilege'...."

For appellant Turner: Kimberly J. Czapranski, Rochester (585) 753-3491
For respondent: Monroe County Assistant District Attorney Matthew Dunham (585) 753-4627

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To be argued Wednesday, September 17, 2014

No. 165 Grace v Law

This legal malpractice case stems from medical malpractice claims that John W. Grace brought against the Veterans Administration Outpatient Clinic in Rochester. Grace retained Robert L. Brenna, Jr. and his firm, Brenna, Brenna & Boyce, and they filed an administrative tort claim with the Veterans Administration (VA) in August 2006. When the government did not respond, Grace retained Michael R. Law and his firm, Phillips Lytle, to pursue a federal suit. In January 2008, Law filed a medical malpractice complaint in U.S. District Court against the United States and the VA under the Federal Tort Claims Act, alleging that Grace lost the vision in his right eye because the VA failed to monitor and treat his eye condition in a proper and timely manner. Dr. Shobha Boghani, who treated Grace at the VA, was employed by the University of Rochester, and the government filed a third-party action against Dr. Boghani and the University in October 2008. In May 2009, Brenna filed an amended complaint in federal court naming Dr. Boghani and the University as defendants in Grace's medical malpractice suit. In November 2010, U.S. District Court dismissed the amended complaint against Dr. Boghani and the University as time-barred. The court also dismissed all claims against the government that were based on alleged negligence of Dr. Boghani, finding the doctor was an independent contractor and not an employee of the VA. This left only one claim against the government -- for negligence in failing to reschedule an appointment after a cancellation.

Rather than appeal, Grace directed the Brenna defendants to discontinue the federal action and commenced this legal malpractice action against them and the Law defendants in Supreme Court, alleging they were negligent in failing to name Dr. Boghani and the University in the initial complaint in federal court. Supreme Court denied the defendants' motions for summary judgment.

The Appellate Division, Fourth Department affirmed in a 4-1 decision, refusing to adopt "a per se rule that a party who voluntarily discontinues an underlying action and forgoes an appeal thereby abandons his or her right to pursue a claim for legal malpractice." It said such a rule "would force parties to prosecute potentially meritless appeals to their judicial conclusion in order to preserve" a legal malpractice claim, "thereby increasing the costs of litigation and overburdening the court system.... The additional time spent to pursue an unlikely appellate remedy could also result in expiration of the statute of limitations on the legal malpractice claim...." It said the defendants "failed to establish that plaintiff was likely to succeed on an appeal from the November 2010 order and, therefore, that their alleged negligence was not a proximate cause of his damages...."

The dissenter said,"[I]n my view, plaintiff is precluded as a matter of law from bringing this legal malpractice action based upon his voluntary discontinuance of the underlying federal action and failure to pursue a nonfrivolous appeal." Had Grace appealed the federal order, he "would have had a meritorious argument ... based upon case law supporting defendants' position that [Dr. Boghani] was a government employee as opposed to an independent contractor." He said, "I cannot see the merit in allowing a litigant, who does not give his or her attorney an opportunity to pursue a potentially meritorious appeal, to abandon his or her underlying case as a strategic decision in order to pursue a legal malpractice claim against his or her attorney."

For appellants Law and Phillips Lytle: Michael J. Hutter, Albany (518) 465-5995
For appellants Brenna and Brenna, Brenna & Boyce: Kevin E. Hulslander, Syracuse (315) 474-2911
For respondent Grace: Brian J. Bogner, Buffalo (716) 855-3437

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To be argued Wednesday, September 17, 2014

No. 166 People v Daniel A. Ludwig *(papers sealed)*
No. 167 People v William Cullen *(papers sealed)*

The primary question in these appeals is whether hearsay testimony about a child abuse victim's prior consistent statements about her sexual abuse improperly bolstered the victim's own trial testimony.

Daniel Ludwig was charged with sexually abusing an 11-year-old girl in East Rochester in 2008 and 2009. About 14 months later, the girl disclosed the abuse to her brother, who then told her mother. At trial, Monroe County Court permitted the prosecutor to elicit testimony from the girl's mother and brother about her prior statements that she was sexually abused by Ludwig, rejecting defense counsel's objection that it was inadmissible hearsay. Ludwig was convicted of predatory sexual assault against a child and sentenced to 16 years to life in prison.

