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.

WEEK OF APRIL 29 - MAY 1, 2014

NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

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, April 29, 2014

No. 120 People v Vinod Patel
No. 93 People v Churchill Andrews *(papers sealed)*
No. 94 People v Kevin Kruger

The question raised in these appeals is when may an appellate court allow a criminal defendant to appeal a conviction after the statutory period for taking an appeal has expired due to ineffective assistance of counsel. Defendants generally have 30 days to file a notice of appeal or application for leave to appeal, and CPL 460.30 provides a grace period of one year for defendants to seek permission from an intermediate appellate court or the Court of Appeals to file a late appeal. All three defendants here rely on People v Syville (15 NY3d 391 [2010]), which permits appellate courts to grant coram nobis relief after the CPL 460.30 grace period has expired, in certain circumstances. "Where an attorney has failed to comply with a timely request for the filing of a notice of appeal and the defendant alleges that the omission could not reasonably have been discovered within the one-year period, the time limit imposed in CPL 460.30 should not categorically bar an appellate court from considering that defendant's application to pursue an untimely appeal," this Court said in Syville.

Vinod Patel pled guilty in Queens to two counts of possessing a sexual performance by a child and was sentenced to consecutive terms of 1⅓ to 4 years in prison in February 2007. His attorney failed to file a notice of appeal. Before the grace period expired, Patel made a pro se motion for permission to file a late notice of appeal under CPL 460.30, which the Appellate Division, Second Department denied. After Syville was decided, he sought a writ of error coram nobis, arguing his attorney had been ineffective in failing to file the notice of appeal. The Second Department granted the petition and deemed his notice of appeal timely. The prosecution argues here that Patel is not entitled to coram nobis relief because he "had already sought and obtained review of the merits of his claim" with his pro se motion under CPL 460.30.

Churchill Andrews pled guilty in Brooklyn to criminal sale of a controlled substance in the fifth degree and was sentenced to a six-month jail term in September 2008. Neither he nor his attorney filed a notice of appeal at the Appellate Division before the grace period expired. Andrews, a lawful permanent resident from Guyana, was taken into federal custody for deportation proceedings in 2010. In March 2013, he filed this coram nobis petition, which the Second Department denied. He argues he is entitled to coram nobis relief because he was denied his right to effective assistance of counsel and, consequently, of his only chance to avoid deportation by direct appeal of his conviction.

Kevin Kruger pled guilty to first-degree burglary in Orange County in 2006, but withdrew the plea when County Court refused to honor its promise to cap his sentence at 10 years. Months later, he again pled guilty to the charge and waived his right to appeal in return for a sentence of 12½ years. The Second Department affirmed his conviction in December 2009, and Kruger asked his attorney to seek leave to appeal to the Court of Appeals. In 2012, when he discovered no application for leave was ever filed, he sought a writ of error coram nobis from the Second Department, which denied his petition to file a late application at this Court. He argues Syville, which addressed the failure of defense counsel to file an appeal as of right at the Appellate Division, applies equally to counsel's failure to file a discretionary application for leave at the Court of Appeals.

No. 120 For appellant: Queens Assistant District Attorney John M. Castellano (718) 286-5801
For respondent Patel: Lynn W. L. Fahey, Manhattan (212) 693-0085
No. 93 For appellant Andrews: Lisa Napoli, Manhattan (212) 693-0085
For respondent: Brooklyn Assistant District Attorney Joyce Slevin (718) 250-2531
No. 94 For appellant Kruger: Benjamin Ostrer, Chester (845) 469-7577
For respondent: Orange County Asst. District Attorney Andrew R. Kass (845) 615-3640

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, April 29, 2014

No. 95 Matter of Town of Islip v New York State Public Employment Relations Board

Until 2008, the Town of Islip assigned town-owned vehicles to numerous employees who were allowed to take them home, despite provisions in the Town's Ethics Code (Town Code § 14-12) and its Administrative Procedure Manuel limiting such use to official business and to employees who were on call 24 hours a day. During contract negotiations in 2007, the Town proposed to eliminate the use of take-home vehicles for employees who did not qualify under its written policies, but it withdrew the proposal two months later, contending the issue was not a mandatory subject of collective bargaining under the Taylor Law (Civil Service Law article 14).

