

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 Friday, September 7, 2012 (11 a.m.)

No. 165 People v Carlos Herring

Carlos Herring was charged with fatally shooting Donald Thompson and wounding another man during a dispute outside a nightclub in Spring Valley, Rockland County, in August 2006. At his trial, County Court questioned juror number 11 about her ability to serve, saying "you appear to be falling asleep an awful lot." The juror said she had been taking cough medicine that made her drowsy, said she would stop taking it during the day, and acknowledged that it was important for her to pay attention to the evidence. She was allowed to continue without objection. During the jury's deliberations, another juror reported that juror 11 was "just not participating ... at all" and was "just sleeping basically" during a "prolonged period of the deliberations." The court summoned juror 11 and again inquired about her ability to serve. She denied she had been sleeping and said she had no illness that would prevent her from serving. "I'm capable to do this," she said. "I don't know why I'm here." After the court sent her to rejoin the jury, defense counsel complained that its inquiry was made "with absolutely no regard" for how much of the testimony and deliberations she had slept through. He said, "I think that the inquiry that has been made, it's absolutely inadequate, insufficient, superficial. My client is now here being tried by a jury of 11." The court denied defense motions to discharge the juror or declare a mistrial, based on the juror's assurance that she was capable of fulfilling her duties. It said, "[W]ith that response I refuse to inquire any further as to who is participating in deliberations, as to how they are participating in deliberations.... I think it invades the privacy and the province of that jury and I will not do it, over your objection."

Herring was convicted of second-degree murder, second-degree assault, and second and third-degree criminal possession of a weapon. He was sentenced to 25 years to life for murder and a consecutive term of seven years on the third-degree weapon count.

The Appellate Division, Second Department affirmed, saying County Court "did not improvidently exercise its discretion in denying the defendant's motion to discharge a certain juror or for a mistrial based on the alleged inattentiveness of that juror, after making an inquiry of that juror...."

Herring argues that he "was deprived of his Constitutional right to a jury of twelve members when a sworn juror disregarded her fundamental duties and slept during trial and deliberations.... Since the juror's sleeping rendered her 'grossly unqualified,' the court improperly denied appellant's requests to strike her or grant a mistrial, and never afforded appellant the opportunity to consent in writing, during deliberations, to replace that juror with an available alternate (CPL 270.35[1] ...).

For appellant Herring: Diane E. Selker, Peekskill (914) 736-1738

For respondent: Rockland County Exec. Asst. District Attorney Itamar J. Yeger (845) 638-5001

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To be argued Friday, September 7, 2012 (11 a.m.)

No. 166 Matter of D'Angelo v Scoppetta

This case arises from a confrontation between two employees of the Fire Department of the City of New York (FDNY) -- firefighter Michael D'Angelo, who is white, and emergency medical technician Russell Harris, who is black -- at the scene of a Brooklyn automobile accident in 2006. Harris filed a complaint with the FDNY's Equal Employment Opportunity (EEO) Office, alleging D'Angelo shouted a racial slur at him. The Office opened an investigation. The FDNY's Bureau of Investigations and Trials also began an investigation, which it later closed without taking any action against D'Angelo. In May 2008, after interviewing D'Angelo, Harris, and other witnesses, the EEO Office submitted an investigative report to Fire Commissioner Nicholas Scoppetta which said Harris's complaint was substantiated and recommended EEO training for D'Angelo, among other things. Scoppetta approved the recommendation.

In June 2008, the EEO Office issued a letter to D'Angelo which said, in part, "After conducting a thorough investigation..., this office finds that the allegations that you exercised unprofessional conduct and made an offensive racial statement are Substantiated. The EEO Office determined that you exhibited conduct that violates the Fire Department's EEO Policy and Code of Conduct in that you made an inappropriate and offensive comment of a racial nature in the workplace to another Fire Department employee.... [I]t is the recommendation of the EEO Office that you receive an EEO Advisory Memorandum, which is enclosed for your review and signature ... [and] that you receive EEO Training.... This document serves as a formal Notice of Disposition of the filed Complaint." Copies of the letter and memorandum were placed in D'Angelo's EEO file, but not in his personnel file.

D'Angelo brought this article 78 proceeding against Scoppetta, the EEO Office and the City (collectively FDNY), seeking an order annulling the Commissioner's determination that he acted unprofessionally and made an offensive racial comment, and expunging the letter from his EEO file. He argued the determination and letter were disciplinary in nature and were issued in violation of Civil Service Law § 75, which requires municipal employers to provide a formal hearing and other due process protections to an employee before imposing discipline.

Supreme Court granted his petition to annul the determination and expunge the letter, saying, "The letter is a disciplinary reprimand and not a critical evaluation." The Appellate Division, Second Department affirmed. It said, "Contrary to the appellants' contentions, the subject letter ... cannot be properly characterized as a 'critical evaluation[]' or '*Holt*' letter.... Moreover, the record does not substantiate the appellants' contention that there is 'ample evidence' that they comported with the requirements of due process."

The FDNY argues the letter "should not be deemed 'discipline,' and, rather, should be viewed as no more than an administrative review of an employee's conduct, in accordance with the Fire Department's EEO Policy. The Fire Department did not discipline petitioner, nor did the EEO Office, which has no authority to discipline employees, recommend discipline."

For appellant FDNY: Assistant Corporation Counsel Ellen Ravitch (212) 788-1040

For respondent D'Angelo: Michael N. Block, Manhattan (212) 732-9000

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To be argued Friday, September 7, 2012 (11 a.m.)

