State of New York Court of Appeals

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To be argued Wednesday, April 24, 2013

No. 95 People v Ray Lam

This case arose in June 2010 in Union Square Park, where Ray Lam was selling tee shirts that bore graphic images of his own design. A plainclothes officer from the Manhattan South Peddler Task Force approached his folding table and asked the price of a shirt, and Lam replied $20. The officer then asked if he had a vendor's license, Lam said no, and the officer arrested him on a misdemeanor charge of unlicensed general vending under New York City Administrative Code § 20-453.

Before trial, Lam moved to dismiss the charge on the ground that his shirts were works of visual art and his selling them was protected speech under the First Amendment. He said he sold the same images as prints on canvas, and some customers who bought tee shirts had him sign the shirts and hung them in frames on the wall. Criminal Court said, "If you sell them as framed T-shirts, that will be a horse with a different color; but if you are selling them as T-shirts, then they have value as apparel." Applying the balancing test in Mastrovincenzo v City of New York (435 F3d 78), the court found the predominant use of the shirts would be as clothing, not art, and denied Lam's motion to dismiss. At his non-jury trial, a different judge again rejected Lam's argument that his shirts were constitutionally protected artwork. "The transferring of an artistic image to the T-shirt changed the art, the non-expressive purpose became dominant [--] clothing," the court said, finding him guilty as charged and fining him $250.

The Appellate Term, First Department affirmed. "On this record and considering, among other factors, the manner in which defendant displayed the tee shirts -- folded and in piles -- and the uniform, modest selling price ($20 each) quoted by defendant to the undercover police officer, Criminal Court was warranted in concluding that defendant's wares were mere commercial goods whose dominant purpose was utilitarian, and not expressive," it said, citing Mastrovincenzo.

Lam argues that his "vending of artistic tee shirts was constitutionally protected speech, immune from prosecution under the New York City General Vending Ordinance...." He asks the Court to overturn his conviction on state as well as federal constitutional grounds, saying, "The New York courts have taken an approach to free speech issues more protective than the Federal Constitution."

For appellant Lam: Martin M. Lucente, Manhattan (212) 577-3586
For respondent: Manhattan Assistant District Attorney Andrew E. Seewald (212) 335-9000

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No. 96 People v Isaac Diggins

Isaac Diggins was charged with pointing a gun at his wife in the street in front of their Manhattan apartment in August 2003, when she confronted him and his girlfriend about their relationship. No shots were fired and Diggins drove away in his car. He was arrested later that day at his girlfriend's apartment, where police recovered a loaded handgun. His defense counsel moved to suppress statements Diggins had made to police and a hearing was scheduled. Diggins, who was free on bail, did not appear.

Supreme Court found Diggins had voluntarily absented himself and ordered that the suppression hearing and trial would proceed in his absence. Defense counsel did not participate in the hearing and informed the court he would not participate in the trial, saying he could not conduct a defense "in a case that is heavily dependent on the personal relationships here" without his client present to assist him. The court denied counsel's motion to withdraw. Defense counsel did not participate in jury selection, did not make an opening or closing statement, did not call any witnesses or cross-examine prosecution witnesses, and did not file a notice of appeal. Diggins was convicted of criminal possession of a weapon in the second and third degrees and menacing. He was sentenced in absentia to an aggregate term of 12 years.

After he was returned to custody in 2005, Diggins filed a CPL 440 motion to vacate his convictions on the ground that his attorney's failure to participate in the trial deprived him of the effective assistance of counsel. Supreme Court denied the motion after a hearing, saying that after Diggins undermined his attorney's ability to raise a viable defense by absconding, defense counsel "made a conscious, strategic decision not to participate" in the proceedings and Diggins failed to show the strategy was unreasonable or prejudicial.

The Appellate Division, First Department affirmed. "The record demonstrates that defendant's counsel, whose ability to conduct a defense was impaired by his client's absence, pursued a 'protest strategy' (People v Aiken, 45 NY2d 394...) or 'strategy of silence' (United States v Sanchez, 790 F2d 245...). There is a presumption of prejudice where 'counsel entirely fails to subject the prosecution's case to meaningful adversarial testing' (United States v Cronic, 466 US 648...). However, that presumption is inapplicable to the facts of this case," it said, citing Sanchez, in which the defendant had also absconded.

Diggins argues he was deprived of his state and federal rights to counsel when his attorney "refused to participate in any aspect of his trial." He says, "This case is one of those exceedingly rare instances where counsel completely refused to subject the prosecution's case ... to meaningful adversarial testing. As a result, Mr. Diggins' trial bore no resemblance to an adversarial proceeding. The narrow exception recognized by the United States Supreme Court in Cronic must be applied and, accordingly, prejudice must be presumed from the constructive denial of counsel."

