State of New York Court of Appeals

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To be argued Thursday, January 3, 2013

No. 6 Matter of New York State Office of Victim Services v Raucci

Steven C. Raucci, the former facilities director for the Schenectady City School District, is serving 23 years to life in prison following his 2010 conviction on 18 counts of first-degree arson, weapon possession and other crimes. He was found guilty of, among other things, planting bombs at the homes of coworkers and fellow union members whom he perceived as adversaries. During his incarceration, Raucci's pension checks from the New York State and Local Employees' Retirement System, about $5,800 per month, were delivered to his wife Shelley, who holds his power of attorney and was able to cash them. After two of Raucci's victims notified the State Office of Victim Services (OVS) of their intent to bring civil actions against him, OVS brought this proceeding on their behalf under the Son of Sam Law, Executive Law § 632-a, to freeze his assets.

OVS sought a preliminary injunction deeming Raucci to have directed the retirement system to send the pension checks to his inmate account and prohibiting disbursements, thus preserving the funds to satisfy any civil judgments awarded to his victims. The Rauccis argued the pension checks are exempt from seizure under the Son of Sam Law by Retirement and Social Security Law § 110, which protects the pensions of public employees from "execution, garnishment, attachment, or any other process whatsoever," and by CPLR 5205(c), which exempts defined benefit pension plans "from application to the satisfaction of a money judgment."

Supreme Court denied the motion for an injunction, finding it was precluded by "the clear language of Retirement and Social Security Law § 110." It said "the plain language of the statute ... protects [Raucci's] 'retirement allowance' from execution, garnishment, attachment, or any other process whatsoever." It did not decide the propriety of OVS's request for an order deeming Raucci to have directed that the checks be sent to his inmate account, but said it was "unprecedented."

The Appellate Division, Third Department reversed and granted the motion for a preliminary injunction, ruling the Son of Sam Law superceded the pension protections of section 110. While the Son of Sam Law originally allowed victims to recover only "profits from a crime," it said a 2001 amendment broadened it to allow recovery of "any profits from a crime or funds of a convicted person." The court said, "Although the Legislature expressly exempted certain categories of funds from the reach of the Son of Sam Law, it did not list pension proceeds as one of those categories, indicating that such funds were intended to be recoverable. Moreover, the older, more general provisions of Retirement and Social Security Law § 110 are subordinate to the more recent and specific dictates of the Son of Sam Law because 'a prior general statute yields to a later specific or special statute'...."

For appellants Steven and Shelley Raucci: Alan J. Pierce, Syracuse (315) 565-4500
For respondent OVS: Assistant Solicitor General Owen Demuth (518) 486-4087

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No. 7 People v Carl Watson

Carl Watson was a part-time livery cab driver in Brooklyn in May 2007, when he shot and killed Livingston Powell, another livery driver with whom he had been feuding. He was charged with second-degree murder and weapon possession. Watson claimed self-defense, testifying that he panicked and fired when Powell walked toward his car in a threatening manner and reached for his waist, where he was known to carry a gun. The police found no gun on Powell. Prior to trial, Watson sought to subpoena the Brooklyn District Attorney's records of Powell's prior violent criminal conduct, including violent acts that were unknown to Watson at the time of the shooting, to support his claim that Powell was the initial aggressor.

Supreme Court ruled the evidence inadmissible based on longstanding New York case law. "It is clear that New York law does not authorize evidence of a homicide victim's prior violent acts to prove that the victim was the initial aggressor unless the defendant was aware of these acts. '[A] defendant claiming self-defense may not introduce evidence of the violent propensities of the alleged victim merely to show that the victim was the likely aggressor,['"] the court said, citing Matter of Robert S. (52 NY2d 1046) and People v Miller (39 NY2d 543). It also said the violent incidents cited by Watson "are largely remote in time, going back 20-30 years." The jury acquitted Watson of murder, but convicted him of first-degree manslaughter and second-degree criminal possession of a weapon. He was sentenced to consecutive terms of 10 years for manslaughter and 3½ years for weapon possession.

The Appellate Division, Second Department affirmed, saying, "The Supreme Court providently exercised its discretion in denying admission of evidence of the decedent's prior specific criminal acts of violence, because the defendant lacked the requisite knowledge of these criminal acts...."

Watson argues that "New York State should change its century-old law excluding evidence of a victim's violent character on the issue of who was the initial aggressor in a justification case in light of, inter alia, the overwhelming trend nationwide, the paramount purpose of evidentiary rules to promote accurate verdicts, and the defendant's fundamental right to present exculpatory evidence in his defense." He also argues the trial court denied him due process and a fair trial by refusing to admit evidence of Powell's decades-old shootout with police, which Powell had told him about, "to corroborate appellant's testimony that he reasonably believed he was in imminent danger."

