

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, February 5, 2013

No. 28 People v Akieme Nesbitt

Akieme Nesbitt was staying with Anthony Johnson's family in their Manhattan apartment in September 2005, when Nesbitt and Johnson got into a heated argument. Nesbitt made threatening statements, pulled out a weapon consisting of three scalpels attached to a handle, and slashed Johnson's neck, back, arm and face. The neck wound was an inch from his carotid artery, a tendon in his arm was cut, and all of the wounds left visible scars. Several of Johnson's siblings witnessed the incident. Nesbitt was charged with second-degree attempted murder and two counts of first-degree assault, one alleging that he intentionally caused "serious physical injury" and the other that he caused serious and permanent disfigurement. All three charges are class B felonies.

At trial, Nesbitt's defense counsel told the court that the evidence of first-degree assault was overwhelming, that he could think of no defense to those charges, and that the only defense he could foresee was to attempted murder. When the court asked if he would request any lesser included offenses, counsel said he could not think of any. In his summation, defense counsel urged the jury to find Nesbitt not guilty of attempted murder, but said the assault charges were "up to you." The jury deadlocked on attempted murder, but convicted Nesbitt of both assault charges and he was sentenced to concurrent terms of 25 years in prison.

The Appellate Division, First Department affirmed on a 3-2 vote, finding defense counsel's tactics did not deprive Nesbitt of effective assistance of counsel. "The evidence of disfigurement and impairment suffered by the victim strongly supported defendant's conviction, and it is not probable that the jury would have found them only to meet the elements of a lesser included offense of assault in the second degree," the court said. In successfully defending against attempted murder, counsel "argued that the wounds the victim received were superficial, which could have given the jury a basis for finding defendant not guilty of the assault charges as well. Although counsel did not explicitly argue to the jury that they should find defendant not guilty on those charges, his comments were not a concession of guilt. Rather, it is apparent that counsel's strategy was to focus the jury on what he correctly believed was the winnable part of the People's case. This necessarily involved foregoing an argument on the much less defensible assault charges, which counsel would not have been unreasonable in believing would have eroded his credibility and resulted in conviction on all three counts."

The dissenters argued Nesbitt "received ineffective assistance of counsel when his attorney essentially conceded his guilt of first-degree assault.... [D]espite the strength of the People's case, there was a sound basis for counsel to argue that the victim did not suffer the requisite 'serious physical injury' or 'serious disfigurement,'" or that there was insufficient proof of Nesbitt's intent. Counsel "should have at least requested submission of second-degree assault as a lesser included offense," a class D felony, they said. "The majority inexplicably ignores the fact that counsel accomplished little or nothing by only defending against the attempted murder charge, albeit successfully. The acquittal did not limit defendant's sentencing exposure" since he "was still convicted of class B felonies" and sentenced to the maximum term.

For appellant Nesbitt: David J. Klem, Manhattan (212) 577-2523, ext. 527

For respondent: Manhattan Assistant District Attorney Patricia Curran (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, February 5, 2013

No. 29 Matter of Howard v Stature Electric, Inc.

David W. Howard injured his back in March 2003 while working for his employer, Stature Electric, Inc. in Watertown. A Workers' Compensation Law Judge (WCLJ) awarded him lost wage benefits and authorized surgery to be covered by Stature's workers' compensation carrier, the State Insurance Fund (SIF). In November 2005, Howard was arrested on insurance fraud and other charges for allegedly misrepresenting his work status, based on evidence from SIF investigators purportedly showing that he held other jobs while receiving benefits. Howard ultimately entered an Alford plea to insurance fraud in the fourth degree in exchange for a sentence to a conditional discharge. His attorney stated on the record that he "is pleading guilty because of the risks involved in going to trial; and without an admission of wrongdoing." The factual allegations underlying the crime were not mentioned during the plea colloquy.

At a subsequent workers' compensation hearing, SIF argued Howard was ineligible for benefits because his insurance fraud conviction established a violation of Workers' Compensation Law § 114-a, which disqualifies a claimant who "knowingly makes a false statement or representation as to a material fact" to obtain benefits. The WCLJ ruled Howard was entitled to a hearing because "the plea agreement did not involve a hearing on the merits," but the Workers' Compensation Board held on appeal that his criminal conviction precluded him from contesting whether he violated section 114-a under the doctrine of collateral estoppel.

The Appellate Division, Third Department reversed and remitted the case for a hearing. "An Alford plea, by its very nature, is accepted on the explicit basis that the person making the plea does not admit having committed the charged acts," the court said. When Howard entered his Alford plea, "he made no factual admissions, his counsel specified that he was pleading guilty 'without an admission of wrongdoing,' and the transcript of the plea proceeding includes no discussion of the factual basis for the charge. The question of whether claimant committed the charged conduct, though decisive in determining whether he violated [section] 114-a, was not determined in the criminal action. Thus, the requirement of identity was not met, and collateral estoppel does not apply...." After an evidentiary hearing, a WCLJ found SIF failed to prove Howard violated section 114-a by misrepresenting his work status and awarded him benefits. The Workers' Compensation Board affirmed.

SIF argues collateral estoppel bars Howard from asserting that he did not violate Workers' Compensation Law § 114-a because his insurance fraud conviction and his alleged violation of section 114-a are based on the same acts. "It is well-settled that an Alford plea binds as strongly as an admission of the facts constituting the crime and is the equivalent of a conviction," SIF says. "As such, the conviction vitiates the need for an administrative hearing in an administrative forum. Accordingly, the Third Department erred when it reversed the Board's finding that claimant violated [section] 114-a based upon his criminal conviction...."

