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 Monday, November 16, 2015

No. 191 People v Luciano Rosario
No. 192 People v Marcos Llibre

These defendants argue they were denied the opportunity to appeal their guilty pleas because their attorneys did not file a notice of appeal or inform them of their right to appeal. Defendants generally have 30 days to file a notice of appeal and CPL 460.30 provides a one-year grace period for defendants to seek permission from an appellate court to file a late appeal, periods that expired before these defendants sought writs of error coram nobis that would permit them to file late appeals due to ineffective assistance of counsel. They rely on People v Syville (15 NY3d 391 [2010]), which held, "Where an attorney has failed to comply with a timely request for the filing of a notice of appeal and the defendant alleges that the omission could not reasonably have been discovered within the one-year period, the time limit imposed in CPL 460.30 should not categorically bar an appellate court from considering that defendant's application to pursue an untimely appeal."

Luciano Rosario was charged with stalking and harassment in the Bronx in 2008 and, three months later, with violating an order of protection issued in connection with the stalking charges. In January 2009, he pled guilty to second-degree harassment and second-degree attempted criminal contempt and was sentenced to 30 days in jail. When Supreme Court asked if he waived his right to appeal (among other rights), his attorney answered "yes," but there was no explanation or further mention of the right to appeal in the record of his plea proceeding. Rosario did not sign a written waiver of appeal. In October 2013, he filed this petition for a writ of error coram nobis, which the Appellate Division, First Department denied without opinion.

Marcos Llibre was arrested for possession of cocaine in Manhattan in 2006. He pled guilty to criminal possession of a controlled substance in the fourth degree and, in June 2007, he was sentenced to five years of probation. Llibre signed a written waiver of appeal at the plea proceeding and waived his right to appeal orally, telling the court he had discussed it with his attorney. The court said, "We haven't done pre-trial hearings so you are not waiving much. But, you are waiving your right to appeal. Do you understand?" Llibre answered "yes." In December 2013, he filed this coram nobis petition, which the Appellate Division denied without opinion.

The defendants argue coram nobis relief is appropriate because defense counsels' ineffectiveness in failing to file a notice of appeal or inform them of their appellate rights deprived them of their "fundamental right to appeal." Both say they would have pursued appeals had they known they could. Llibre argues his appeal waiver was invalid "because it was unexplained and not knowingly, intelligently, and voluntarily made."

The prosecutors argue the defendants' claims of ineffective assistance of counsel are "perfunctory," "unsubstantiated and blatantly self-serving," and in any case, the time to raise such claims should not be extended past the 13-month statutory limit. In Llibre, the prosecution says the defendant's oral and written waivers "showed that defense counsel did inform [him] of his appellate rights" and that Llibre had no desire to appeal at that time.

For appellants Rosario and Llibre: Robin Nichinsky, Manhattan (212) 577-2523 ext. 519
For respondent (No. 191): Bronx Assistant District Attorney David P. Johnson (718) 838-7123
For respondent (No. 192): Manhattan Asst. District Attorney Hope Korenstein (212) 335-9000

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 Monday, November 16, 2015

No. 193 People v Natanael Sagastumeal Varenga

Natanael Sagastumeal Varenga, a Honduran citizen residing in the United States under a temporary protective status visa, was charged with assault for slashing a man with a knife in Farmingville, Suffolk County, in 2008. He pled guilty to second-degree assault and was sentenced to five years of probation in a judgment entered on May 14, 2009. The U.S. Department of Homeland Security initiated removal proceedings against him in 2011 on the ground that his conviction was a deportable offense. Varenga filed this CPL 440.10 motion to vacate his conviction, arguing he was denied effective assistance of counsel because his attorney did not inform him prior to his plea that it could subject him to deportation. He relied on Padilla v Kentucky (559 US 356 [2010]), in which the U.S. Supreme Court held that the Sixth Amendment requires defense counsel to advise clients about the immigration consequences of a guilty plea.

State Supreme Court denied his motion without a hearing, declining to apply Padilla retroactively. The court implicitly held that Varenga's conviction became final -- either on the date of sentencing or 30 days later, when the period in which he was allowed to file a notice of appeal expired -- before Padilla was decided on March 31, 2010. Subsequently, the U.S. Supreme Court (in Chaidez v United States [133 S Ct 1103 (2013)]) and New York Court of Appeals (in People v Baret [23 NY3d 777 (2014)]) ruled Padilla does not apply retroactively.