For appellant Watson: A. Alexander Donn, Manhattan (212) 693-0085
For respondent: Brooklyn Assistant District Attorney Camille O'Hara Gillespie (718) 250-2490

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To be argued Thursday, January 3, 2013

No. 8 Matter of Shenendehowa Central School District Board of Education v Civil Service Employees Association, Local 1000, AFSCME, AFL-CIO, Local 864

Cynthia DiDomenicantonio, a member of Civil Service Employees Association, Local 1000, AFSCME, AFL-CIO, Local 864 (CSEA), was employed as a bus driver by the Shenendehowa Central School District for nearly 10 years, until she failed a random drug and alcohol test in October 2009. She tested positive for marijuana and the School District discharged her. CSEA challenged her termination in arbitration, arguing the District violated the collective bargaining agreement (CBA), in which the District and CSEA "subscribe to the concept of progressive discipline, except for the most serious offenses." The CBA provides increasing steps for discipline beginning with written warnings, but it also states, "Suspension without pay or discharge may be invoked with less than two (2) written warnings where the employee's conduct creates a danger to the health, safety or welfare of staff, students and/or the general public.... A positive result in any required drug or alcohol test is considered such a danger." The provision permits suspension or discharge, but the District said it had adopted a zero tolerance policy for positive drug tests and DiDomenicantonio's discharge was mandatory.

The arbitrator found DiDomenicantonio tested positive for marijuana, but also found the District violated the CBA by refusing to exercise any discretion and treating her discharge as mandatory. He said the District, "after negotiating a Contract that provides for a range of discipline for a positive drug test, may not change or renounce that Agreement by unilaterally instituting an automatic discharge for positive drug tests." He ordered DiDomenicantonio reinstated without back pay.

Supreme Court vacated the award and confirmed the District's decision to terminate DiDomenicantonio. It said the District "was not compelled to terminate an employee who failed a drug test but it had the option to do so under [the CBA]. The arbitrator, by ruling to the contrary, 'in effect made a new contract for the parties' as opposed to interpreting it..., and thus clearly exceeded his power."

The Appellate Division, Third Department reversed in a 3-2 decision and confirmed the arbitration award, saying, "If [the District] intended to implement a zero tolerance policy, it could and should have negotiated with CSEA to include such mandatory language in the CBA. Not having done so, petitioner must abide by the language actually negotiated for and agreed upon with CSEA. As the arbitrator correctly stated, petitioner's 'unilaterally established ... policy, no matter how consistently enforced by [petitioner,] is not consistent with the mutually negotiated [CBA].'" It said the remedy, which equated to a six-month suspension without pay, was rational.

The dissenters argued that the District had the contractual right to discharge DiDomenicantonio and it did not violate the CBA when it did so, since her failed drug test meant she "did not have a right to progressive discipline. Under the circumstances, why and how it settled on termination of respondent is totally irrelevant and involves collateral considerations that have nothing to do with its rights under the CBA." They said, "[W]hat the arbitrator chose to do here was not to answer the question posed by the parties for arbitration but, instead, to fashion a resolution of this dispute that he thought was palatable to all involved.... [I]n doing so, the arbitrator 'clearly exceed[ed] a specifically enumerated limitation on [his] power.'"

For appellant School District: Beth A. Bourassa, Albany (518) 487-7617
For respondents CSEA and DiDomenicantonio: Daren J. Rylewicz, Albany (518) 257-1443

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To be argued Thursday, January 3, 2013

No. 9 People v Robert B. Pealer

Robert Pealer was arrested for driving while intoxicated in October 2008 in the Village of Penn Yan, Yates County, while driving home from a bar. Police had received an anonymous tip that he was drunk. An officer followed his car for four minutes and, since Pearson committed no moving violations, finally stopped him for an equipment violation -- an "unauthorized sticker" on his rear window. He failed the field sobriety tests and was taken to the Sheriff's Department for a breathalyzer test, which indicated his blood alcohol content was .15 percent.

At his trial, County Court admitted into evidence breath test calibration and simulator solution certificates, prepared by the Division of Criminal Justice Services and the State Police, to verify the accuracy of the breathalyzer test. It admitted them under the business records exception to the hearsay rule, denying Pealer's objection that admitting the certificates without testimony by the persons who prepared them would violate his right to confront witnesses under the Sixth Amendment and Crawford v Washington (541 US 36). He was convicted of felony DWI, sentenced to 2⅓ to 7 years in prison, and fined $5,000.