For appellants Stature and SIF: Susan B. Marris, Liverpool (315) 453-6530
For respondent Howard: Christine Ann Scofield, Syracuse (315) 474-5533

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, February 5, 2013

No. 30 People v Demetrius McGee

Demetrius McGee was arrested after a high-speed chase in Buffalo in May 2008. He was accused of driving a gold Equinox while his co-defendant, Mychal Carr, fired a handgun from the passenger seat at houses along Cambridge Avenue and at one of the pursuing police officers. He told an arresting officer that he "was just driving." After a joint trial, McGee was found guilty as an accomplice of first-degree attempted murder, for the shots fired at the officer, and first-degree reckless endangerment, for the shots fired at the residents and houses on Cambridge Avenue. He was sentenced to 25 years to life in prison.

The Appellate Division, Fourth Department affirmed, rejecting McGee's argument that there was insufficient evidence to support his conviction. Regarding attempted murder, the court said prosecutors "presented evidence establishing the defendant shared his codefendant's intent to kill the [officer] and intentionally aided the codefendant by, inter alia, driving the vehicle involved in the shooting, positioning the vehicle to enable the codefendant to get a clear shot at the victim and operating the vehicle at a high rate of speed in order to evade the police...." Similar evidence established that McGee "and the codefendant shared the requisite 'community of purpose' for accomplice liability to attach," including testimony that he "drove down the street at least twice prior to the shooting [and] operated the vehicle at a speed enabling the codefendant to fire multiple shots and strike several houses...." Rejecting McGee's ineffective assistance of counsel claim, the court said he "failed to demonstrate the lack of a strategic basis for defense counsel's failure to request a lesser included offense charge.... Indeed, defendant's theory of the case was that he was 'just the driver,' i.e., that he did not share the codefendant's criminal intent, not that he only intended to 'cause serious physical injury' rather than death."

McGee argues there was insufficient proof that he was driving the vehicle, that he intended to kill or injure anyone, or that he and Carr had formed a common scheme or plan, saying that he "had no knowledge of his co-defendant's intentions to fire the weapon." During the chase, he says, "the passenger had many, many opportunities to fire" at the officers and "the driver had several opportunities to cause a collision with any one of the police vehicles. Indeed, [McGee] and his co-defendant had the ideal opportunity to injure or even kill the two officers standing vulnerable in the street as they sped by. All of the foregoing facts point to the inescapable conclusion that the appellant's main objective was to avoid a confrontation with the police and that he clearly had not formed the specific intent to murder or even injure a police officer." McGee also argues he was deprived of effective assistance of counsel based, in part, on his attorney's failure to seek severance of his trial or to request submission of the lesser-included offense of second-degree attempted assault.

For appellant McGee: Karen C. Russo-McLaughlin, Buffalo (716) 853-9555

For respondent: Erie County Assistant District Attorney Michael J. Hillery (716) 858-2424

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, February 5, 2013

No. 31 Marinaccio v Town of Clarence

Paul Marinaccio, Sr. brought this action for trespass and private nuisance against the Town of Clarence and Kieffer Enterprises, Inc. (KEI), the developer of a residential subdivision adjacent to Marinaccio's 42-acre property in Erie County. He sought damages for flooding caused by water intentionally diverted from the subdivision onto his property. After a jury trial, Marinaccio was awarded \$1,642,000 in compensatory damages against the Town and KEI, as well as \$250,000 in punitive damages against KEI. KEI appealed the award of punitive damages.

The Appellate Division, Fourth Department affirmed in a 3-2 decision, saying there was adequate support for "the jury's conclusion that KEI's conduct was sufficiently egregious to warrant an award of punitive damages." KEI and the Town were aware that prior phases of the subdivision had caused drainage problems and that construction of Phase III in 2006 would divert more water to the area of Marinaccio's property, the court said. The Town had said it would obtain an easement from Marinaccio, but the Town and KEI conceded they did not obtain his permission to route water onto his property. Marinaccio's expert engineer testified KEI diverted more water onto his land than its drainage plans called for and his wetlands expert testified the project greatly expanded the amount of wetland on his property, from about six acres in 2001 to 30.23 acres in 2009. The majority said the evidence "is legally sufficient to allow the jury to conclude that KEI knowingly and intentionally disregarded plaintiff's property rights in a manner that was either 'wanton, willful or reckless.'"

The dissenters argued that punitive damages were unjustified. "Although there is no question that KEI discharged water into the furrow [across Marinaccio's property] and that it did so with knowledge and intent, we conclude that there is insufficient evidence in this record that KEI was motivated by maliciousness or vindictiveness or that KEI engaged in such "'outrageous or oppressive intentional misconduct'" to warrant a punitive damages award..." they said. KEI's owner "relied on the expertise of his engineers to prepare an appropriate drainage plan, and that plan was submitted to, and approved by, the [Town's] Engineering Department ... and the Town Board. Indeed, the record reflects that KEI developed Phase III in accordance with all of the Town's requirements."

For appellant KEI: Michael B. Powers, Buffalo (716) 847-8400

For respondent Marinaccio: Joseph J. Manna, Buffalo (716) 849-1333