State of New York
Court of Appeals

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To be argued Thursday, February 11, 2021 (arguments begin at noon)

No. 18 Toussaint v Port Authority of New York and New Jersey

Curby Toussaint was injured while working on the World Trade Center construction site in 2014 when he was struck from behind by a power buggy, which is generally used to carry newly mixed concrete from the truck to the site of the pour. Toussaint was working with a rebar bending machine when another worker drove up with the power buggy and climbed down from it. Toussaint said an operating engineer, James Melvin, began joking with the driver, then "jumped on it, and he lost control of the buggy, fell off the buggy, and it smashed me." He said Melvin apologized and explained he had been "horse playing." Melvin testified that he had been assigned to maintain cranes in another area of the work site that day, that he had never received any training on power buggies and had never used one, and had not been assigned to operate this one. He said he decided to move the buggy "because it was in the middle of the road." Toussaint brought this suit against the Port Authority of New York and New Jersey as the owner of the work site, asserting a claim under Labor Law § 241(6) premised on an alleged violation of Industrial Code (12 NYCRR) § 23-9.9(a). The code provision states, "Assigned operator. No person other than a trained and competent operator designated by the employer shall operate a power buggy."

Supreme Court denied the Port Authority's motion to dismiss the Labor Law § 241(6) claim, rejecting its argument that the Industrial Code provision was too general to support the claim. The court also found there was a question of fact about whether Melvin was acting within the scope of his employment when he moved the buggy.

The Appellate Division, First Department modified in a 3-2 decision by searching the record and granting summary judgment to Toussaint on the issue of liability. It said, "The requirement that a designated person operate a power buggy is 'self-executing in the sense that [it] may be implemented without regard to external considerations such as rules and regulations, contracts or custom and usage'.... We have held that similarly worded provisions of the Industrial Code are sufficiently specific to support a Labor Law § 241(6) claim.... We agree with the dissent that the regulation's requirement that a 'trained and competent operator ... shall' operate the power buggy is general, as it lacks a specific requirement or standard of conduct.... However, since the term 'designated person' has been held to be specific, 12 NYCRR 23-9.9(a) is a proper predicate for a claim under Labor Law § 241(6)." It concluded, "It is undisputed that [Melvin] was not 'designated by the employer' to operate the power buggy ... and his operation of [it] was a proximate cause of plaintiff's injuries."

The dissenters argued the claim should be dismissed, relying on a prior First Department decision that found another Industrial Code provision "which, in almost identical language to that in section 23-9.9(a), requires that '[a]ll power-operated equipment ... shall be operated only by trained, designated persons,' was only a 'mere general safety standard that is insufficiently specific to give rise to a nondelegable duty under [Labor Law § 241(6)].... I conclude that Industrial Code § 23-9.9(a) is insufficiently specific to support a claim under" the statute. They said, "To impose liability under these circumstances, and on these facts..., would potentially expose a defendant to liability any time an unauthorized person on his own initiative or even a trespasser moved such an item of equipment and caused injuries, an outcome not within the scope of the statute and inconsistent with our precedent."

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For respondent Toussaint: Brian J. Shoot, Manhattan (212) 732-9000

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To be argued Thursday, February 11, 2021 (arguments begin at noon)

No. 19 People v Daria N. Epakchi

Daria Epakchi, a 17-year-old probationary driver, was charged with failing to stop at a stop sign in the Town of Huntington, Suffolk County, in September 2013. She pled not guilty on the back of the ticket (a simplified traffic information) and requested a supporting deposition from the complaining officer, which was not provided. Epakchi moved to dismiss the simplified information, arguing that she was entitled to the officer's deposition under CPL 100.25 and that the failure to comply rendered the information facially insufficient under CPL 100.40(2). District Court dismissed the charge. On the same day, the Suffolk County Traffic and Parking Violations Agency filed a new simplified information charging Epakchi with the same traffic violation based on the same incident, this time with the officer's deposition attached.

District Court denied Epakchi's motion to dismiss the new simplified information based on the Court of Appeals' 1991 decision in People v Nuccio (78 NY2d 102), which allowed prosecutors to pursue charges in a local criminal court after a prior simplified information, charging the same offenses, had been dismissed for failure to provide supporting depositions required by CPL 100.25. The Court held there was no statutory bar to "reprosecution for nonfelony charges when the information is dismissed for legal insufficiency." District Court subsequently found Epakchi guilty of the stop sign violation and imposed a fine and fees.