In 2008, after an impasse in negotiations was declared, the Town Board adopted a resolution that unilaterally restricted the assignment of take-home vehicles to elected officials, emergency responders, and employees who had no fixed work site. About 80 employees lost the use of take-home vehicles, including at least 45 who were members of the predecessor of the United Public Service Employees Union (UPSEU). The union filed an improper practice charge with the State Public Employment Relations Board (PERB), alleging the Town's action violated the Taylor Law because use of a take-home vehicle to commute to work is an economic benefit subject to mandatory bargaining. The Town argued that the Town Code prohibited it from providing vehicles to employees who did not qualify under its written policy.

An administrative law judge ruled in favor of the union and PERB affirmed, saying "use of an employer-owned car for personal purposes is an economic benefit and a term and condition of employment which cannot be unilaterally withdrawn."

The Appellate Division, Second Department confirmed PERB's determination, saying the Town could be required to negotiate the issue, despite the prohibition in its Ethics Code, because "the Town frequently and openly ignored that Code and its policy for managing its vehicle fleet, only to contend later that the Code allowed it to act unilaterally in taking the vehicles away from the employees who had been permanently provided with them. The PERB was not required to give more effect to the Town Ethics Code than the Town itself gave to it." The court said the assignment of take-home vehicles "continued unabated for many years" and "created a reasonable expectation among the affected unit employees that the practice would continue."

The Town argues that PERB "does not possess the authority to compel the Town to continue an illegal past practice" and that the effect of PERB's decision "is to make laws adopted by a Town, or any municipality in the State of New York, unenforceable by the lack of diligence and/or management of prior administrations in acting in accordance with the law, thereby forever negating the Local Law as applied to unionized employees.... As a matter of public policy, an illegal past practice should not be permitted to ripen into a binding term and condition of employment that cannot be corrected by a public employer."

For appellant Town: Ernest R. Stolzer, Garden City (516) 267-6300
For respondent UPSEU: Liam L. Castro, Manhattan (917) 551-1300
For respondent PERB: David P. Quinn, Albany (518) 457-2678

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, April 29, 2014

No. 96 IDT Corp. v Tyco Group, S.A.R.L.

IDT Corp. and affiliates of Tyco Telecommunications entered into a settlement agreement in October 2000 to resolve litigation over a failed fiber optic communications venture. The settlement required Tyco to provide fiber optic capacity to IDT, free of charge for 15 years, on a network Tyco was building to connect North America, Asia and Europe, and it specified various terms. The settlement also required the parties to negotiate additional agreements, including an "indefeasible right to use" (IRU) agreement for IDT's use of the fiber optic network that was to be "consistent with" the standard agreements Tyco was developing for other customers "and, in any event, containing terms and conditions consistent with those described herein." In June 2001, Tyco proposed an IRU that would have allowed it to shut down the network after five years, as well as other terms allegedly inconsistent with the settlement. Negotiations continued into March 2004. Two months later, IDT sued Tyco for breach of the settlement agreement.

In 2007, Supreme Court granted IDT's motion for summary judgment on liability. The Appellate Division, First Department reversed and dismissed the suit, finding no breach. It said the settlement agreement was not fully enforceable when the parties entered into it because essential terms remained indeterminate until Tyco devised its standard customer agreements. The Court of Appeals affirmed in IDT Corp. v Tyco Group, S.A.R.L. (13 NY3d 209 [2009]), saying, "Although there was a valid settlement agreement in this case, Tyco's obligation to furnish capacity never became enforceable because agreed-upon conditions were not met."

The parties resumed negotiations, although Tyco told IDT that the appellate decisions dismissing the suit established that it had no further obligations under the 2000 settlement. In November 2010, IDT brought this action for breach of contract against Tyco.

