State of New York
Court of Appeals

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NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

Week of September 12 and 13, 2017

State of New York Court of Appeals

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To be argued Tuesday, September 12, 2017

No. 99 Garthon Business Inc. v Stein

Garthon Business Inc. and Crestguard Limited, both owned by Kazakh businessman Patokh Chodiev, brought this breach of contract, fraud and negligence action against financial advisor Kirill Ace Stein and his company, Aurdeley Enterprises Limited, in December 2014 in state Supreme Court, alleging that their misadvice induced the Chodiev companies to make three unsecured loans totaling $16 million that were never repaid.

The Chodiev group initially retained Stein and Aurdeley in two separate agreements, both effective January 1, 2000. The first, between Chodiev's Quennington Investments Limited and Stein, contained a forum selection clause that said it would be governed by U.S. law and "the Courts of the United States of America shall have exclusive jurisdiction to settle any claim, dispute, or matter of difference, which may arise out of or in connection with this Agreement ... or the legal relationship established by this Agreement." The second, between Chodiev and Aurdeley, was nearly identical to the Quennington agreement, except it was to be governed by English law and the courts of England were to have exclusive jurisdiction over disputes arising from it. Chodiev and Aurdeley later entered into a second consulting agreement, effective July 1, 2009, which expressly terminated the first Aurdeley agreement and also contained a merger clause providing that it "supersedes all prior arrangements, agreements or understandings ... relating to the subject matter of this Agreement." The new Aurdeley contract stated, "Any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the London Court of International Arbitration Rules." At the same time, Quennington and Stein entered into a new agreement that expressly terminated the original Quennington agreement. It contained an arbitration clause identical to the one in the new Aurdeley agreement.

In response to this suit, Stein and Aurdeley moved for an order compelling arbitration of all the claims in London under the arbitration clauses in the 2009 agreements. Supreme Court granted the motion to compel arbitration.

The Appellate Division, First Department reversed on a 3-2 vote, ruling the claims must be litigated in court. The language of the 2009 arbitration clauses "[a]t best ... indicates that the parties intended only to arbitrate disputes that arose after July 1, 2009.... It does not indicate a clear manifestation that the forum selection clause in the [2000] Quennington agreement had been abandoned," it said. Broader than the arbitration provisions, the forum selection clause "applied to the 'legal relationship established by' the agreement. That relationship survived the Quennington agreement. Since the complaint asserts that Stein breached the fiduciary duty born out of that relationship, the forum selection clause should apply to the complaint."

The dissenters argued that the 2009 arbitration clauses "reserved to the arbitrator the right to determine the issue of arbitrability." They said they "neither agree nor disagree with the majority's conclusion that the later agreements at issue did not negate the effectiveness of the forum selection clause in the earlier Quennington agreement, [We] only conclude that ... the determination of that issue belongs to the arbitrators...."

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For plaintiffs Garthon and Crestguard: Pieter Van Tol, Manhattan (212) 918-3000

State of New York Court of Appeals

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To be argued Tuesday, September 12, 2017

No. 100 People v Ross Campbell *(papers sealed)*

Ross Campbell and several co-defendants were charged with sexually and physically abusing three women and forcing them to work as prostitutes in the Bronx in 2008. At Campbell's trial, prospective juror number 4 said she did not think she "would be a good candidate because I'm a hairstylist, and I probably will lose my job if I did serve on this as a juror." She also said she would have difficulty serving as a juror because "I went out on a date and I was almost raped and -- I mean, after you started to bring this up, then memories started to come back. And then my husband got drunk one night and he also raped me, so there's certain things that, after you start to hear about this, start to bring back memories." She said she would like to speak to the judge about it privately. Later, when the judge met privately with other prospective jurors, he decided not to meet with juror number 4 after discussing the matter with defense counsel. Both mentioned only her employment and the court said "I don't think she wanted to relate anything other than her concern that she's going to lose her job if she's here too long." Defense counsel neither challenged the juror nor sought further inquiry by the court into whether her experiences with sexual violence would affect her ability to serve impartially. She was seated on the jury. Campbell was convicted of rape, sex trafficking, promoting prostitution, criminal sexual act, and kidnapping; and he was sentenced to 25 years in prison.