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For respondent: Manhattan Assistant District Attorney Sheryl Feldman (212) 335-9000

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To be argued Wednesday, April 24, 2013

No. 97 Wild v Catholic Health System

Eighty-three year old Marguerite Horn was transported to Mercy Hospital of Buffalo (operated by Catholic Health System) in June 2005, after her husband found her lying unconscious on the floor of their home. She appeared to have difficulty breathing and an emergency room physician, Dr. Raquel Martin, asked a third-year resident to insert a breathing tube in her trachea. After the resident failed twice, Dr. Martin made two unsuccessful attempts to intubate Horn, mistakenly inserting the tube in Horn's esophagus on the first try. A respiratory therapist then tried and failed to insert the tube. Dr. Martin then summoned an anesthesiologist, who successfully intubated Horn. During these procedures, Dr. Martin observed symptoms that Horn might have a perforated esophagus, but did not note this on her chart, order tests or contact a surgeon about her concern. When a surgeon discovered the perforation several days later, he was unable to repair the damage and doctors had to insert a permanent feeding tube into Horn's stomach. She was never again able to consume solid foods or liquids normally.

Horn and her husband brought this malpractice action against Dr. Martin and her practice group, Buffalo Emergency Associates LLP, as well as other defendants, alleging that Dr. Martin was negligent in her attempts to intubate Horn and perforated her esophagus. They also alleged Dr. Martin and others were negligent in failing to diagnose the esophageal tear in a timely manner and thus deprived Horn of a chance to avoid the permanent feeding tube through immediate surgery, a so-called "lost chance" theory. When Horn died of unrelated causes in 2008, her children, the co-executors of her estate, were substituted as plaintiffs.

Supreme Court gave the jury a "lost chance" instruction on proximate cause, saying, "The negligence of any of the defendants may be considered a cause of the injuries to Marguerite Horn if you find the defendant's actions or omissions deprived Mrs. Horn of a substantial possibility of avoiding the consequence of having a permanent feeding tube. The chance of avoiding a need for a permanent feeding tube to be substantial, does not have to be more likely than not and it does not have to be more than 50 percent, but it has to be more than slight." The jury found that only Dr. Martin was negligent and awarded damages against her and her partnership of $500,000 for pain and suffering and $500,000 for loss of consortium.

The Appellate Division, Fourth Department reduced the award for loss of consortium to $200,000 and otherwise affirmed. It said the lost chance instruction "was entirely appropriate for the omission theories," the claim that Dr. Martin failed to follow-up on the esophageal tear and thereby delayed its diagnosis; but "it was not an appropriate instruction for the commission theories," the claim that Dr. Martin's negligent intubation caused the tear. However, it said the error was harmless because a finding of negligence in the intubation "necessarily entailed a finding of proximate cause."

Dr. Martin argues that "the relaxed standard of causation" described in the lost chance instruction "represents a substantial departure from the long-established rules of proximate cause in the State of New York. This Court has never adopted the 'loss of chance' theory of causation, and no court in New York has adopted the radical version of the loss of chance theory charged by the trial court here." She says the court's instruction reduced the burden of proof for causation from "more probable than not" to "'more than a slight' chance."

For appellants Dr. Martin et al: Michael J. Willett, Buffalo (716) 856-5500
For respondents Wild et al: Debra A. Norton, Buffalo (716) 852-1000

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To be argued Wednesday, April 24, 2013

No. 98 Greater New York Taxi Association v The State of New York
No. 99 Taxicab Service Association v The State of New York
No. 100 Metropolitan Taxicab Board of Trade v Bloomberg

In January 2011, New York City Mayor Michael Bloomberg proposed amending the City's Administrative Code to allow livery car drivers to accept street hails from potential customers (i.e., a person on the street waving to be picked up). The Mayor's Office initially submitted the proposal to the City Council, but the medallioned taxicab industry opposed the plan and there was no quick agreement. The Mayor's Office then approached the State Legislature, which passed a bill in June 2011. The Governor signed it in December 2011 as Chapter 602 of the Laws of 2011. The Legislature and Governor amended the new law in February 2012 with Chapter 9 of the Laws of 2012. The resulting law, the "Street Hail Livery Law," allows liveries with the newly authorized "Hail licenses" to pick up street hails in all five boroughs, except for Manhattan's central business district and the two airports in Queens. It also enables the City to raise revenue by selling 18,000 Hail licenses to liveries and up to 2,000 new taxi medallions for yellow cabs, subject to quotas for wheelchair accessibility. The City Charter requires City Council approval to issue new taxi medallions, but the legislation gave that power to the Mayor's Office. The Legislature, in its findings, declared that improving access to "adequate and reliable transportation," particularly for the disabled, were "matters of substantial state concern." Three major trade associations representing the medallioned taxicab industry, with other plaintiffs, brought these actions to challenge the constitutionality of the law.

