State of New York
Court of Appeals

To be argued Thursday, February 13, 2020

No. 19 Bill Birds, Inc. v Stein Law Firm, P.C.

Bill Birds, Inc. manufactures decorative metal auto parts for vintage cars and, for about 11 years, it operated under a license agreement with General Motors, Service Parts Operation (GM) to produce and sell restoration parts for discontinued GM models. At the end of 2005, as the agreement was coming up for renewal, Bill Birds paid the Stein Law Firm $7,500 to research the validity of the trademarks and copyrights that GM had been licensing to it. The law firm reported that GM did not own the rights it had been licensing and advised Bill Birds that it had superior rights to the trademarks. In response, Bill Birds did not renew the licensing agreement and, in 2006, it paid the Stein Law Firm another $17,500 to file a federal action for fraud and breach of contract against GM in the Eastern District of New York. The U.S. District Court dismissed the suit in 2008 based on the forum selection clause in GM's licensing agreement, which required that any litigation be commenced in Michigan.

In 2010, after attempts to obtain their client files from the law firm failed, Bill Birds and its president, William Pelinsky, brought this action against the Stein Law Firm and its principal Mitchell A. Stein (collectively, Stein), including claims for legal malpractice and violation of Judiciary Law § 487. Among other things, Bill Birds claimed Stein misrepresented the merits of its action against GM to it and the federal court solely to induce it to pay Stein $25,000 in legal fees. It sought treble damages under Judiciary Law § 487, which states, "An attorney or counselor who: 1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or, 2. Wilfully delays his client's suit with a view to his own gain ... forfeits to the party injured treble damages, to be recovered in a civil action."

Supreme Court dismissed all claims except the claim for violation of Judiciary Law § 487, citing the views of Bill Birds' intellectual property expert that Stein should have known its client had no case against GM and sought to induce Bill Birds into litigation under false pretenses. The court said, "This evidence raises a triable issue of fact as to whether plaintiff sustained any damage proximately caused either by [Stein's] alleged deceit or by an alleged chronic, extreme pattern of legal delinquency.... In addition, the plaintiff's allegations in his affidavit, *inter alia*, that he wasn't told that the case was dismissed on March 31, 2008, until the statute [of limitations] had nearly run in December of that year, that counsel made up an excuse that 'the Judge held the decision in chambers and didn't release it,' all of which caused him to lose ... his $25,000 payment to [Stein], raise issues of fact that can only be resolved after a trial."

The Appellate Division, Second Department reversed and dismissed the section 487 claim, saying, "A chronic extreme pattern of legal delinquency is not a basis for liability pursuant to Judiciary Law § 487.... Further, the plaintiffs failed to allege sufficient facts demonstrating that the defendant attorneys had the 'intent to deceive the court or any party'.... Allegations regarding an act of deceit or intent to deceive must be stated with particularity (see CPLR 3016[b]...). That the defendants commenced the underlying action on behalf of the plaintiffs and the plaintiffs failed to prevail in that action does not provide a basis for a cause of action alleging a violation of Judiciary Law § 487 to recover the legal fees incurred."

For appellants Bill Birds et al: Thomas Torto, Manhattan (212) 532-5881
For respondents Stein Law Firm et al: James D. Spithogiannis, Garden City (516) 294-8844

State of New York
Court of Appeals

To be argued Thursday, February 13, 2020

No. 20 People v Jose Perez *(papers sealed)*

Jose Perez is challenging his designation as a level two (moderate risk) sex offender under the Sex Offender Registration Act (SORA), arguing he should not have been assessed the maximum 30 points under risk factor nine ("number and nature of prior crimes") because his 1999 conviction of "lewdness" in New Jersey does not constitute a "sex offense" or a felony under New York law.

Perez was charged in Florida with fondling the breasts and buttocks of a 10-year-old girl in 2002, pled guilty to the felony sex crime of lewd and lascivious molestation, and was sentenced to 9 years in prison. In 2010 Perez, who had absconded from New York after pleading guilty to a felony drug sale charge in Brooklyn in 1996, was returned to the state and sentenced to one to three years in prison. He was required to register as a sex offender in New York because his 2002 sex offense in Florida required registration there.

Prior to Perez's release by New York in 2012, the Board of Examiners of Sex Offenders recommended in its Risk Assessment Instrument that he be designated a risk level two offender based, in part, on the assessment of 30 points for his prior lewdness conviction in New Jersey. At his SORA hearing in Supreme Court, when he objected that the assessment was improper because his lewdness conviction was not a sex offense, the prosecutor argued the New Jersey case "involved lewd and lascivious" conduct toward a 12-year-old girl and should be treated as a prior sex crime. The prosecutor presented records from the New Jersey case that said Perez had exposed himself to the girl through his window and blew her a kiss. Supreme Court accepted the Board's recommendation and adjudicated Perez a risk level two offender.