The Appellate Term for the 9th and 10th Judicial Districts reversed "as a matter of discretion in the interest of justice" and dismissed the new information based on its own precedents beginning with People v Aucello (146 Misc 2d 417 [1990]), which require a showing of "special circumstances" for reprosecution in such cases. It said, "This court has consistently reversed judgments of conviction, as a matter of discretion in the interest of justice, where, absent special circumstances warranting the reprosecution of a defendant, the People proceeded to trial on a refiled accusatory instrument, after an earlier simplified traffic information, charging the same offense based upon the same incident, had been dismissed for failure to serve the defendant with a requested supporting deposition.... No special circumstances have been shown to exist in this case to warrant defendant's reprosecution. A ruling to the contrary 'would defeat the very purpose of CPL 100.40(2), disregard the interest of judicial economy, and erode the confidence of the public in the criminal justice system'...."

The Traffic and Parking Violations Agency argues that, under Nuccio, it may refile the same charge after dismissal of the original traffic information without showing special circumstances. It says the special circumstances requirement "is an undefined, capricious and arbitrary standard that is not supported by statute or case law." It concludes,"No matter how the Appellate Term characterizes its decision ... in this case, clearly such decision is based purely upon principles of law and is thus properly reviewable by this Court."

Epakchi argues, "This ... Court lacks jurisdiction to review the Appellate Term's order reversing the judgment of conviction..., since such reversal was made 'as a matter of discretion in the interest of justice,'" and so "the jurisdictional predicate of CPL 450.90(2)(a) is not satisfied."

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For respondent Epakchi: David A. Day, Glen Cove (516) 466-6065

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To be argued Thursday, February 11, 2021 (arguments begin at noon)

No. 20 People v Leslie K. Olds

Leslie K. Olds was charged with misdemeanor counts of forcible touching and endangering the welfare of a child in 2013 based on an incident involving a 15-year-old girl in the Town of Lewiston, Niagara County. At a non-jury trial in Town Court, he was convicted of forcible touching and acquitted of child endangerment. Olds was sentenced to three years of probation and, due to the nature of his conviction, he was required to register as a Level 1 sex offender under the Sex Offender Registration Act (SORA). He appealed to Niagara County Court, which reversed his conviction on the ground that he did not waive his right to a jury trial. On remand, Olds pled guilty to endangering the welfare of a child, a conviction that did not require registration as a sex offender. An updated pre-sentence investigation (PSI) recommended incarceration for several reasons, including its view that Olds did not comply with sex offender treatment during his vacated term of probation and failed to show remorse. Town Court, without mentioning facts presented in the PSI, sentenced Olds to the maximum term of one year in jail.

Olds appealed, arguing that his sentence to a jail term (instead of probation), a term imposed after his prior successful appeal, raised a presumption of vindictiveness and violated his right to due process. The prosecution argued that the one-year jail sentence was not more severe than the initial sentence of probation with the requirement that Olds register as a sex offender, so the presumption of vindictiveness did not apply.

Niagara County Court affirmed the sentence, saying, "Neither party has provided any authority for the proposition that a one-year local jail sentence is 'harsher' than a sentence of probation and sex offender registration. The comparison between the two sentences seems to be the proverbial 'apples and oranges' argument. This court has handled numerous 'sex offender" cases and recognizes that defense attorneys frequently attempt to gain pleas for clients that do not involve sex offender registration. On the other hand, incarceration is a complete deprivation of liberty. Under the circumstances, where Defendant appealed from a judgment convicting him following a non-jury trial with a sentence of probation and sex offender registration, there was a possibility that success on the appeal ultimately could place Defendant in the position he now faces. This court does not believe that the newly imposed sentence is vindictive as a matter of law. Nor is there any evidence in the record that the sentencing court was vindictive...." The court also said Olds failed to preserve the issue for appeal.

Olds argues that "the presumption of a vindictive sentence cannot be reasonably questioned nor overcome.... Here, appellant spared the People and the victim from going through a retrial yet was given the maximum sentence." He says County Court "equated the original imposition of the SORA determination with the full deprivation of liberty effected by the subsequent term of incarceration. However, this Court has made clear that 'SORA requirements, unlike postrelease supervision, are not part of the punishment imposed by the judge; rather, SORA registration and risk-level determinations are nonpenal consequences that result from the fact of conviction for certain crimes'.... Therefore, it cannot reasonably be said that a sentence of incarceration is NOT harsher than one of probation and a SORA determination."

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