The Appellate Division, First Department affirmed. "Defendant's ineffective assistance of counsel claims are generally unreviewable on direct appeal because they involve matters of strategy not reflected in, or fully explained by, the record.... Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal," it said. "In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards.... Defendant has not shown that any of counsel's alleged deficiencies fell below an objective standard of reasonableness, or that, viewed individually or collectively, they deprived defendant of a fair trial or affected the outcome of the case."

Campbell contends he was deprived of effective assistance of counsel and a fair trial. "Because defense counsel failed to remind the judge that this juror had asked to speak in private after revealing that she was a sex crime victim, the court declined the juror's request for a private discussion.... [D]efense counsel also failed to follow up on the juror's job security fears and the potential impact on her impartiality. As a result, the juror never was asked to state that she could be fair and impartial -- even though she, herself, had identified two particular issues -- crime experience and income loss -- that courts have recognized to be problematic.... Moreover, on this record, it is clear that defense counsel had no strategic reasons for allowing the juror to serve."

For appellant Campbell: Abigail Everett, Manhattan (212) 577-2523
For respondent: Bronx Assistant District Attorney Ramandeep Singh (718) 838-7201

State of New York Court of Appeals

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To be argued Tuesday, September 12, 2017

No. 101 People v Vilma Bautista

In 2012, Manhattan prosecutors charged Vilma Bautista with conspiring with two of her nephews to sell four valuable paintings they did not own and conceal the proceeds from tax authorities. Decades earlier, Bautista had served as personal secretary in New York to Philippine First Lady Imelda Marcos, who bought the paintings in the 1970s. After the Marcos regime fell in 1986, the paintings came into Bautista's possession. She sold one of them, Claude Monet's "Le Bassin aux Nymphéas" (Water Lily), to an art gallery for $32 million in 2010. Bautista did not report the sale on her state income tax return, which prosecutors alleged would have made her liable for more than $1 million in New York taxes.

The thrust of her defense was that she had not intentionally sought to evade taxes or falsify tax documents. Her sole witness was a tax attorney who testified that he discussed the sale of the painting with Bautista and Philippine attorney Gavino Abaya, who had represented Marcos for many years and advised Bautista on the sale. The tax attorney said they led him to believe that she sold the painting on behalf of Marcos and he did not advise her that she would owe taxes on any proceeds she kept for herself. He said he later told Abaya that Bautista would have to report on her tax return any commission she received. During summation, the prosecutor repeatedly argued that the tax attorney testified that he told Bautista and Abaya "multiple times" that "any income she earned related to the sale had to be reported" and that "she did not ... follow on the advice given because the advice given was pay your taxes." Defense counsel objected that the prosecutor was misstating the testimony. Supreme Court overruled the objections and told the jury "it's your memory of the witness's words that are important." The court also rejected a defense argument that the notes of police investigators who interviewed Abaya, an unindicted co-conspirator, were exculpatory Brady material that must be disclosed. According to the notes, Abaya told them Marcos gave the Water Lily painting to Bautista and gave her the authority to sell it. Bautista was convicted of first-degree criminal tax fraud and offering a false instrument for filing. She was sentenced to two to six years in prison.

The Appellate Division, First Department affirmed, saying Bautista "was not deprived of a fair trial by the prosecutor's argument in summation that she was told by a tax attorney" to declare her income from the sale. "The tax attorney did not testify that he had directly so advised defendant, but rather testified that he met with defendant and [Abaya] to discuss tax issues..., and that [he] advised [Abaya] two weeks later of defendant's obligation to report the income. It was reasonable to infer that this information was conveyed to defendant." The investigators' notes were not Brady material, it said. "Moreover, there is no reasonable possibility that they would have affected the outcome of the trial..., since the alleged coconspirator presumably would have invoked his Fifth Amendment right against self-incrimination if called by the defense."

Bautista argues, "A prosecutor's repeated factual misstatements ... of a defense witness's crucial testimony cannot be legitimized on the ground that the misstatements constituted a reasonable inference from the evidence when there was insufficient evidence in the record to support such an inference.... A Brady violation cannot be sanctioned based on speculation -- without record support -- that an unindicted co-conspirator would have asserted his Fifth Amendment right ... if the defense, knowing of his exculpatory statements, had called him to the stand."