Supreme Court granted summary judgment to the plaintiffs, ruling the street hail law violates the home rule, double enactment, and exclusive privileges provisions of the State Constitution. Under the home rule provision, the State may enact a special law "in relation to the property, affairs or government of any local government only ... on request of" the local legislature, unless the special law serves "a substantial State interest." The court said the hail law violates home rule "for two independent reasons: (1) as a matter of history and common sense, New York City taxicab service is not a matter of substantial State interest or concern (and to deem it otherwise would largely eviscerate the concept of 'home rule'); and (2) a law that shifts power from the City's legislative branch to its executive branch, and micro-manages the exercise of that power, fails to bear a reasonable relationship to any such interest or concern."

On direct appeal, the City, the State, and an organization of livery companies argue the hail law did not require a home rule message because it furthers a substantial State interest. The State says the law, "on its face, is a police-power regulation designed to promote the welfare, health, and safety of both residents and visitors in New York City by ensuring their access to reliable and effective transportation to, from, and within the city. The Legislature enacted specific and detailed findings affirming that public health, safety, and welfare are currently impaired by lack of access to street-hail service in the outer boroughs and the lack of wheelchair-accessible vehicles available for street hails citywide."

For appellant City: Assistant Corporation Counsel Scott Shorr (212) 788-1089
For appellant State: Deputy Solicitor General Richard Dearing (212) 416-8022
For intervenor-appellant Livery Base Owners: Stephen L. Saxl, Manhattan (212) 801-9200
For respondent GNYTA (No. 98): Steven G. Mintz, Manhattan (212) 696-4848
For respondent TSA (No. 99): Randy M. Mastro, Manhattan (212) 351-4000
For respondent MTBOT (No. 100): Richard D. Emery, Manhattan (212) 763-5000
For intervenor-respondent Livery Roundtable (No. 100): Steven J. Shanker, Manhattan (646) 755-3338

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To be argued Wednesday, April 24, 2013

No. 101 Empire State Chapter of Associated Builders, Inc. v Smith

The plaintiffs in this action challenge recent amendments to the "Wicks Law," which applies to public works projects when their costs exceed a certain threshold. The law requires the State and local governments, when a project exceeds the threshold, to prepare separate bid specifications and award separate contracts for three categories of work: plumbing; heating, ventilating and air conditioning; and electrical work. The threshold was set at $1,000 for all projects when the Wicks Law was enacted in 1912. The uniform threshold was raised to $50,000 by 1964 and then left unchanged until 2008, when the State Legislature adopted a three-tiered threshold as part of a comprehensive reform of the Wicks Law. The 2008 amendments set the threshold at $3 million for the five boroughs of New York City; $1.5 million for the downstate counties of Nassau, Suffolk and Westchester; and $500,000 for all other counties. The amendments also allowed a government to opt out of the law's separate bidding provisions if it required its contractors to enter into a Project Labor Agreement (PLA) that complies with Labor Law § 222, which requires contractors to "participate" in approved apprentice training programs.

The plaintiffs -- including Erie County, two organizations representing public works contractors, and out-of-state, minority-owned, and women-owned contractors -- brought this action against the State Comptroller and Labor Commissioner, alleging the three differing cost thresholds set by the amendments constitute a "special law" that was enacted in violation of the "home rule" provision of the State Constitution. They also alleged the apprenticeship provisions violate the federal Privileges and Immunities Clause and dormant Commerce Clause. Supreme Court rejected all of the plaintiffs' challenges.

The Appellate Division, Fourth Department declared the amendments valid. It split 3-2 on the home rule issue, with the majority finding the three-tiered threshold "bears a reasonable relationship" to a substantial State concern. It said documents in the record "indicate that the 2008 amendments reflect the legislature's judgment that the monetary threshold in place since the 1960s had become out-of-date, and that raising that threshold would ease the burden that the Wicks Law imposes on local governments by eliminating smaller projects from the Wicks Law mandates. Those documents also support defendants' position that the three-tiered monetary threshold was devised to take into consideration geographically-based differences in the costs of construction."

The dissenters argued that "the three-tiered classification ... is arbitrary and not reasonably related to" the State's interests. "Notably absent from the record is any discussion of the basis for the monetary thresholds underlying the three-tiered classification...," they said. "[We] conclude that the threshold monetary amounts selected by the legislature must have some factual or evidentiary support beyond the general proposition that the cost of construction is higher in downstate counties than in their upstate counterparts.... A review of the legislative record clearly indicates that a key purpose of the 2008 amendments was to relieve New York City from much of the burden imposed by the Wicks Law, with the remainder of the State being somewhat of an afterthought."

For appellants Associated Builders et al: Timothy W. Hoover, Buffalo (716)847-8400
For respondents Smith and DiNapoli: Deputy Solicitor General Andrea Oser (518) 473-6948