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 Tuesday, October 13, 2015

No. 151 Matter of Sierra Club v Village of Painted Post

The Village of Painted Post in 2012 agreed to sell one million gallons of water per day to a Shell Oil Company subsidiary, SWEPI, LP, with an option for SWEPI to buy an additional 500,000 gallons per day. At the same time, the Village and its subsidiary, Painted Post Development LLC, leased a former industrial site to the Wellsboro & Corning Railroad for construction of a rail spur and transloading facility, where the water would be loaded into railcars for shipment to SWEPI's hydrofracking gas wells in Pennsylvania. The Village issued a negative declaration under the State Environmental Quality Review Act (SEQRA), asserting that no environmental review of the water sale agreement or railroad lease were necessary. When construction of the water loading facility began in the summer of 2012, the Sierra Club, two other environmental organizations, and five individual residents of Painted Post brought this article 78 against the Village, its development agency, SWEPI and the Railroad to block the project, contending the Village violated SEQRA by failing to prepare an Environmental Impact Statement. The water loading facility was completed and began operations in August 2012.

Supreme Court denied a motion by the Village and SWEPI to dismiss the suit for lack of standing. While the environmental groups and four individuals failed to allege "injury that is in some way different from that of the public at large," as required by Society of Plastics Indus. v County of Suffolk (77 NY2d 761), the court found that John Marvin, the petitioner who lived closest to the transloading facility and alleged that the noise of the increased train traffic "was so loud it woke me up and kept me awake repeatedly," had standing. Marvin "does not distinguish this noise from that of the previous train noises associated with the existing rail line or from the former industrial use of the area...," it said. "Marvin's undifferentiated complaint of train noise, however, may be considered in the context of an industrial and rail facility which fell into disuse for a considerable period of time prior to construction of the subject project, and thus his complaint of rail noise is availing to show harm distinct from that suffered by the general public." While proximity alone will not confer standing in a non-zoning case, it said, "this is not a proximity 'without more' case; Marvin has standing." The court granted summary judgment to the petitioners on the merits, finding the Village violated SEQRA.

The Appellate Division, Fourth Department reversed and dismissed the suit, finding Marvin lacked standing. It said he "raised no complaints concerning noise from the transloading facility itself," and maps showed the railroad runs through the whole village, with many houses "closer to the rail line than Marvin's residence." "Inasmuch as we are dealing with the noise of a train that moves throughout the entire Village, as opposed to the stationary noise of the transloading facility, we conclude that Marvin will not suffer noise impacts 'different in kind or degree from the public at large'.... '[S]tanding cannot be based on the claim that a project would indirectly affect ... noise levels ... throughout a wide area.'"

The petitioners argue that proximity should confer standing in all land use cases, not just zoning cases. If not, they urge the Court to clarify the rule requiring injury different from the public at large, saying that under the Appellate Division's reasoning, "there would be no resident within the Village of Painted Post who would have standing to challenge the inadequate SEQRA review...." This interpretation "has resulted in the absurd situation where the more people that are adversely affected by an environmental action, the less likely that anyone will have standing to require an environment review under SEQRA, or to obtain judicial review because of lack of standing."

For appellants Sierra Club et al: Rachel Treichler, Hammondsport (607) 569-2114
For respondents Painted Post et al: Joseph D. Picciotti, Pittsford (585) 419-8800

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To be argued Tuesday, October 13, 2015

No. 152 People v Willie L. Wragg *(papers sealed)*

A nine-year-old girl was walking by herself to a park in Rochester when, she said, "a man came out of nowhere" and touched her vaginal area with his hand outside of her clothing. She identified Willie Wragg in a photo array 18 days after the incident and identified him again in court as the stranger who accosted her. The reliability of her identification was the central issue at trial. Wragg was convicted of first-degree sexual abuse.

After the verdict was entered, but prior to sentencing, County Court told the prosecutor he believed Wragg should be sentenced as a "second child sexual assault felony offender" (under Penal Law § 70.07) and asked her to file the predicate offender statement required by CPL 400.19. Defense counsel objected that the filing would be too late, since CPL 400.19(2) provides that the predicate statement "may be filed by the prosecutor at any time before trial commences." The court said, "While ... at first blush the statute would seem to say that the People were obligated to make such designation prior to the trial, a closer review of the statute, and the few cases that have ventured to interpret this provision, leads this court to believe otherwise." The prosecutor ultimately filed a statement alleging that Wragg had been convicted in 2000 of first-degree rape involving a child under the age of 11. After a hearing, the court imposed an enhanced sentence of 15 years in prison. Wragg would otherwise have faced a maximum of seven years.

The Appellate Division, Fourth Department affirmed, rejecting Wragg's claim that he was improperly sentenced as a second child sexual assault felony offender because the prosecutor failed to file the CPL 400.19 statement before his trial began. It also found he received effective assistance of counsel.