For appellant Bautista: Nathan Z. Dershowitz, Manhattan (212) 889-4009
For respondent: Manhattan Assistant District Attorney Garrett Lynch (212) 335-9000

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To be argued Wednesday, September 13, 2017

No. 102 Matter of State of New York v Floyd Y. *(papers sealed)*

Floyd Y. was convicted in 2001 of first-degree sexual abuse and endangering the welfare of a child for molesting two children between 1996 and 1998. He was sentenced to four to eight years in prison. In 2007, after his sentence expired, the State filed a civil management petition under Mental Hygiene Law article 10, alleging that he is a dangerous sex offender who should be confined in a secure treatment facility. The statute requires the State to prove by clear and convincing evidence that an offender suffers from a "mental abnormality," which it defines as "a congenital or acquired condition, disease or disorder that affects the emotional, cognitive, or volitional capacity of a person in a manner that predisposes him or her to the commission of conduct constituting a sex offense and that results in that person having serious difficulty in controlling such conduct." A jury found that Floyd suffered from a mental abnormality under Mental Hygiene Law § 10.03, but the verdict was reversed in M/O State v Floyd (22 NY3d 95 [2013]). At his second trial, the jury again found he suffered from a mental abnormality.

Supreme Court granted Floyd's motion to set aside the verdict, finding the State presented insufficient evidence that he had "serious difficulty" controlling his sexual misconduct. The court cited M/O State of New York v Donald DD. [Kenneth T.] (24 NY3d 174 [2014]), which it said "significantly increased the quantum of evidence the State must present to demonstrate that [an offender] has a serious difficulty controlling his sex offending behavior." It noted that the State's expert in this case and in Kenneth T. relied on the offender's lack of progress in sex offender treatment, admission that he had serious difficulty controlling his sexual urges, and lengthy history of sexual misconduct despite prior arrests and imprisonment in concluding that he suffered from a mental abnormality. After a subsequent hearing, the court determined that Floyd was not a dangerous sex offender requiring confinement.

The Appellate Division, First Department reversed both orders and reinstated the jury's verdict that Floyd had a mental abnormality. It said the State's expert here, in contrast to Kenneth T., "did not solely rely on the facts of [Floyd's] sex offenses in concluding that he had serious difficulty controlling his urges. Instead, [the expert] based his opinion on [Floyd's] triple diagnosis (pedophilia, [antisocial personality] and substance abuse disorders), his pattern of sexual misconduct, and his abject failure to satisfactorily progress in treatment." It said another important distinction was that "the underlying sexual disorder in Kenneth T. was paraphilia NOS, not pedophilia," which, "by definition, involves an element of difficulty in control.... By this decision, we do not hold that all offenders who suffer from pedophilia are automatically, by virtue of that diagnosis alone, subject to mandatory civil management. We simply hold that the State's evidence in this case -- including [Floyd's] multiple diagnoses, his history of sexual misconduct, his admitted inability to control his pedophilic urges, his lack of satisfactory progress in sex offender treatment and his failure to have a viable relapse prevention plan -- was legally sufficient to uphold" the jury's verdict.

For appellant Floyd Y.: Alexandra Keeling, Manhattan (646) 386-5891
For respondent State: Assistant Solicitor General Matthew W. Grieco (212) 416-8014

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To be argued Wednesday, September 13, 2017

No. 82 People v Sean Garvin *(papers sealed)*

Detectives investigating a series of Queens bank robberies in January 2011 found Sean Garvin's fingerprint on a note the masked robber left at one of the banks. Without obtaining an arrest warrant, detectives went to his home in a two-family house and entered the front door. They walked through a vestibule and up a staircase leading to his apartment on the top floor. A detective knocked on his door and, when Garvin opened it, told him he was under arrest. Garvin turned around, put his hands behind his back, and was handcuffed as he stood in the doorway. The detectives found $542 in his pocket when they searched him at the precinct. In oral and written statements, he admitted that he robbed four banks and unsuccessfully attempted to rob a Bank of America branch. Later, in a holding cell, he said, "I should have stuck to Chase banks. They're the ones that give the money out."

Garvin moved to suppress his statements and other evidence obtained as a result of his warrantless arrest, arguing the detectives had illegally entered his residence without his consent. Supreme Court denied the motion. Convicted at a bench trial of four counts of third-degree robbery and one of attempted robbery, he was sentenced to 15 years to life in prison.

