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.

NOVEMBER 16 - 18, 2015

NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

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

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, November 17, 2015

No. 195 People v Kaity Marshall

Kathleen Rison was riding on a city bus in Brooklyn in July 2008 when she was assaulted by a woman she had never met. The woman had stepped on her foot and, when she refused to apologize, Rison criticized her for poor manners. The woman began punching Rison in the face. When Rison took off her shoe to strike her assailant, the woman took a knife from her purse and brandished it, then fled from the bus. In September 2008, Rison saw Kaity Marshall at Kings County Hospital and, believing she was her assailant, called the police, who arrested Marshall.

In January 2010, about 16 months after the arrest and 9 months before trial, a newly-assigned prosecutor showed Rison a photo police had taken of Marshall after her arrest. The prosecutor disclosed the photo display at a court appearance the next day and, saying he had been trying to clarify his understanding of the descriptions Rison gave police on the day of the assault and the day of Marshall's arrest, argued the display was not an identification procedure, but instead was permissible "trial preparation" under People v Herner (85 NY2d 877 [1995]). Marshall argued the display was an unduly suggestive identification procedure that would taint any in-court identification by Rison.

After a Herner hearing, Criminal Court ruled the photo display was not an identification procedure warranting a Wade hearing. It said, "The hearing testimony of Ms. Rison established that the viewing of the photograph took place as part of trial preparation," in which the prosecutor was permitted "to use exhibits." Marshall was convicted of third-degree attempted assault, fourth-degree attempted criminal possession of a weapon, menacing and harassment, and was sentenced to seven days of community service and an anger management program.

The Appellate Term for the 2nd, 11th and 13th Judicial Districts affirmed, saying, "The prosecutor had been assigned to the case the day before he met with the victim. Moreover, the victim was unable to identify the person depicted in the photograph, which the victim described as blurry and not clear...." Even if Rison had identified the photo as Marshall's, "because the victim had previously identified defendant upon defendant's arrest, the photographic identification would not have tainted her in-court identification of defendant...."

Marshall asks the Court to reconsider Herner, saying the trial preparation exception stands "in apparent tension" with New York's "well-defined regime" for defendants to challenge the admission of suggestive identification procedures under CPL 710.30. "Under the trial preparation doctrine that has developed, ... pre-trial procedures that would normally be regarded as suggestive and would certainly be subject to careful scrutiny at a full Wade hearing have been defined as outside the ambit of CPL 710.30's definition of an 'identification procedure.'" Even under Herner, she argues she was entitled to a Wade hearing because the "trial preparation display ... did not involve a photo of a non-suggestive lineup, but rather a single photo showup" of her arrest photograph; and because Rison "had never selected appellant in any non-suggestive identification procedure."

For appellant Marshall: Richard Joselson, Manhattan (212) 577-3451
For respondent: Brooklyn Assistant District Attorney Camille O'Hara Gillespie (718) 250-2000

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, November 17, 2015

No. 196 People v Todd Holley

In May 2010, a man tried to snatch a purse from a woman's shoulder in Manhattan's Prince Street subway station, but she and a friend wrested it away from him. Two other women who witnessed the incident stayed with them to talk with the police. Before any officers arrived, the man returned and punched two of the women, then fled the station. The witnesses told a detective their assailant was a black man about 6'0" to 6'2" tall, 30 to 40 years old, with unkempt hair and wearing a black jacket and blue knit cap. Two of them also said he was "skinny."

Three days later, the detective called one of the witnesses to his office to try to identify the assailant in a computer-generated photo array. The detective ran a search for photos of black men ranging from 6'0" to 6'4" tall and 30 to 40 years old who had been arrested in Manhattan from 2007 to 2010. He did not enter any weight range. The search returned about 3,000 arrest photos, which were displayed six at a time. On the second page, the witness identified Todd Holley as the assailant. She went on to pick out two more photos of Holley on pages 13 and 14. After Holly's arrest, the detective held a line-up for two of the witnesses. Both identified Holley.

Holley's attorney moved to suppress the photo and line-up identifications on the ground they were unduly suggestive, saying the detective's failure to enter any information about the suspect's weight in the photo array search created a risk that Holley would stand out "as a tall skinny person." He argued that, because the police failed to preserve the photo array, Holley was entitled to a presumption that it was suggestive. He said the line-up was suggestive because Holley was significantly lighter than the five fillers and he was the only one in his 30s.

Supreme Court denied the suppression motion, saying the photos "were not suggestive in any way" and noting the witness "kept identifying the same person." It said a photo of the line-up showed "there is nothing that highlights the defendant which would suggest to a witness to pick him out." Holley was convicted at trial of third-degree attempted robbery and assault and was sentenced to two to four years in prison.

