

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 12, 2013

No. 43 White v Farrell

In June 2005, Paula White and her late husband, Leonard, signed a contract to buy a house in Skaneateles from Dennis and Nancy Farrell for \$1,725,000. The Whites made a deposit of \$25,000. One condition of the sale was that the Farrells install a drainage system prior to closing, which was scheduled for July 10, 2005. Three days before the closing, the Whites informed the Farrells that they were terminating the contract because "[t]he drainage situation may never be rectified." The Farrells ultimately sold their property to a different buyer in March 2007 for \$1,376,550.

The Whites brought this action against the Farrells to recover their \$25,000 deposit, and the Farrells counterclaimed for breach of contract. The Farrells sought actual damages of \$348,450, the difference between the stated price in their contract with the Whites and the price they finally received in the March 2007 sale, and consequential damages of \$217,636.88 to cover their mortgage payments, property taxes and other carrying costs for the property.

Supreme Court granted the Farrells' motion for summary judgment, ruling the Whites had breached the sales contract and the Farrells were entitled to retain the \$25,000 deposit, but the court determined the Farrells had suffered no actual damages. It adopted the standard from Webster v Di Trapano (114 AD2d 698 [3d Dept]), which said "the proper measure of damages is the difference between the contract price and the market value of the property at the time of the breach." Based on deposition testimony of the Farrells' realtor that the fair market value of the property in 2005 was \$1,725,000, the court found no actual damages were attributable to the breach "because the contract price and the value of the property at the time of the breach was the same." It also rejected the Farrells' claim for consequential damages. The Appellate Division, Fourth Department affirmed without opinion.

The Farrells argue that they suffered actual damages and are entitled to recover, contending that the lower courts applied an improper standard. "A subsequent arms-length sale is the best manner to determine the damages in a residential breach of contract action and only if there is no subsequent sale should opinion evidence of the fair market value at the time of the breach be utilized." They also argue that they are entitled to consequential damages.

For appellant Farrells: John A. Cirando, Syracuse (315) 474-1285

For respondent White: W. Bradley Hunt, Syracuse (315) 474-7571

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No. 44 People v Stephen DeProspero

During a large-scale investigation of Internet file sharing of child pornography, the State Police found evidence that Stephen DeProspero repeatedly downloaded suspected child pornography in February and March 2009. On May 4, 2009, police obtained a warrant to search his home in the city of Rome and to seize his computers and related equipment. When the warrant was executed the next day, a "limited preview" of his computer found a single image of a young girl having sexual contact with a man. The State Police Crime Laboratory did not conduct any further forensic examination of the seized equipment at that time. DeProspero accepted a plea offer in September 2009, pleading guilty to possessing a sexual performance by a child. On November 2, 2009, he was sentenced to six months in jail and ten years of probation.

After the sentencing, defense counsel requested the return of the seized property, including two digital cameras. The prosecutor told the State Police to examine the equipment before releasing it to ensure that it contained no contraband. In January 2010, a forensic analyst found hundreds of pornographic images and videos of children on the computer and recovered from a digital camera a deleted video clip of a disabled boy, a resident of the group home where DeProspero worked, having sexual contact with him. Indicted on new charges, DeProspero moved to suppress the evidence on the ground that the police lacked authority under the original warrant to search his computer and cameras once the 2009 prosecution had ended. He argued they were required to obtain a new search warrant. After County Court denied his motion, he pled guilty to predatory sexual assault against a child and was sentenced to 18 years in prison.

The Appellate Division, Fourth Department affirmed, rejecting his claim that the authority to search his property expired at the conclusion of the 2009 prosecution. Neither the warrant nor the Fourth Amendment set a specific time limit for examination of a seized computer, and the delay in this case was reasonable, it said. "[T]he police had an obligation to search defendant's property for contraband before returning it to him" because returning child pornography "would constitute a crime." Ruling the police did not need a new warrant for the 2010 search, it said, "Once defendant's property had been lawfully seized pursuant to the May 2009 warrant, he lacked a legitimate expectation of privacy in that property, notwithstanding the passage of time."

DeProspero argues the examination of his digital camera in 2010 was a warrantless search requiring suppression. He cites *DeBellis v Property Clerk* (79 NY2d 49), which held that once criminal proceedings have terminated, "the government's presumptive right to detain the property no longer exists" and "due process requires that the property be returned upon demand unless the government can establish a new basis for its detention." At that point, he says, his "expectation of privacy in his property was fully restored" and any further intrusion by the state "is unreasonable unless supported by probable cause and a warrant." To avoid returning contraband, he says police could get a court order authorizing a search or simply "wipe the hard drive clean."

For defendant DeProspero: Frank Policelli, Utica (315) 793-0020

For respondent: Oneida County District Attorney Scott D. McNamara (315) 798-5766

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To be argued Tuesday, February 12, 2013

No. 45 People v Kirk Hanley

(papers sealed)

Kirk Hanley was a 21-year-old City College student in April 2008, when he told a friend that he had been thinking about shooting other students at the school with a replica Remington 1858 black powder revolver and then killing himself. The friend persuaded him to go with her to the financial aid office, left him in the waiting room and alerted an employee, who called campus security and the police. When officers arrived, Hanley grabbed a 19-year-old female student, pointed his gun at her head and threatened to shoot her if anyone moved. He also shouted at the officers to kill him. After a short time, he released the student and pointed the gun at his own head. The officers eventually convinced him to put down the gun and arrested him.

Without waiving his right to appeal, Hanley pled guilty to the entire indictment: second-degree kidnapping, second-degree criminal possession of a weapon (two counts), and first-degree reckless endangerment. He was sentenced to 14 years for kidnapping and concurrent terms of 7 years for weapon possession and 1 year for endangerment. On appeal, he argued the kidnapping charge must be dismissed under the merger doctrine because the same conduct, holding another person at gunpoint, was the basis for his kidnapping and reckless endangerment convictions.

The Appellate Division, First Department affirmed. "By pleading guilty, defendant forfeited appellate review of his argument that his kidnapping conviction merged into his conviction for reckless endangerment..." the court said. "Moreover, since there was no trial, the record is inadequate to review defendant's claim."

Hanley argues he did not forfeit his merger claim because the claim is not inconsistent with his plea. "By pleading guilty, [he] admitted facts sufficient to establish the elements of both kidnapping and reckless endangerment. He did not concede the validity of the prosecution's theory that he could be convicted of both kidnapping and reckless endangerment based upon the very same acts..." he says. "Because kidnapping merger is not about factual sufficiency, but about whether the kidnapping conviction should be precluded under circumstances with a great potential for overcharging, the claim is not forfeited by a guilty plea."

For appellant Hanley: Matthew L. Mazur, Manhattan (212) 698-3500

For respondent: Manhattan Assistant District Attorney Gina Mignola (212) 335-9000