

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 5, 2012

No. 155 Matter of the New York County Lawyers' Association v Bloomberg

County bar associations from each of the five boroughs of New York City, joined by intervenor New York Criminal Bar Association (NYCBA), brought this article 78 proceeding to challenge revisions the City made to its Indigent Defense Plan in 2010. The City first established its plan in 1965 pursuant to County Law § 722, which required it to provide counsel to indigent criminal defendants through any of four options: (1) a public defender; (2) a legal aid society; (3) private counsel "furnished pursuant to a plan of a bar association;" or (4) any combination of those options. The City adopted a combination plan with the section 722(2) and (3) options, making the Legal Aid Society of New York the primary provider and, for cases where Legal Aid would have a conflict of interest, private attorneys appointed from assigned counsel panels created and screened by the County Bars. The Appellate Division assumed responsibility for the screening of attorneys in 1980. The revisions adopted in 2010 would retain the assigned counsel panels created by the City Bars, but would also permit assignment of conflict cases to Legal Aid and other institutional providers selected by the City's Criminal Justice Coordinator (CJC) through a bidding process. The County Bars argue the new system violates section 722 and the Municipal Home Rule Law because, among other things, conflict counsel would no longer be "furnished pursuant to a plan of a bar association" under section 722(3).

Supreme Court held that the City's 2010 revisions complied with County Law § 722 and dismissed the proceeding.

The Appellate Division, First Department affirmed in a 3-2 decision, saying section 722 gave the City, not the bar associations, authority to adopt an indigent defense plan. It said the revised plan "is not arbitrary and capricious or irrational..., does not require the consent of the county bar associations..., and does not violate section 722" or the Municipal Home Rule Law. It said the legal aid society option of section 722(2) "is not restricted to primary assignments, and the 'plan of a bar association' option of § 722(3), ... contrary to petitioners' contention, does not give the County Bars the exclusive right to provide 'conflict counsel.'" It said the revised plan "does not improperly usurp the role of the County Bars. Nor does the plan ... eliminate the judiciary's right under [section 722(4)] to assign counsel when a conflict of interest prevents assignment pursuant to the plan...."

The dissenters argued that the revised plan violates section 722 and the Home Rule Law because, among other things, the new role of the assigned counsel panels is no longer a "plan of a bar association." They said, "[N]o matter how we characterize the changes, the ineluctable reality is that a 'Bar Plan' that has not been adopted, but instead has been rejected by the bar associations, is not 'a plan of a bar association' as contemplated by County Law § 722(3)." They said that, in the absence of a valid bar plan under section 722(3), the new Indigent Defense Plan "falls under County Law § 722(2). In that circumstance, § 722(4) provides that a judge may appoint conflict counsel."

For appellant County Bars: Jonathan D. Pressment, Manhattan (212) 659-7300

For intervenors-appellants NYCBA et al: Zoë E. Jasper, Manhattan (212) 818-9200

For respondent City: Assistant Corporation Counsel Julian L. Kalkstein (212) 788-1030

For intervenor-respondent Legal Aid Society: Daniel F. Kolb, Manhattan (212) 450-4000

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No. 156 People v Western Express International, Inc.

(papers sealed)

In 2007, a Manhattan grand jury indicted Western Express International, a financial services company; its president, Vadim Vassilenko; and 16 other individuals on 173 counts of grand larceny, fraud, conspiracy and -- the focus of this appeal -- enterprise corruption under Penal Law § 460.20(1) of the Organized Crime Control Act. The defendants were accused of participating in an international "cyber-crime" operation that trafficked in stolen credit card information. Western Express allegedly acted as an intermediary by providing credit and facilitating anonymous transactions between buyers and sellers of the stolen information, earning a commission on each transaction. Defendants Douglas Latta, Lyndon Roach, and Angela Perez were identified as buyers of stolen credit card data, which they allegedly used to make fraudulent purchases and produce counterfeit credit cards.

Defendants moved to dismiss the top count of enterprise corruption for lack of evidence that they were engaged in a "criminal enterprise" as defined in Penal Law § 460.10(3): "a group of persons sharing a common purpose of engaging in criminal conduct, associated in an ascertainable structure distinct from a pattern of criminal activity...." Supreme Court granted the motion, saying, "Although the statute does not require any particular structure..., courts have consistently required some evidence of a system of authority or hierarchy binding the defendants together.... [N]owhere do the People allege that any of these individuals or entities made decisions or shared authority over each other."

The Appellate Division, First Department reversed in a 3-2 decision and reinstated the enterprise corruption count. "Given that the statute merely requires an 'ascertainable structure,' there is no reason to engraft on it that the structure be of the old-fashioned, hierarchical nature..., " it said. "Although the criminal enterprise here was not of a traditional hierarchical sort, the participants worked together, employing a repeating pattern in their transactions that served to maximize the profits of each while minimizing their exposure, with each participant playing a different role: buyers, sellers, and money movers."

The dissenters said, "[T]here is no evidence of any collective decision-making or coordination with respect to the purported enterprise's activities or of any overarching structure of authority or hierarchy in which defendants participated.... Western Express was in essence no more than the equivalent of a common fence, taking stolen property from independent thieves and selling it to buyers looking for an illicit deal. Although defendants may all have been in the same industry, [they] operated at arm's length for their own benefit, not as an enterprise with a shared purpose."