The Appellate Division, First Department affirmed, finding the photo identification procedure was not unduly suggestive. "The fact that the police failed to preserve the arrays ... does not warrant a different conclusion...," it said. "We also conclude that the detective entered sufficient information about the description of the perpetrator to ensure that the computer generated a fair selection of photos." Regarding the line-up, it said, "Any differences between defendant and the other participants, including an age disparity not fully reflected in the participants' actual appearances, and a weight disparity that was minimized by having the participants seated, was not so noticeable as to single defendant out...."

Holley argues the prosecution's failure to preserve the photo array entitles him "to an inference or presumption that it was unduly suggestive, and the evidence adduced at the hearing did not establish that there existed sufficient safeguards against suggestiveness to rebut that inference or presumption." He says the line-up was unduly suggestive because he "stood out like a sore thumb as the only person who matched the description of the suspect."

For appellant Holley: Andrew C. Fine, Manhattan (212) 577-7989
For respondent: Manhattan Assistant District Attorney Joshua L. Haber (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 Tuesday, November 17, 2015

No. 197 People v Dennis P. Smalls

Dennis Smalls was charged in a misdemeanor information with criminal possession of a controlled substance in the seventh degree in 2011 after he was searched by a police officer in the Bronx. In a deposition, the arresting officer said he found in a pocket of Smalls' jacket "one (1) glass pipe containing a tar-like substance. Deponent further states that based upon his training and experience, which includes training in the recognition of controlled substances and their packaging, the aforementioned substance is alleged and believed to be CRACK-COCAINE RESIDUE."

Smalls moved to dismiss the charge as jurisdictionally defective, arguing that the allegation he possessed "a 'glass pipe containing a tar-like substance' is facially insufficient without a laboratory report" confirming the substance was cocaine. After Supreme Court denied his motion to dismiss, Smalls pled guilty to the charge and was sentenced to 30 days in jail.

The Appellate Division, First Department affirmed, ruling the criminal information was not jurisdictionally defective. "Nonhearsay allegations established every element of the charged offense, notwithstanding the absence of a laboratory report (see People v Kalin, 12 NY3d 225 [2009])," it said. "Based on the allegation that defendant possessed a glass pipe containing 'a tar-like substance' that, based on the officer's 'training in the recognition of controlled substances and their packaging, ... [he] believed to be crack-cocaine residue,' an inference can be drawn that defendant knew that he was in possession of cocaine...."

Smalls argues that Kalin, which said a laboratory report identifying the drugs was not necessary to set forth a prima facie case of possession, is distinguishable because the heroin and marijuana in Kalin were "commonly recognizable *unconsumed* drugs contained in signature packaging ... and accompanied by drug paraphernalia.... Here, in contrast, the police officer observed a 'tar-like substance' in a glass pipe, and the officer's boilerplate assertion of unspecified 'training' made no reference to any training in identifying burned substances.... The 'substance' was not contained in any packaging ... and was unaccompanied by any drug paraphernalia -- the police officer did not contend that the glass pipe was identifiable as a 'crack pipe.' Most importantly, as it was a 'tar-like substance,' likely the byproduct of some kind of smoking or burning, it was impossible to determine by naked observation whether the substance still contained, or ever contained, crack cocaine."

For appellant Smalls: Lawrence T. Hausman, Manhattan (212) 577-7989
For respondent: Bronx Assistant District Attorney Marianne Stracquadanio (718) 838-6100

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, November 17, 2015

No. 198 Matter of Suarez v Williams *(papers sealed)*

Ricardo and Laura Suarez, the paternal grandparents of a 13-year-old boy, are seeking custody of their grandson, who was born in August 2002 and lived primarily with them for the first ten years of his life. The boy visited with his mother, Melissa Williams, several times a week, including overnight visits at her home about 12 miles away, but he lived with the Suarezes in Barneveld and later in Syracuse, where they enrolled him in the Syracuse City School District in 2007. They provided virtually all of his financial support, including his daycare, medical and education expenses. Soon after he was born, his father and Williams signed a statement that read, "This is to certify that [the Suarezes] have any and all decision making power regarding our son.... This is in effect at all times and has no expiration date." In 2006 and on a later unspecified date, Williams signed two more statements giving the Suarezes "permission to make any and all medical and educational decisions as needed" for her son, although the Suarezes regularly discussed his schooling and activities with her. In 2006, in a separate proceeding that did not involve the Suarzes, Williams and the father stipulated to an order awarding them joint legal custody of the boy and awarding primary physical custody to Williams. She did not exercise that right until 2012, when she told the Suarezes she intended to enroll her son in the school district where she had moved and have him live with her. The Suarezes then filed this petition to modify the 2006 custody order and grant primary physical custody to them. The boy's father consented to and joined the petition, which is supported by the attorney for the child.