William Cullen was charged with sexually abusing a 13-year-old girl in Syracuse in 2006 and 2007. About four months later, the girl told her mother and a counselor that Cullen had abused her. Supreme Court admitted testimony by the mother and counselor that the girl had told them of sexual misconduct by Cullen. He was convicted of multiple counts of rape, incest and criminal sexual act in the second degree and was sentenced to an aggregate term of 15 years in prison.

The Appellate Division, Fourth Department affirmed both convictions, rejecting defense claims that hearsay testimony about the victims' prior statements was improperly used to bolster the victims' credibility. In Ludwig, it said the testimony "did not constitute improper bolstering inasmuch as the evidence was not admitted for its truth.... Rather, the evidence was admitted to explain how the victim eventually disclosed the abuse and how the investigation started...."

The defendants argue that the victim's credibility was a key issue at trial, as there was little or no physical evidence against them, and they were deprived of a fair trial when the prosecutor was permitted to use hearsay testimony of other witnesses to confirm the victim's own testimony. Ludwig says, "This Court's century old rule against the admission of prior consistent statements is fatally undermined if ... such testimony is admissible merely to establish how and why the investigation commenced, when that was never raised as an issue at trial.... [S]uch bolstering hearsay testimony will always be admissible in sexual offense cases, and this limitless investigation exception would swallow the rule."

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For respondent: Monroe County Assistant District Attorney Geoffrey Kaeuper (585) 753-4674
For appellant Cullen: Kristen N. McDermott, Syracuse (315) 422-8191 ext. 0138
For respondent: Onondaga County Chief Asst. Dist. Attorney James P. Maxwell (315) 435-2470

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To be argued Wednesday, September 17, 2014

No. 168 Matter of Smith v Brown

Eric Smith was charged with criminal possession of a weapon in December 2008, when police officers allegedly recovered a loaded handgun from his waistband during a traffic stop in Queens. During jury deliberations at his trial in 2010, after the alternate jurors had been dismissed, two jurors informed Supreme Court that juror 11 told the entire panel that he had spoken to an "attorney friend" about a "hypothetical gun case" and was advised that the only thing the jury should focus on was whether they believed a gun was present in the car. The jurors who reported the incident said they did not believe it would affect their ability to deliberate. Defense counsel and the prosecutor agreed juror 11 should be discharged for misconduct. The prosecutor would not consent to continuing the trial with the remaining 11 jurors. Defense counsel urged the court to continue, arguing that the taint had been removed and that Smith had a right to proceed with 11 jurors. The court declared a mistrial over defense objection, finding the absolute integrity of the jury process had been compromised. Defense counsel again objected and asked the court to conduct an inquiry of all the jurors to determine whether they had been improperly influenced. The court denied the request.

More than two years later, when his retrial was set to begin, Smith filed this article 78 petition to prohibit Queens District Attorney Richard A. Brown from retrying him for the offense on the ground of double jeopardy.

The Appellate Division, Second Department granted the petition and prohibited the retrial, saying, "When a mistrial is declared without the consent of or over the objection of a defendant, a retrial is precluded unless 'there was manifest necessity for the mistrial or the ends of public justice would be defeated'.... Here, the People have not met their burden of demonstrating that the declaration of a mistrial was manifestly necessary. While it is undisputed that juror number 11 was grossly unqualified to continue serving, the court abused its discretion in declaring a mistrial without considering other alternatives.... [I]t would have been appropriate to poll the remainder of the jurors to ascertain whether they could render an impartial verdict.... Moreover, as the improper information imparted to the jurors did not significantly prejudice the People, the court should have considered whether a specific curative instruction could have clarified what constituted 'evidence' and whether such an instruction could have cured the impropriety...."

Brown argues the trial court "had no choice but to declare a mistrial and defendant had no right to proceed with a jury of eleven. The entire panel of twelve was tainted by its exposure to erroneous outside legal advice, delivered with the intent to influence the other jurors on the key issue in the case." Since the remaining jurors "failed to heed the court's instructions that they should promptly report any outside influence" and instead discussed the outside advice and sought clarification of the law before two of them reported the incident, he says the court "justifiably lacked faith in the deliberative process, including the juror's ability to follow instructions" if the trial continued. He says Smith waived his claim by consenting to a retrial if the jury could not continue as 12, when the alternates were excused, and then consenting to the discharge of juror 11. He also argues Smith's petition is time-barred.

For appellant Brown: Queens Assistant District Attorney Jill Gross Marks (718) 286-5882
For respondent Smith: Patrick Michael Megaro, Winter Park, Florida (407) 388-1900