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 Thursday, June 4, 2015 (arguments begin at 1 p.m.)

No. 115 Burton v New York State Department of Taxation and Finance

Robert Burton and 14 other investors, all residents of Tennessee, sold all of their stock in JBS Sports, Inc., a Tennessee corporation, to Yahoo! Inc. for more than $80 million in 2007. JBS was organized as an S corporation for federal and New York tax purposes. The JBS shareholders and Yahoo made an election under Internal Revenue Code (26 USC) § 338(h)(10) to treat the 2007 transaction as a "deemed asset sale" for tax purposes. The shareholders reported their gains from the sale for federal income taxes, but did not report the gains as New York source income for state income taxes.

After a 2011 audit, the state Department of Taxation and Finance (DTF) ruled any gain from the deemed asset sale was New York source income taxable by New York and it assessed the shareholders $167,000 in income taxes. DTF's determination was based on a retroactive amendment enacted in 2010, Tax Law § 632(a)(2), which provides, in part, "[I]f the shareholders of the S corporation have made an election under section 338(h)(10) of the Internal Revenue Code, then any gain recognized on the deemed asset sale for federal income tax purposes will be treated as New York source income...." The shareholders brought this action to challenge the tax assessment, claiming the application of Tax Law § 632(a)(2) to them violated article XVI, § 3 of the New York Constitution, which provides, "Moneys, credits, securities and other intangible personal property within the state not employed in carrying on any business therein by the owner shall be deemed to be located at the domicile of the owner for purposes of taxation."

Supreme Court declared the amended tax law provision constitutional and dismissed the suit, finding the shareholders' election to treat the stock sale as a deemed asset sale under the Internal Revenue Code changed the nature of the transaction for New York tax purposes from a nontaxable stock sale to a taxable asset sale. Rejecting their claim that Tax Law § 632(a)(2) violates the constitutional bar against taxing the sale of intangible property of a nonresident, the court said their argument "ignores their direct election to treat the transaction as an asset sale.... [T]he effect of [Tax Law § 632(a)(2)] is simply to conform the characterization of the transaction on both the Federal and New York State returns. In doing so, treating an 'asset sale' as New York source income does not run afoul of the constitutional prohibition against taxing a nonresident's intangible personal property."

On direct appeal to this Court, the shareholders argue the constitution "is clear that unless the nonresident shareholder of a corporation uses his ownership interest in the entity in some other trade or business carried on in New York State, the intangible property is 'deemed located at the domicile of the owner' and the gain from the sale thereof is not New York source income.... Nor does the rule change because the sale of stock relates to ... an S corporation that made an election to treat the sale as a fictitious sale of assets under" federal law. They say their "federal election may not be treated as a waiver of the constitutional restriction on taxing nonresidents.... [T]he constitutional provision is a matter of public policy and not merely a matter of private rights. Further, there was no specific, voluntary and knowing[] waiver.... The 2010 legislative amendment was enacted three years after the sale of the stock which the State now seeks to tax."

For appellants Burton et al: Kenneth I. Moore, Manhattan (212) 682-5702
For respondent DTF: Assistant Solicitor General Judith N. Vale (212) 416-6274

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To be argued Thursday, June 4, 2015 (arguments begin at 1 p.m.)

No. 116 Caprio v New York State Department of Taxation and Finance

Philip and Phyllis Caprio are residents of Florida and former sole shareholders of Tri-Maintenance & Contractors, Inc. (TMC), a New Jersey S corporation that conducted some of its business in New York. On February 1, 2007, they sold their TMC stock to Sanitors Services, Inc. for a base price of about $20 million plus additional contingent payments based on TMC's performance. Sanitors agreed to pay the base price in two installments -- a payment of $19.5 million on March 1, 2007, and the remaining $500,000 on February 1, 2008 -- and gave the Caprios promissory notes for the installment obligations. The parties made an election under Internal Revenue Code (26 USC) § 338(h)(10) to treat the stock sale as a deemed sale of TMC's assets, followed by liquidation of TMC. TMC distributed the installment obligations to the Caprios and, pursuant to IRC 453(h)(1)(A), the Caprios reported and paid federal income taxes on their gains from the sale as they received the installment and contingent payments, but they did not pay New York taxes on the gains.

In 2010, the Legislature amended the Tax Law by enacting section 632(a)(2). It states, if an S corporation has distributed an installment obligation to a nonresident shareholder under IRC 453(h)(1)(A), "then any gain recognized on the receipt of payments from the installment obligation for federal income tax purposes will be treated as New York source income." It also provides, if S corporation shareholders make an election under IRC 338(h)(10), "then any gain recognized on the deemed asset sale for federal income tax purposes will be treated as New York source income." The amendments apply retroactively to tax years beginning on or after January 1, 2007. In 2011, after an audit, the state Department of Taxation and Finance (DTF) assessed the Caprios $775,000 in taxes and interest due on the TMC deal. The Caprios filed this action, claiming retroactive application of the amendments violate due process.

Supreme Court granted summary judgment to the State and dismissed the suit, saying the 2010 amendments did not create a "wholly new tax," but were meant to correct and clarify two 2009 determinations by the Division of Tax Appeals, Matter of Mintz and Matter of Baum, which altered the taxation of transactions by nonresident shareholders of S corporations. It said the Caprios could not have relied on the 2009 decisions in structuring their 2007 stock sale, and retroactivity was a rational legislative response to the "aberrational" rulings in Mintz and Baum.

The Appellate Division, First Department reversed on a 4-1 vote and ruled retroactive application of the amendments to the Caprios violated due process. It said the State failed to show it "had a long-standing practice of taxing S corporations for transactions like the TMC sale" prior to Mintz and Baum, and the Caprios structured their sale "in reasonable reliance on the previous law." It said the amendments were not "a curative measure," but were meant to raise $30 million for the 2010-11 state budget, which "is not a particularly compelling justification." It also found the length of the retroactive period was excessive.