Family Court, Onondaga County granted the petition, awarding the Suarezes joint legal custody and primary physical custody, subject to visitation with Williams and the father. Based on Domestic Relations Law § 72, which governs custody petitions by grandparents, it found the Suarezes showed there were "extraordinary circumstances" warranting a modification in the best interests of the child. The statute provides that an "extended disruption of custody ... shall constitute an extraordinary circumstance," and it defines such a disruption as including "a prolonged separation of the respondent parent and the child for at least twenty-four continuous months during which the parent voluntarily relinquished care and control of the child and the child resided" with the grandparents. The court said, "The evidence ... demonstrates that the child has been in the care of the Grandparents since shortly after his birth, thereby constituting an extended disruption of custody between the Mother and her child.... In addition, the evidence amply demonstrated that Mother voluntarily relinquished care and control of [her son] both by written instruments and her behavior with respect to him."

The Appellate Division, Fourth Department reversed, saying the Suarezes failed to satisfy the standard set by Matter of Bennett v Jeffreys (40 NY2d 543), which held, "The State may not deprive a parent of the custody of a child absent surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances." The court said, "Here, while the mother allowed petitioners to have primary physical custody of the child for a prolonged period, there were no other factors to show the existence of extraordinary circumstances." Rejecting arguments by the Suarezes and attorney for the child that section 72 does not require proof that a parent "relinquished 'all' care and control of the child" or that it "in any way eases a grandparent's burden of showing extraordinary circumstances," the court said "Bennett and cases decided thereafter remain good law.... [P]etitioners failed to meet this high bar, where their own witnesses testified that the mother maintained a presence in the child's life consistently, even while he was living primarily with petitioners...."

For appellants Suarez: Linda M. Campbell, Syracuse (315) 428-9393
For the child: Patrick J. Haber, Syracuse (315) 472-5827
For respondent Williams: Christopher M. Judge, Syracuse (315) 422-1311

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, November 18, 2015

No. 199 People v Anthony V. Pavone

In January 2010, former correction officer Anthony Pavone fatally shot Patricia Howard, his recently estranged girlfriend, and Timothy Carter at Carter's home in the Town of Dannemora, Clinton County, where Howard was spending the night. Pavone was arrested four days later in Broome County, where he was staying at a motel under a false name, and was charged with two counts of first-degree murder. He admitted killing the couple, but maintained at trial that he had acted under an extreme emotional disturbance, an affirmative defense that would have limited his criminal culpability to first-degree manslaughter. Prosecution and defense experts presented the jury with conflicting opinions as to whether Pavone suffered from extreme emotional disturbance at the time of the killings. The prosecutor sought to discredit his affirmative defense by presenting testimony from a police negotiator, who induced Pavone to surrender, and three other officers that Pavone said nothing to them about his emotional or mental state when he was arrested or as he was transported back to Clinton County, arguing in his summation that Pavone made up his story of emotional breakdown only after he was charged. The jury rejected the affirmative defense and convicted Pavone of first-degree murder and a related weapon charge. He was sentenced to life in prison without parole.

The Appellate Division, Third Department affirmed in a 3-1 decision. It found the testimony and summation comments on Pavone's failure to mention emotional trauma violated his constitutional right to remain silent, but it said the issue was "largely unpreserved" because defense counsel raised only one objection and sought no curative instructions. It also found admission of the testimony was "harmless in light of the overwhelming evidence" of Pavone's guilt and his "failure to prove his affirmative defense ... by a preponderance of the evidence.... [D]efendant systematically hunted down and then executed Howard and Carter, and the foregoing proof -- consisting of defendant's own words and admitted actions leading up to, during and following the shootings -- evidences a level of calculation, planning, calm deliberation and consciousness of guilt that is both entirely inconsistent with his claimed extreme emotional disturbance defense and completely undeserving of any leniency or mercy." The court rejected Pavone's claim that his attorney's failure to object to evidence of his pre-trial silence and failure to properly prepare his psychiatric expert deprived him of effective assistance of counsel.

The dissenter argued the majority erred in finding the error harmless. She said the issue is "whether the evidence controverting the extreme emotional disturbance defense is so overwhelming that there is no reasonable possibility that the constitutional error affected the jury's rejection of that defense.... Here, for this court to reach this conclusion as a matter of law -- in effect, rejecting the opinion of defendant's expert as unworthy of belief -- usurps the jury's prerogative to determine whether, in its discretion, the defense of extreme emotional disturbance is applicable.... Considering all of the evidence and, in particular, the conflicting expert opinions, I cannot conclude that the error of permitting the People to use defendant's postarrest silence to suggest that he had falsified his affirmative defense was harmless beyond a reasonable doubt...."