For appellant Vassilenko: Marianne Karas, Thornwood (914) 434-5935

For appellant Latta: Jan Hoth, Manhattan (212) 577-2523

For appellant Roach: Allen Fallek, Manhattan (212) 577-3566

For appellant Perez (aka Ciano): Matthew Galluzzo, Manhattan (212) 918-4661

For respondent: Manhattan Assistant District Attorney David M. Cohen (212) 335-9000

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No. 157 Matter of 677 New Loudon Corporation v NYS Tax Appeals Tribunal

677 New Loudon Corporation operates an adult entertainment club in the Town of Colonie under the name Nite Moves, which features exotic dancers. After an audit in 2005, the State Division of Taxation determined that the club's general admission charges and its "couch sales," the fees patrons pay for private dances, are subject to sales tax and assessed Nite Moves \$124,921.94 in taxes due plus interest for the period from December 2002 through August 2005.

Nite Moves challenged the assessment, saying it was exempt from sales tax on admission fees to "any place of amusement" under Tax Law § 1105(f)(1), which exempts "dramatic or musical arts performances." It also claimed exemption from sales tax on charges of a "cabaret or similar place" under Tax Law §§ 1105(f)(3) and 1101(d)(12), which exclude "a place where merely live dramatic or musical arts performances are offered." Nite Moves relied largely on an expert witness, a cultural anthropologist specializing in exotic dance, who testified that "the presentations at Nite Moves are unequivocally live dramatic choreographic performances."

An administrative law judge ruled for Nite Moves, crediting the club's expert and finding its admission and private dance fees qualified for the exemption for "dramatic or musical arts performances." The ALJ said, "The fact that the dancers remove all or part of their costume ... simply does not render such dance routines as something less than choreographed performances."

The Tax Appeals Tribunal reversed and reinstated the tax assessment. It gave little or no credence to Nite Move's expert, who admitted she did not observe any private dances, and ruled the club failed to prove its exotic dances were exempt performances. It said the expert's "view of choreographed performance is so broad as to include almost any planned movements done while playing canned music.... Further, the terminology [the witness] employs in her report and testimony at times appears designed to neatly fit into the statutory exemption language."

The Appellate Division, Third Department affirmed, saying the Tribunal's rejection of the expert testimony was not arbitrary and the club's remaining evidence failed to prove it is entitled to the exemption for choreographed performances. It said, "The record reflects that the club's dancers are not required to have any formal dance training and ... often rely upon videos or suggestions from other dancers to learn their craft." Rejecting the club's constitutional claims, it said, "[E]ach of the statutory provisions at issue is facially neutral and in no way seeks to levy a tax upon exotic dance as a form of expression.... [P]etitioner was denied the requested relief due not to the nature of its business but, rather, because of the inadequacy of its proof."

Nite Moves argues the Tribunal's ruling was arbitrary and capricious and "relied on legal error." It says the Tribunal "stretched and pulled at both the law and the facts to avoid what appears to Petitioner to be obvious: that this establishment qualifies as one which features 'choreographed' performances, and thus is excluded from the tax at issue.... [T]he Tribunal set itself up as a dance critic, despite claiming no expertise in the field. It determined that there was no merit to the expert opinion offered by petitioner, despite no attempts before the ALJ to impeach or undermine her." It also argues, "Nude dancing is protected expression, and not subject to a discriminatory tax."

For appellant Nite Moves: W. Andrew McCullough, Midvale, Utah (801) 565-1099

For respondent Tribunal et al: Assistant Solicitor General Robert M. Goldfarb (518) 473-6053

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To be argued Wednesday, September 5, 2012

No. 159 People v Jose Alfaro

Xiao Dong Jin was walking in midtown Manhattan in March 1999 when he was jumped from behind by men who punched him and knocked him to the sidewalk. They dragged him face-down into a freight elevator lobby and continued to beat him, then turned him on his back and rifled through his pockets, taking several documents. When they fled, Jin pursued them and with the help of bystanders detained Jose Alfaro for police. While arresting Alfaro, officers recovered novelty handcuffs with keys and a cigarette lighter shaped like a gun.

Before trial, defense counsel applied to preclude introduction of the toy handcuffs and gun-shaped lighter as irrelevant, because they were not used or mentioned during the robbery, and he argued their admission would be unduly prejudicial. He said, "It goes to propensity rather than any legitimate issue of identity or intent in this case." Supreme Court denied the application, saying, "This is part of the *res gestae*. It's exceedingly relevant.... It's part of the whole of the transaction." The court also denied Alfaro's request to instruct the jury that the handcuffs and lighter could not be considered as evidence of his propensity to commit the crime, saying the instruction was unnecessary and confusing. Alfaro fled on the eve of trial and was convicted in absentia of first and second-degree robbery, first-degree assault and second-degree gang assault. He began serving his 15-year sentence when he was apprehended in 2008.

The Appellate Division, First Department affirmed the conviction, saying, "The court properly admitted into evidence an imitation pistol, handcuffs and handcuff keys found in defendant's possession or vicinity immediately after the crime was committed. Although defendant was not charged with unlawful possession of an imitation pistol, his possession of those items provided circumstantial evidence of his intent to commit the crimes charged.... Furthermore, the probative value of this evidence outweighed its prejudicial effect. The lack of a limiting instruction does not warrant reversal under these circumstances."

Alfaro argues that admission of the handcuffs and imitation gun violated the Molineux rule, which limits the use of evidence of uncharged crimes. He says, "In this eyewitness identification case, where intent was not at issue, the trial court erred by: (1) permitting the prosecution to introduce evidence that Jose Alfaro possessed items that were not used, mentioned or displayed in the crime, but could, hypothetically, have been used to commit such a crime, and (2) refusing to instruct jurors that the items could not be considered as propensity evidence." He says, "The fake handcuffs and toy gun had no probative value beyond demonstrating a propensity for robbery and were, thus, inadmissible" under Molineux. "Where the only evidence presented was equivocal or contradictory witness testimony, the introduction of this highly inflammatory and prejudicial evidence denied Mr. Alfaro his right to a fair trial."

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For respondent: Manhattan Assistant District Attorney David P. Stromes (212) 335-9000