The Appellate Division, Second Department reversed and remitted to the trial court for a hearing. It ruled Varenga's motion was governed by Padilla, without considering the issue of retroactivity, because his conviction was not final when Padilla was decided. Based on CPL 460.30, which gives defendants a one-year period to seek permission to file a late notice of appeal after the 30-day period to file the notice expires, it ruled a conviction is not final until one year and 30 days after sentencing. "[T]he defendant's conviction here did not become final until June 14, 2010, the last date on which he would have been permitted to seek leave to file a late notice of appeal" under CPL 460.30, it said. Varenga was entitled to a hearing because the evidence supported his claim that his attorney failed to inform him the plea might lead to deportation and that, if he had been informed, "a decision to reject the plea bargain would have been rational."

The prosecution argues the Second Department "arbitrarily expanded the time within which a conviction becomes final where there has never been an appeal, and has placed itself in conflict with" the Third Department's decision in People v Bent (108 AD3d 882 [2013]). Basing the finality of convictions on CPL 460.30 "would lead to uncertainty in the law because the discretionary nature of this provision could conceivably lead to time limits of wildly varying amounts." It says, "In cases where there has been no appeal and a post conviction motion rests on matters outside the record, a conviction should be deemed final at sentencing" or, "at most, 30 days after sentencing."

For appellant: Suffolk County Assistant District Attorney Thomas C. Costello (631) 852-2500
For respondent Varenga: Phil Solages, Hauppauge (631) 366-5700

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 Monday, November 16, 2015

No. 206 People v Victor Soto

Victor Soto was charged with aggravated driving while intoxicated in July 2010, after his car crashed into a parked vehicle in the Bronx. Soto did not dispute that he was drunk, but maintained he was not the driver. A prosecution witness testified that he saw the accident from his porch, Soto was driving, and he saw no passengers in the car. Lamar Larson, who worked with Soto as a bus driver, testified for the defense that he saw Soto in his car outside a diner prior to the accident. He said Soto was drunk and sitting in the passenger seat, and a young woman was at the wheel. As she prepared to drive away, Larson said he told her "make sure he gets home safe," and she said she would.

Two weeks after the accident, 19-year-old Janny Hunt told Soto's investigator that she was driving Soto's car when it crashed. She said she met Soto on his bus about eight hours earlier and arranged to go out with him that evening, she agreed to drive him home because he was drunk, and she struck the parked car when she took a corner too fast. Hunt said she fled the scene because "It was late. My parents didn't know I was out with [him]. I was scared of the whole situation." The investigator wrote out the statement and Hunt signed it.

Defense counsel sought to call Hunt as a witness. When told she could be charged with leaving the scene of an accident, and the prosecutor refused to grant her immunity, Hunt refused to testify on Fifth Amendment grounds. Defense counsel then asked the court to admit her written statement as a declaration against penal interest. Soto's investigator testified at a hearing that Hunt expressed no concerns as she gave her verbal account, but when the investigator asked if she would sign a written statement, she said she feared "she would potentially get in trouble for the things she was saying" and asked "again and again" about talking with a lawyer. After signing the statement, the investigator said Hunt "asked if she could get in trouble for the accident" and said she was concerned her parents would find out. Supreme Court ruled the statement inadmissible due to the relatively minor criminal penalties for leaving the scene of a property damage accident and lack of proof Hunt "was aware that her declarations could expose her to prosecution for a traffic offense." Soto was convicted of aggravated DWI and DWI.

The Appellate Division, First Department reversed on a 3-2 vote. Even if Hunt was not sure her conduct was illegal, it said, "Her expressions, at the time of or immediately after her statement, of apprehension that she could get in trouble for her conduct, including repeated inquiries about consulting with a lawyer, sufficed to satisfy the requirement that 'the declarent must be aware at the time of its making that the statement was contrary to his [or her] penal interest'...."

The dissenters argued Hunt "was not aware that the statement was adverse to her penal interest at the time it was made, and the statement was not sufficiently reliable.... [T]he intrinsic trustworthiness of Hunt's statement is questionable as it involves the potential exposure to a minor traffic infraction and, unlike the situation where a defendant confesses to a violent crime, the penal consequences resulting from the statement are not obvious, especially to a 19 year old with no criminal history."

For appellant: Bronx Assistant District Attorney Melanie A. Sarver (718) 838-6239
For respondent Soto: Mark W. Zeno, Manhattan (212) 577-2523