For appellant Pavone: Paul J. Connolly, Delmar (518) 439-7633
For respondent: Clinton County Asst. District Atty. Nicholas J. Evanovich, III (518) 565-4770

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, November 18, 2015

No. 200 Cusimano v Schnurr

This case, stemming from disputes over the operation and assets of three family-owned real estate entities formed in New York, hinges on whether the Federal Arbitration Act (FAA) applies and, if so, whether the plaintiffs waived their right to arbitration by commencing this action. Bernard Strianese and his wife formed the Strianese Family Limited Partnership (FLIP) in 1998 and later gave 4.5 percent shares to their daughters, Rita Cusimano and Bernadette Strianese. FLIP initially owned industrial property in New York, but later exchanged it for property in Florida that it leases to a CVS drug store. The second entity, Berita Realty LLC, was formed by sisters Rita and Bernadette as equal partners in 2001, and it holds a minority interest in a company that owns a Marriott Hotel in New York. The third, a pair of related entities known as Seaview Corporation, was formed by Bernard Strianese (50 percent interest) and his daughters (25 percent each), but Rita sold her share to Bernadette in 2000. Seaview owns two commercial buildings in New York. The relevant partnership, operating and sale agreements for all three entities provide that disputes will be submitted to arbitration under the rules of the American Arbitration Association (AAA).

Rita Cusimano and her husband brought this action against accountants Andrew Schnurr and Michael Gerard Norman in 2011, alleging they aided and abetted the Strianeses in fraud and misappropriation. Schnurr, who was an accountant for family members and their businesses from 1991 to 2002, and Norman, who handled their accounting after 2002, moved to dismiss the accounting malpractice claims as time-barred. Supreme Court ruled all malpractice claims that arose prior to 2008 were barred by the three-year statute of limitations. It also found the fraud claims were not pled with sufficient specificity, but granted leave to replead. Instead of repleading, the Cusimanos in 2012 filed a demand for arbitration with the AAA against the accountants and Strianeses. The accountants moved to stay the arbitration on the ground the claims were time-barred. The Strianeses intervened and filed a similar motion. The Cusimanos responded that, under the FAA, the limitations issue was for the arbitrator to decide.

Supreme Court held the FAA did not apply because "the totality of the economic activity" underlying the Cusimanos' claims "has no effect on interstate commerce." It also ruled Rita Cusimano waived any right to arbitration "by her resort to, and aggressive participation in this litigation." She turned to arbitration "only after receiving an unfavorable ruling from this court on the timeliness" of her claims, it said. "This is a flagrant example of forum shopping ... to get a second bite at the apple in arbitration." It permanently stayed all claims against Schnurr and certain claims against Norman and the Strianeses that it found time-barred.

The Appellate Division, First Department reversed, ruling that, because the entities' business activity "bears on interstate commerce in a substantial way," the FAA applies and statute of limitations issues must be decided by the arbitrator. "Because commercial real estate can affect interstate commerce, the ownership of and investment in the commercial buildings here, one of which is occupied by an international chain hotel and another which houses a national chain drug store located out-of-state, renders the FAA applicable to these agreements." It ruled the plaintiffs did not waive their right to arbitration because their "actions in this litigation" did not result in prejudice to the opposing parties, where "they did not engage in aggressive litigation..., nor did they pursue state court appeals," and they "did not obtain any evidence that would not be available to them in arbitration."

For appellants Schnurr et al and Bernard Strianese: Alan Heller, Manhattan (212) 965-4526
For appellant Bernadette Strianese: Patrick McCormick, Ronkonkoma (631) 738-9100
For respondents Cusimano et al: David S. Pegno, Manhattan (212) 943-9000

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 Wednesday, November 18, 2015

No. 201 People v Luis Ortiz

In July 2006, Luis Ortiz was accused of forcing his way into a Bronx apartment occupied by two men and a woman, holding a razor blade to the woman's neck, and forcibly taking a chain from one of the men. Ortiz testified at trial that he went to the building with his girlfriend to see if there was a room for rent, got into a fight when one of the men flirted with his girlfriend, and denied that he had a razor. The jury acquitted Ortiz of first-degree burglary and first-degree robbery, which required proof that he used or threatened to use a dangerous instrument, and convicted him of second-degree burglary, which does not. The Appellate Division reversed his conviction and ordered a new trial on a sole count of second-degree burglary.