The Appellate Division, Fourth Department affirmed, ruling the calibration certificates were not "testimonial" and, thus, not subject to the confrontation requirement. It said, "Here, the statements contained in the breath test documents are not accusatory in the sense that they do not establish an element of the crimes. Indeed, standing alone, the documents shed no light on defendant's guilt or innocence.... The only relevant fact established by the documents is that the breath test instrument was functioning properly. The functionality of the machine, however, neither directly establishes an element of the crimes charged nor inculpates any particular individual. Thus, the government employees who prepared the records were 'not defendant's "accuser[s]" in any but the most attenuated sense'...." It also held the initial stop of Pealer's vehicle was valid, regardless of whether it was pretextual.

Pealer argues the calibration certificates are testimonial in nature because they were prepared expressly for use in prosecuting accused drunk drivers. "While it is true that the calibration of breathalyzer machines is not geared towards a specific arrestee, the fact remains that the purpose of the testing is to guarantee the accuracy of the breathalyzer machines for use in litigation against [any] arrestee blowing into the machine.... Without confrontation, there is nothing to guarantee that law enforcement remains honest in actually conducting the required testing and not fabricating the records to assure more convictions." He says the certificates are not "neutral" business records because they were produced by law enforcement personnel for use in criminal prosecutions. Among other issues, he argues that allowing a stop based on the community college sticker in his rear window would give "the police license to conduct pretextual traffic stops based on little more than a 'whim, caprice or idle curiosity.'"

For appellant Pealer: John A. Cirando, Syracuse (315) 474-1285
For respondent: Yates County District Attorney Jason L. Cook (315) 536-5550

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No. 10 Miglino v Bally Total Fitness of Greater New York, Inc.

In March 2007, Gregory Miglino, Sr. suffered cardiac arrest and collapsed on a racquetball court at a health club in Lake Grove, Suffolk County. The club's staff called 911 for an ambulance and asked anyone at the club with medical training to provide assistance. A personal trainer employed by the club, who was also trained in cardiopulmonary resuscitation and the use of an automated external defibrillator (AED), said the stricken man had his eyes open, normal color and a faint pulse. The trainer went to check on the status of the ambulance, and when he returned a doctor and medical student were tending to Miglino. The trainer said another employee had brought the club's AED to Miglino's side, but he did not use it. Miglino was unconscious when the ambulance arrived and the crew was unable to revive him.

Gregory Miglino, Jr., as executor of the decedent's estate, brought this negligence action against the owner of the club, Bally Total Fitness of Greater New York, Inc., claiming it was negligent in failing to use the AED. He argued that General Business Law § 627-a, which requires health clubs with more than 500 members to have an AED and an employee trained to use it, also imposes a duty on the clubs to use the device when necessary. Bally moved to dismiss the suit on the ground that it was immune under Public Health Law § 3000-a, known as the Good Samaritan statute, which provides that a person who voluntarily renders emergency treatment outside a medical facility may not be held liable for injury or death except in cases of gross negligence. Bally said it was also immune under General Business Law § 627-a, which includes a similar Good Samaritan provision. Supreme Court denied the motion.

The Appellate Division, Second Department affirmed, holding that General Business Law § 627-a imposes a duty on health clubs to use the AEDs it requires them to provide. The purpose of the statute "was to increase the number of lives that could be saved through the use of available AED devices at health club facilities," it said. Since the statute requires clubs "to provide an AED on the premises, as well as a person trained to use such device, it is anomalous to conclude that there is no duty to use the device should the need arise." It rejected Bally's Good Samaritan defense, saying, "While [section] 627-a does incorporate the provision of the Good Samaritan law requiring a showing of gross negligence when the statutorily required AED is used, where, as here, the cause of action is based on the failure to employ the device, as opposed to the manner in which it was employed, the gross negligence standard is not applicable."

Bally cites a First Department case, DiGiulio v Gran, Inc. (74 AD3d 450), which ruled that section 627-a does not implicitly require health clubs to use their AEDs. Bally argues that it satisfied the statute's requirements by having an AED and an employee trained to use it and that the Second Department "added words" to the statute "that conflict with those already present (volunteer/voluntarily) and which most certainly derogate the common law." It says, "The statute was not written to require AED use. It was written to require an AED and a person trained to use that device so that he or she would be encouraged to *volunteer* their assistance in an emergency." It also argues that it is immune from liability under the Good Samaritan statute and that Miglino "assumed the risk of cardiac arrest when he engaged in strenuous physical activity."

For appellant Bally: Brian P. Heermance, Manhattan (212) 825-1212
For respondent Miglino: John V. Decolator, Garden City (516) 578-8212