The dissenter agreed with Supreme Court that the amendments were a "curative" response to Mintz and Baum and that their retroactive application was "rationally related to the legislative goal of minimizing the negative impact" of those decisions. "Due process does not prohibit the legislature from making the equitable choice to deny plaintiffs the windfall of tax immunity, rather than inflict costs and burdens on other, innocent taxpayers," he said.

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For respondent Caprios: John G. Nicolich, Manhattan (212) 907-9600

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To be argued Thursday, June 4, 2015 (arguments begin at 1 p.m.)

No. 117 People v Stanley A. Brown *(papers sealed)*

Stanley Brown was charged in Jefferson County with sexually abusing a young girl over a six-year period, beginning when she was three years old, and engaging in forcible oral sexual conduct with a 12-year old boy. In 2007, he entered a guilty plea to attempted course of sexual conduct against a child in the first degree and an Alford plea to attempted sodomy in the first degree. Brown, who had a prior felony conviction for driving while intoxicated, was sentenced as a second felony offender to concurrent terms of 6½ years in prison.

Prior to his release in 2012, the Board of Examiners of Sex Offenders recommended he be assessed 135 points in his risk assessment under the Sex Offender Registration Act (SORA) based on the nature of his crimes and his record, which would presumptively classify him a level three sex offender. At his County Court hearing, Brown sought a downward departure from his presumptive risk level. He also objected to the assessment of 15 points based on his prior felony DWI conviction, for which he had obtained a certificate of relief from disabilities.

County Court held that clear and convincing evidence supported the assessment of 135 points and that a downward departure was not warranted. It told him "the level of the information that you have provided indicates to me that there is not sufficient evidence for a departure, so that I will rank you a Level Three."

On appeal to the Appellate Division, Fourth Department, Brown argued he had proved a downward departure was warranted by clear and convincing evidence, the level of proof then required by the Fourth Department. He also pointed out the Second Department required proof by a preponderance of the evidence, a less stringent standard. The Fourth Department affirmed, without opinion, the order designating Brown a level three sex offender.

Brown observes that, after the Fourth Department decided his appeal, this Court resolved the departmental conflict over the standard of proof in People v Gillotti and People v Fazio (23 NY3d 841 [2014]), holding that SORA defendants must prove mitigating factors supporting a downward departure by a preponderance of the evidence, not clear and convincing evidence. He argues that he "is at least entitled to have his case remitted to the Appellate Division for application of the correct standard of proof to his downward departure request, along with a review of the discretionary aspect of the SORA court's departure decision."

For appellant Brown: Mark C. Davison, Canandaigua (585) 394-5222
For respondent: Jefferson County District Attorney Cindy F. Intschert (315) 785-3053

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To be argued Thursday, June 4, 2015 (arguments begin at 1 p.m.)

No. 118 People v Dean Pacquette

In the early morning hours of May 17, 2007, Dean Pacquette was arrested in a buy-and-bust operation near Washington Square Park in Manhattan. Detective James Vanacore, acting as a "ghost" officer, watched from across the street as an undercover officer interacted with a drug seller, a tall black male wearing a gray hooded sweatshirt and a dark baseball cap, and signaled that he had bought drugs. The undercover officer then walked away with another suspect and the seller left in the opposite direction. Vanacore followed the undercover officer, losing sight of the seller for a time. Another officer pursued and arrested Pacquette, who he said was the only person in the area matching the description. About 10 or 15 minutes after the drug sale, Vanacore and the undercover officer returned to the scene and identified Pacquette as the seller. Officers found the prerecorded buy money in his pocket.

The prosecutor gave pre-trial notice, pursuant to CPL 710.30(1)(b), that he intended to present testimony of one officer who made a confirmatory identification of Pacquette. After a hearing, Supreme Court ruled the undercover officer's testimony was admissible. At trial, the prosecutor said in his opening statement that he would call the undercover officer and Detective Vanacore to testify about their identifications of Pacquette. Defense counsel objected that he had been given no notice of a second identification witness and moved to preclude Vanacore's testimony. The court denied the motion after a hearing, finding Vanacore's identification was confirmatory and so not subject to the notice requirement. Pacquette was convicted of third-degree criminal sale of a controlled substance and sentenced to five years in prison.

The Appellate Division, First Department affirmed, saying, "The court properly determined that an identification made by an officer other than the purchasing undercover officer was confirmatory and thus did not require CPL 710.30(1)(b) notice (see People v Wharton, 74 NY2d 921 [1989]). The requirements of a police confirmatory identification were met, in that the officer at issue carefully observed defendant at close range throughout the drug transaction and made a prompt identification as part of a planned procedure.... The officer also transmitted a detailed and accurate description of defendant." It also said any error was harmless.

Pacquette argues notice was required under People v Boyer (6 NY3d 427 [2006]), which said the Wharton exception applies only where the "officer's observation of defendant is so clear that the identification could not be mistaken." He says Vanacore "did not engage in a careful face-to-face transaction with the seller, or anything equivalent to it, which might have carried the bullet-proof assurance that his subsequent identification 'could not be' the product of undue suggestiveness.... [H]is initial observation of the fleeting drug transaction ... was made from a distance across the street, on a slight diagonal, past midnight, in a crowded West Village neighborhood. Then ... Vanacore promptly lost sight of the suspect for 10 or 15 minutes as he tailed the undercover purchasing officer off the set."

For appellant Pacquette: Carl S. Kaplan, Manhattan (212) 577-2523
For respondent: Manhattan Assistant District Attorney Brian R. Pouliot (212) 335-9000