At his retrial, Ortiz moved to preclude all evidence of his alleged use of a razor based on the doctrine of collateral estoppel, arguing that the jury at his first trial had necessarily decided he did not use or threaten to use a dangerous instrument when it acquitted him of the armed robbery and burglary counts. Supreme Court denied the motion and the complaining witnesses again testified that Ortiz threatened to cut the woman's neck with a razor. He was convicted of second-degree burglary.

The Appellate Division, First Department affirmed the conviction. Rejecting Ortiz's collateral estoppel claim, it said he "failed to meet his heavy burden to establish that the jury at his first trial necessarily decided these particular factual issues in his favor (see People v Acevedo, 69 NY2d 478, 487 [1987])." "Moreover, it is apparent in this case that 'the Acevedo rule [could not] practicably be followed if a necessary witness [were] to give truthful testimony,'" it said, citing People v O'Toole (22 NY3d 335 [2013]). "[T]he case turned on the credibility issue of whether the incident was an altercation or a home invasion. Thus, the presence of the razor blade was essential to completing the complaining witnesses' narrative and establishing the criminal intent element of burglary, and defendant was properly precluded from 'tak[ing] unfair advantage of the dilemma that Acevedo creates for the People' (id.)."

Ortiz argues that his case is indistinguishable from O'Toole, in which the facts "were nearly identical to the facts in this case." In O'Toole, the jury at the defendant's first trial acquitted him of first-degree robbery, which required proof that he or an accomplice displayed a gun, and convicted him of second-degree robbery, which did not. The conviction was reversed and at the second trial, the victim again testified that the defendant's accomplice pointed a gun at him. The O'Toole Court said the first jury "could not logically" acquit the defendant of first-degree robbery and convict him of second-degree robbery "without finding that the People had failed to prove beyond a reasonable doubt that the robbery involved the display of a firearm," and it applied collateral estoppel to bar the prosecution from presenting evidence at a later trial that contradicted the first jury's finding. Ortiz contends he is entitled to a new trial under O'Toole.

For appellant Ortiz: Anant Kumar, Manhattan (212) 402-4100
For respondent: Bronx Assistant District Attorney Catherine M. Reno (718) 838-7119

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, November 18, 2015

No. 202 Matter of RAM I LLC v New York State Division of Housing and Community Renewal

Phyllis Berk has lived in a rent controlled apartment in a residential cooperative in Manhattan since 1958. In 1994, the building's owner obtained J-51 tax benefits for capital improvements and, pursuant to Administrative Code § 26-403(e)(2)(j), the building was exempt from luxury deregulation while it continued to receive the benefits. The J-51 benefits expired in 2005. RAM I LLC, which purchased the unsold cooperative shares allocated to Berk's apartment in 1996, filed a petition with the New York State Division of Housing and Community Renewal (DHCR) seeking luxury decontrol of the apartment. Berk met the income and rent thresholds for luxury decontrol, and the agency's rent administrator issued an order deregulating the apartment.

DHCR revoked the order on administrative appeal, concluding that, once a landlord accepts J-51 tax benefits, the statutory prohibition of luxury decontrol for a rent controlled apartment continues -- even after the benefits expire -- until the apartment becomes vacant. Supreme Court annulled DHCR's decision and reinstated the order deregulating the apartment.

The Appellate Division, First Department reversed and ruled that luxury decontrol is not available for a rent controlled apartment after J-51 benefits expire, citing significant differences between the City's Rent Control Law (RCL) and Rent Stabilization Law (RSL). The luxury deregulation provisions in both laws "are essentially the same" and provide that deregulation "shall not apply to housing accommodations which became or become subject to this law" by receiving J-51 benefits, it said. "However, the RSL contains an additional provision, Administrative Code § 26-504(c)," which provides that apartments that were subject to rent stabilization before J-51 benefits were received revert to their former status when the benefits expire, including "the right of an owner to seek luxury deregulation in appropriate cases." It said section 26-504(c) "has no counterpart in the RCL."

RAM I argues that "nothing in the relevant statutes bars luxury deregulation of rent-controlled apartments when J-51 tax benefits end. Nor when such benefits expire does any pertinent statute bar an owner from pursuing high rent/high income deregulation of a rent-controlled apartment while a tenant remains in possession. Indeed, the legislative history of the Rent Regulation Reform Act of 1993 shows a clear legislative intent to permit luxury deregulation of rent-controlled apartments when a building no longer receives J-51 benefits."

For appellant RAM I: Lawrence D. Bernfeld, Manhattan (212) 818-8800
For respondent DHCR: Martin B. Schneider, Manhattan (212) 480-6783