

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 or gspencer@nycourts.gov.

To be argued Thursday, February 10, 2022 (arguments begin at noon)

No. 16 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 10, 2022 (arguments begin at noon)

No. 18 **People v Jeffery Bush**

Jeffery Bush was driving in Brooklyn in May 2017 when a police officer stopped him for changing lanes without signaling. After the officer observed an open container of alcohol on the passengers seat and learned Bush's license had been suspended, the officer arrested him. In a search at the precinct, the officer recovered a bag of crack cocaine from Bush's waistband.

Bush agreed to a plea bargain in which he would plead guilty to a class A misdemeanor of criminal possession of a controlled substance in the seventh degree, with 20 days of community service, in satisfaction of all charges against him. At the plea hearing, Supreme Court explained the rights Bush would be giving up by pleading guilty, confirmed the details of the crime, and told him, "You understand you can't get re-arrested. You must return on the adjournment date [for sentencing]. And you must complete the community service or else there will be a one year jail alternative." Bush confirmed that he understood and entered his guilty plea. The court made no mention of a conditional discharge at the plea proceeding.

Two months later, after Bush completed his community service, he appeared for sentencing and the court mentioned for the first time on the record that the sentence would be a conditional discharge. Addressing the prosecutor and defense counsel, the court said, "Community service completed. And the promise is a C.D.?" Both attorneys said yes. Without explaining that Bush would face up to a year in jail if he violated conditions of the discharge, the court then sentenced him to a one-year conditional discharge and a six-month license suspension.

The Appellate Division, Second Department affirmed, rejecting Bush's argument that his plea was not knowing, voluntary, and intelligent because he was not informed before the plea that his sentence would include a period of conditional discharge. It said, "The defendant's contention is unpreserved for appellate review because the defendant was made aware that he would be subject to a period of conditional discharge at the outset of the sentencing proceeding, and nonetheless failed to move to withdraw his plea or otherwise raise this issue prior to the imposition of sentence...." The court declined to exercise its interest of justice jurisdiction.

Bush argues that Court of Appeals precedents "establish that preservation is not necessary or reasonable where the court introduces an entirely new *type* or *category* of sentence after the defendant has pleaded guilty.... Because Mr. Bush was never informed before pleading guilty that he would have to complete a one-year conditional discharge after satisfying his community service sentence, and was first told of this new type of sentence shortly before the sentence was imposed, he did not ... have an adequate opportunity to object and preservation should not be required." He further argues, "The court's failure to inform him of the direct consequence of the conditional discharge before he pleaded guilty deprived him of due process...."

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