No. 167 People v Norman Cajigas

Norman Cajigas's former girlfriend, Maria Rodriguez, obtained orders of protection in 2007 that prohibited him from having any contact with her, based on allegations that he had physically abused and threatened her. He was later charged with criminal contempt for violating the orders on two occasions in July 2007, first by accosting Rodriguez at a Manhattan beauty salon and following her to her mother's apartment, and again by attempting to enter her apartment on East 13th Street. He was also charged with second-degree attempted burglary, the focus of this appeal, based on the second incident. Rodriguez's daughter was alone in the apartment when she heard Cajigas rattling the doorknob. He did not reply and walked away when she asked what he wanted. He returned in a few minutes and tried the knob and pushed at the door, then left without speaking when she asked again what he wanted.

At trial, Cajigas moved to dismiss the attempted burglary charge for failure to prove he intended to commit a crime after gaining entry to the apartment. He also asked the court to instruct the jury that his "intent to commit a crime therein" could not be satisfied by conduct that would not be criminal if the order of protection did not prohibit it. He cited People v Lewis (5 NY3d 546), which held that "the 'intent to commit a crime therein' element of burglary ... may be satisfied by a defendant's intent to engage in conduct prohibited by an order of protection while in the banned premises," but not "solely by a defendant's intent to violate an order of protection by entering the dwelling that the order of protection declares off limits." He also cited the Appellate Division, Fourth Department's ruling in People v VanDeWalle (46 AD3d 1351), which held "that the 'intent to commit a crime therein' element of burglary cannot be satisfied by intended conduct that would be innocuous if the order of protection did not prohibit it, and that such insufficient intended conduct would include the defendant's mere 'contact' or 'communication' with -- or proximity to -- the [person] named in the order of protection." Supreme Court denied the motion and requested jury charge and Cajigas was convicted of all counts. He was sentenced to 6½ to 8 years in prison, including 5 years for attempted burglary.

The Appellate Division, First Department affirmed, saying "the intent element will be satisfied if the defendant entered the premises with the intent to violate another provision of the order of protection, distinct from the trespass," including a provision "requiring that he stay away from the victim." It said, "The court correctly declined to charge that the criminal intent element could not be satisfied by an intent to commit an act that would be innocuous if the order of protection did not prohibit it. We find nothing in Lewis that would require such an instruction."

Cajigas argues the Fourth Department adopted "the proper reading" of Lewis. "[A]n unlawful entry coupled with the intent to conduct oneself in a manner that would be innocuous absent the order of protection is nothing more than a mere trespass into the apartment...", he says. "[T]he violations of the 'stay away' from the home provision and the 'stay away' from the person represented a single criminal act with a single criminal intent -- to violate the order of protection," and it cannot be used "to establish both the unlawful entry and the intent to commit a crime elements of burglary."

For appellant Cajigas: Jonathan M. Kirshbaum, Manhattan (212) 577-2523

For respondent: Manhattan Assistant District Attorney Britta Gilmore (212) 335-9000

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No. 168 People v Luis Alvarez

No. 169 People v William George

The common issue in these appeals is whether the trial courts' exclusion of the public, including members of the defendants' families, during the first round of jury selection violated their Sixth Amendment right to a public trial. Both judges said they excluded spectators due to lack of space. Another question is whether the issue must be preserved by objection at trial.

Luis Alvarez was tried on weapon possession charges in Supreme Court, Queens County, in 2008. After the first round of voir dire, defense counsel told the court he had just learned that Alvarez's parents were excluded from the courtroom and moved for a mistrial on the ground "that the right to a free and open trial was denied." The parents were allowed to attend subsequent rounds. The court denied the motion, saying the initial exclusion was "mitigated by the fact that because of the logistics we only have x amount of seating; every one [of] which was taken by the jury panel. So every trial we ask the family to step out and as soon as seats are available, they are [the] first ones offered seats." Alvarez was convicted of multiple charges, including two counts of second-degree possession of a weapon.

William George was tried for robbery in Supreme Court, Kings County, in 2008. Before jury selection began, the court asked George's mother and other family members to leave. It said George "has some people in the courtroom and they are certainly entitled to be here. The only thing I would ask, when we have potential jurors come in, there will not be enough seats for everybody. Within five minutes, I'll excuse people and in order to not have spectators and jurors sitting together I'll have the spectators leave." The defense did not object. The spectators were allowed to return before the first round was completed. George was convicted of first and second-degree robbery.

The Appellate Division, Second Department rejected the defendants' Sixth Amendment challenges in separate rulings, but identical language: "The defendant's claim that the Supreme Court deprived him of his right to a public trial is unpreserved for appellate review.... In any event, the defendant's contention is without merit...."

Both defendants, citing Presley v Georgia (130 S Ct 721 [2010]) and People v Martin (16 NY3d 607 [2011]), argue the trial courts violated their right to a public trial by excluding spectators without first finding that closure was required to protect an "overriding interest" or considering alternatives to ensure the closure was no broader than necessary. Alvarez argues his mistrial motion, made after the courtroom was reopened, properly preserved his claim for appeal. George argues preservation is not required. "[B]ecause under Presley a trial court is obligated to consider alternatives to closure on its own initiative..., a closure order is reviewable on appeal as a legal issue, even in the absence of an objection by counsel," he says.

No. 168 For appellant Alvarez: Kendra L. Hutchinson, Manhattan (212) 693-0085

For respondent: Queens Assistant District Attorney Danielle Hartman (718) 286-5939

No. 169 For appellant George: Denise A. Corsi, Manhattan (212) 693-0085

For respondent: Brooklyn Asst. District Attorney Sholom J. Twersky (718) 250-2537