Wragg argues the trial court could not legally impose the enhanced sentence under Penal Law § 70.07 because CPL 400.19 requires the prosecution, if it chooses to seek such a sentence at all, to file the predicate offender statement "at any time before trial commences." He says, "The wording in this statute about timing is clear and unambiguous." He notes that Penal Law § 70.07 provides, "The provisions of [CPL 400.19] shall govern the procedures that must be followed to determine" whether a defendant qualifies as a predicate child sexual assault offender. Wragg also argues his attorney's performance at trial deprived him of meaningful representation.

The prosecution argues enhanced sentencing is mandatory under Penal Law § 70.07(1), which provides that a defendant "who stands convicted of a felony offense for a sexual assault against a child, having been subjected to a predicate felony conviction for a sexual assault against a child, must be sentenced in accordance with the [statute's] provisions" for predicate offenders. "The timing provision of the procedural statute [CPL 400.19] does not displace the mandatory nature of second child sexual assault offender sentencing as set forth in Penal Law § 70.07(1). Providing that the People 'may' file a statement at any time before trial does not mean that, if no statement is filed before trial, the 'must' of [section] 70.07(1) becomes a 'cannot.'"

For appellant Wragg: Shirley A. Gorman, Brockport (585) 637- 5645
For respondent: Monroe County Assistant District Attorney Geoffrey Kaeuper (585) 753-4674

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To be argued Tuesday, October 13, 2015

No. 153 Pegasus Aviation I, Inc. v Varig Logistica S.A.

Pegasus Aviation I, Inc. and two related companies (collectively Pegasus) leased several cargo planes to Varig Logistica S.A. (VarigLog), a Brazilian cargo carrier, in 2005 and 2006. Subsidiaries of MatlinPatterson LLC (MP defendants) and three Brazilian investors purchased VarigLog out of a Brazilian bankruptcy proceeding in 2006. A dispute arose after the purchase and the Brazilian investors used their voting control to freeze the MP defendants out of VarigLog's facilities and business in 2007. VarigLog also stopped making lease payments to Pegasus in 2007 and refused to return the planes. A Brazilian court removed the Brazilian investors for mismanagement and, on April 1, 2008, appointed an MP defendant as sole remaining shareholder to manage VarigLog under judicial supervision.

In February 2008, Pegasus sued VarigLog in Florida for breach of the aircraft leases and conversion of the aircraft. Pegasus discontinued that suit and brought this action in New York in October 2008, asserting the same claims against VarigLog and, on an alter ego theory, against the MP defendants. VarigLog had installed new computer systems that provided regular back-up of its electronically stored information (ESI) after the Florida suit was filed, but it did not institute a litigation hold to preserve ESI relevant to the suit. Computer crashes in February and March of 2009 destroyed all of VarigLog's ESI. When Pegasus learned of the loss of VarigLog's ESI, it moved for sanctions against VarigLog and the MP defendants for spoliation of evidence.

Supreme Court granted the motion and struck VarigLog's answer, making it liable for damages. As for the MP defendants, it ruled Pegasus was entitled to an adverse inference instruction informing the jury it could infer the lost ESI would have supported Pegasus' claim. The MP defendants had enough control over VarigLog that they were obligated to ensure the ESI was preserved, the court said, and "the failure to issue [a] litigation hold constitutes gross negligence," creating a presumption the ESI was relevant. Only the MP defendants appealed.

The Appellate Division, First Department reversed. A three-justice majority said the MP defendants had sufficient control over VarigLog to trigger a duty to preserve its ESI, but there is no per se rule that failure to issue a litigation hold is gross negligence. "Because the record supports, at most, a finding of simple negligence against the MP defendants, [Pegasus] must prove that the lost ESI would have supported [its] claims," proof it said Pegasus failed to offer.

In a partial dissent, one justice agreed with the majority that the conduct of the MP defendants "did not rise to the level of gross negligence," but he argued a "hearing should be held to assess the extent of the prejudice suffered by [Pegasus]" and to determine "the sanction, if any, that would be appropriate." The fifth justice dissented and voted to affirm Supreme Court, arguing that the MP defendants' "failure to take any meaningful steps to preserve evidence constitutes gross negligence" and "an adverse inference would be the correct sanction."

For appellant Pegasus: Richard R. Patch, San Francisco, CA (415) 391-4800
For respondent MP defendants: Thomas C. Rice, Manhattan (212) 455-2000

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To be argued Tuesday, October 13, 2015

No. 154 People v Matthew P. *(papers sealed)*

Matthew P. was arrested in June 2011 by two plainclothes police officers, who said he approached them in the Chambers Street subway station and offered to let them into the subway for two dollars. When they gave him the money, they said, Matthew used a Transit Authority key to open an emergency exit gate and allow them to enter the subway, "thereby depriving the Transit Authority of revenue otherwise owed it ... for access to the subway system." He was charged with petit larceny, among other things. In July 2011, while those charges were pending, he was arrested in the station at 23rd Street and 8th Avenue by a police officer who said Matthew entered the subway through an exit gate "without permission or authority to do so and without paying the required fare." He was charged with theft of services. Matthew pled guilty to both charges and was sentenced as a youthful offender to 15 days in jail, time he had already served.