The Appellate Division, Second Department affirmed in a 3-1 decision, finding the warrantless arrest did not violate his rights under Payton v New York (445 US 573) because the detectives did not enter his home. "[W]here the defendant lived in the upstairs apartment of a building containing two separate apartments, there is clearly a 'distinction between homes and common areas such as halls and lobbies ... which are not within an individual tenant's zone of privacy'...," it said. "The arresting officer did not go inside the defendant's apartment ... or reach in to pull the defendant out.... Since the defendant was arrested at the threshold of his apartment, after he 'voluntarily emerged [and thereby] surrendered the enhanced constitutional protection of the home'...," the arrest was legal. It also said the trial court did not abuse its discretion in sentencing him as a persistent felony offender. "The court's conclusion that the nature of the defendant's criminal conduct, his history, and his character warranted extended incarceration and lifetime supervision is supported by the record...."

The dissenter said Garvin's motion to suppress the evidence should have been granted. "At the suppression hearing, the People failed to present sufficient evidence to show, in the first instance, that the police entry into the building where the defendant lived was lawful. There was no evidence presented as to how the police officers entered the building [and] no testimony that the police officers believed the building to be a two-family house prior to entering it. Furthermore, there was no evidence that the subject building was in any way distinguishable from a one-family house. Based on my reading of the hearing testimony, it can reasonably be inferred that the subject police officer testified that the building ... was a 'two-family house' based on his observations from inside the building, not from its outward appearance."

For appellant Garvin: Tammy E. Linn, Manhattan (212) 693-0085
For respondent: Queens Assistant District Attorney Danielle S. Fenn (718) 286-5838

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To be argued Wednesday, September 13, 2017

No. 83 People v Phillip Wright

In January 2009 two men, one of them armed with a gun, abducted Giles Manley from a street in Brooklyn and drove him away in a car. The next day, after a series of calls demanding ransom were made from Manley's cell phone to his friends and family, the police tracked his phone to a car in which Phillip Wright and his co-defendant were sitting. Officers recovered a loaded handgun from Wright and found the injured victim, bound and gagged with duct tape, in the trunk of the car.

At their joint trial, defense attorneys asked prospective jurors if anyone thought police officers "have a duty not to lie?" One juror replied, "I feel like we are all humans. We do make mistakes to a certain extent. And I am not saying police officers don't lie, or anything like that. But they are humans, too.... [A]t the same time, they are officers. Their job is to protect. To do the right.... So I do give them the benefit of the doubt to do the right." She said she would not "automatically" believe police testimony, but agreed she would "lean towards it." Supreme Court denied -- without further inquiry -- Wright's challenge to strike the juror for cause, so he used a peremptory challenge to remove her.

The jury acquitted Wright of kidnapping and assault, but convicted him of second-degree criminal possession of a weapon. The court sentenced him to 15 years to life as a persistent felony offender under Penal Law § 70.10 and CPL 400.20, which permit enhanced sentences for defendants with two or more prior felony convictions if the judge finds by a preponderance of the evidence that "the history and character of the defendant and the nature and circumstances of his criminal conduct indicate that extended incarceration and life-time supervision will best serve the public interest." Wright argued on appeal that the juror should have been removed for cause and that his sentencing violated the 2000 Supreme Court ruling in Apprendi v New Jersey (530 US 466), which said, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."

The Appellate Division, Second Department affirmed, saying the juror's statements "did not rise to the level of actual bias or otherwise indicate that [she] would be unable to render an impartial verdict.... Thus, there was no basis for the Supreme Court to administer an expurgatory oath or sustain the defendant's challenge for cause...." It rejected Wright's claim that the persistent felony offender statutes are unconstitutional based on precedents of this Court, which said they do not conflict with Apprendi because "defendants are eligible" for enhanced sentencing "based solely on whether they had two prior felony convictions." The Appellate Division said the statutes were not unconstitutional as applied to Wright because the trial court based its sentencing decision "solely on his prior convictions, facts found by the jury in the instant case, and [its] discretionary evaluation of the seriousness of [his] criminal history...."

Wright says the trial court erred in denying his for-cause challenge to a juror "who admitted she would give the 'benefit of the doubt' to police officers and 'lean towards' believing them," without obtaining an "unequivocal assurance that she could set aside her bias." He says recent Supreme Court rulings "make clear" that the persistent felony offender statutes are unconstitutional under Apprendi because their "plain language, history, and purpose all show that the sentencing court must make factual findings about a defendant's background and criminal conduct" and they "authorize the court to make findings about the quantity and quality of a defendant's prior convictions that far exceed the mere 'fact' of their existence...."

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