The Appellate Division, Second Department affirmed. "The defendant's prior New Jersey conviction constituted 'a misdemeanor sex crime' under New York law for the purposes of risk factor nine," it said, citing the SORA Risk Assessment Guidelines. "[T]he prior conviction properly qualified as a 'misdemeanor sex crime' under the Guidelines despite the fact that it did not constitute the New York equivalent of a 'sex offense' within the meaning of Correction Law § 168-a(2), and is not otherwise codified under article 130 of the Penal Law," it said, citing a footnote in the Guidelines which states, "An offender who engages in public lewdness by exposing himself also may commit crimes that involve direct 'hands on' contact with a victim," although it does not expressly define public lewdness as a misdemeanor sex crime.

Perez argues that he was improperly assessed 30 points for his New Jersey conviction and should be redesignated a level one offender. "Public lewdness, in New York, is not considered a sex crime," but is instead "an offense against public sensibilities. Furthermore, public lewdness is not a registerable offense in New York or New Jersey, the jurisdiction in which appellant was convicted.... [A]s the Appellate Division properly held, neither Penal Law nor the Guidelines includes public lewdness in its definition of 'sex offense'...." He says, "Here, the People simply made a sexual conduct argument. Risk factor nine, however, is not based on conduct. Instead, it is solely limited to prior convictions and adjudications."

For appellant Perez: Harold V. Ferguson, Jr., Manhattan (212) 577-3548
For respondent: Brooklyn Assistant District Attorney Jean M. Joyce (718) 250-3383

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 or gspencer@nycourts.gov.

To be argued Thursday, February 13, 2020

No. 21 People v Jose Delorbe

Jose Delorbe, a citizen of the Dominican Republic who had lawful permanent resident status in the United States, was charged with second-degree burglary for allegedly breaking into a Manhattan apartment and stealing cash in 2011. He was identified by a fingerprint found in a bedroom of the apartment. At his arraignment in August 2011, Delorbe was given a printed "notice of immigration consequences" that warned, in English and Spanish, that a guilty plea could result in deportation, but there was no discussion of immigration consequences on the record during the arraignment. In April 2012, he pled guilty to a reduced charge of second-degree attempted burglary in exchange for a sentence of five years in prison. The crime is an "aggravated felony" that made him subject to mandatory deportation under federal law. There was no mention of the immigration consequences of his plea in the record of the plea colloquy.

Delorbe filed a pro se CPL 440.10 motion to vacate his conviction in 2016, arguing that he received ineffective assistance of counsel because his defense attorney failed to inform him that his guilty plea would make him deportable. If he had known his deportation would be mandatory, he said he would have "asked his attorney to try to negotiate a plea with less severe immigration consequences, and, if unsuccessful, would have gone to trial." Supreme Court denied the motion without a hearing, saying "This conclusory assertion is unsupported by any factual allegations regarding the significance that potential deportation holds for him or his incentive to remain in the United States, as required by CPL 440.30(4)(b)."

In his direct appeal of the conviction, Delorbe argued his plea was obtained in violation of People v Peque (22 NY3d 168 [2013]), which says "deportation is a plea consequence of such tremendous importance, grave impact and frequent occurrence that a defendant is entitled to notice that it may ensue from a plea. We therefore hold that due process compels a trial court to apprise a defendant that, if the defendant is not an American citizen, he or she may be deported as a consequence of a guilty plea...." He also argued his CPL 440.10 motion was improperly denied.

The Appellate Division, First Department affirmed, ruling his Peque argument was unpreserved and he "has not established that the narrow exception to the preservation requirement applies to his Peque claim.... Defendant was informed of his potential deportation by a notice of immigration consequences served upon him in the presence of his attorney over a year before the guilty plea..., which gave him the opportunity to raise the issue." It also ruled his CPL 440.10 motion was properly denied without a hearing.

Delorbe argues "there was no indication that [he] was aware of the possibility of deportation. Thus, he should not have been required to 'preserve' his Peque claim.... [T]he trial court's Peque obligation cannot be satisfied by a generic immigration consequences form given at arraignment, often (and in this case) months before any plea agreement is even reached, and without any evidence the defendant read it, understood it, or was aware of deportation consequences. Permitting prosecutors to substitute this form for the trial court's obligation to ensure a knowing, intelligent and voluntary plea does not comport with Peque or due process."

For appellant Delorbe: Robin Nichinsky, Manhattan (212) 577-2523 ext. 519
For respondent: Manhattan Assistant District Attorney Alexander Michaels (212) 335-9000