On appeal, Matthew argued the charges were jurisdictionally defective because the facts alleged in the misdemeanor informations did not establish that he committed either crime. He cited People v Hightower (18 NY3d 249), in which the Court held that allegations the defendant took money to swipe riders through a subway turnstile with an unlimited ride MetroCard were facially insufficient to establish petit larceny because they did not satisfy the definition of "larceny" as the taking of property "from an owner thereof" [Penal Law § 155.05(1)]. While the money collected by the Hightower defendant "could have been due and owing" to the Transit Authority, the Court said, the authority "never acquired a sufficient interest in the money to become an 'owner' within the meaning of" the Penal Law.

The Appellate Term, First Department affirmed. "'[G]iven a fair and not overly restrictive or technical reading,'" it said, the facts alleged in the petit larceny information "established prima facie that defendant deprived the Transit Authority of the two dollar fee that he accepted from the ersatz subway riders through his unauthorized possession and use of a subway entrance key...." It distinguished Hightower on the ground that it involved the use of a "valid MetroCard," rather than unauthorized use of a subway key. Regarding the theft of services charge, it said the allegations "were 'sufficiently evidentiary in character' ... to establish the defendant's knowledge of his unlawful entry into the subway station and his intent to unlawfully obtain subway service...."

Matthew argues he did not commit petit larceny because, "as in Hightower, the [Transit Authority] cannot be considered the owner of the money voluntarily given to appellant at the time he let the officers and himself through the emergency gate.... The money received by appellant represented only an unpaid fare and thus was never within the [Transit Authority's] possession or control." He said Hightower did not "turn on a distinction of whether the unlimited MetroCard there was valid," but on whether the Transit Authority ever became an owner of the money the defendant received. He says the theft of services charge was defective because it failed to allege that "he unjustifiably refused to pay" when he entered through an exit gate.

For appellant Matthew P.: Amy Donner, Manhattan (212) 577-3487
For respondent: Manhattan Assistant District Attorney Ryan Gee (212) 335-9000

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To be argued Tuesday, October 13, 2015

No. 155 People v Alfred Gary

Alfred Gary was one of 14 defendants charged with participating in a conspiracy to steal millions of dollars in mortgage proceeds through a series of sham real estate transactions in Nassau County from 2004 to 2009. The criminal enterprise headed by James Robert Sweet used straw buyers to obtain mortgage loans and purchase residential properties, sometimes impersonating the seller as well, then stole the loan proceeds and left the properties to foreclosure. Gary was accused of falsifying verifications of employment for the loan applications of some straw buyers, saying they worked at his New Jersey car dealership. He was also accused of laundering stolen funds through his dealership and recruiting a friend with an investment firm to do the same. All of the defendants but Gary entered guilty pleas.

Prior to Gary's bench trial, the parties stipulated to the admission of a large number of exhibits into evidence to expedite the proceedings. The evidence included 24 loan files from defrauded banks, in one of which was a verification of employment form with a handwritten note that read, "1/12 spoke w/ Gary and he QC [quality controlled] all info." Gary's defense attorney moved to redact the note early in the trial, saying he was unaware of the note when he agreed to admit the document and objecting that it was hearsay. Supreme Court denied the motion, saying a prosecution witness had already testified about the note without objection. Gary was acquitted of enterprise corruption, scheme to defraud, money laundering and falsifying business records, but was convicted of a single count of fourth degree conspiracy. He was sentenced to serve five years of probation and pay $139,910 in restitution.

The Appellate Division, Second Department affirmed, saying, "The defendant waived his contention that a document offered by the People contained inadmissible hearsay by, prior to trial, stipulating to the admission into evidence of that document, among others." It also ruled there was legally sufficient evidence of guilt and the verdict was not repugnant.

Gary says, "[T]his Court is asked to resolve whether a criminal defendant is forever bound by a stipulation entered into by his counsel before trial -- or whether a defendant ... may still raise a Sixth Amendment Confrontation Clause claim to inadmissible hearsay -- particularly where counsel promptly recognizes his error and vigorously moves to strike the hearsay from evidence." He says the note "was devastating to the defense because it suggested that Alfred Gary authorized the preparation of a false verification in his name" and "supported the prosecution's claim that the bank relied on that false information in issuing a mortgage."

For appellant Gary: Erica T. Dubno, Manhattan (212) 319-5351
For respondent: Nassau County Assistant District Attorney Jason R. Richards (516) 571-3800