Supreme Court granted Tyco's motion to dismiss the suit, saying this Court's statement that "Tyco's obligation to furnish capacity never became enforceable" meant that "Tyco does not have any further obligations" under the settlement and "all rights of IDT ... were extinguished."

The First Department reversed and reinstated the complaint, saying the Court of Appeals "was simply observing that the allegations" in the 2004 lawsuit "did not articulate a breach at the time the action was commenced given the non-occurrence of condition precedent: namely, the parties had not yet entered into final agreements, and the defendants had not otherwise breached their duty to negotiate." It said Tyco's "obligations in this case did not have an expiration date, nor ... did one arise through the mere passage of time," and Tyco's alleged statements that it had no further duty to negotiate would be an anticipatory breach of the settlement. Since IDT's claims are based on Tyco's actions after the Court of Appeals ruling, it said, they are not barred by res judicata or collateral estoppel.

Tyco argues this Court's 2009 ruling "that the condition precedent had not been satisfied -- despite protracted, good faith efforts by Tyco to reach a settlement -- relieved both parties of any extant obligations under the 2000 Settlement Agreement." It says the First Department's contrary view "is at odds with decades of well-established law," as is its "ruling that, unless there is an express 'expiration date,' parties who are subject to a duty to negotiate must continue to negotiate indefinitely." Tyco contends IDT's suit is barred by res judicata and collateral estoppel because it "seeks to relitigate the same claims and the same issues already decided in the 2004 litigation."

For appellant Tyco: Thomas E. L. Dewey, Manhattan (212) 943-9000
For respondent IDT: Hillel I. Parness, Manhattan (212) 980-7400

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, April 29, 2014

No. 59 Matter of Working Families Party v Fisher

In February 2010, Richmond County District Attorney Daniel M. Donovan, Jr. submitted a confidential ex parte application to Deputy Chief Administrative Judge Fern A. Fisher requesting to be relieved from further investigation of possible election law, campaign finance and criminal violations during a 2009 City Council election on Staten Island and seeking the appointment of a special prosecutor to pursue the case. He asked that his application be sealed. Judge Fisher granted the application in January 2012, finding that Donovan and his assistants "should be relieved from acting further in the matter" and, pursuant to County Law § 701, appointing Roger Bennet Adler to act as a special district attorney "in any and all stages of investigation and prosecution" of the case. She ordered that Donovan's application remain sealed. In January 2013, Adler served grand jury subpoenas on the treasurer and assistant secretary of the Working Families Party. The following month, the Working Families Party brought this article 78 proceeding for a writ of prohibition to vacate Judge Fisher's order and quash the subpoenas, contending that the standard for disqualification of a district attorney under County Law § 701 had not been met, among other things.

The Appellate Division, Second Department denied the Party's petition. "Prohibition is an available remedy to void the improper appointment of a Special District Attorney pursuant to County Law § 701 when the Special District Attorney is performing the quasi-judicial act of representing the State in its efforts to bring individuals accused of crimes to justice...," it said. "However, it is not an available remedy when the Special District Attorney is performing the purely investigative function of investigating 'suspicious circumstances' with a view to determining whether a crime has been committed, since, in such circumstances, his or her acts are to be regarded as executive in nature.... Here, the WFP failed to establish that Special District Attorney Adler was performing a quasi-judicial act" and, thus, "prohibition does not lie."

The Working Families Party argues that prohibition is available here because its petition challenges Judge Fisher's authority to relieve Donovan of his duties and appoint Adler as special district attorney, not Adler's conduct of his investigation. "It is undisputed that Judge Fisher was acting in a judicial capacity when she entered the Order," it says. "The petition challenged the Order entered by *Judge Fisher* on the grounds that *Judge Fisher* acted in excess of her jurisdiction. The fact that *Special District Attorney Adler* might be acting in an executive capacity is irrelevant." On the merits, the Party argues Judge Fisher improperly allowed Donovan to disqualify himself without "a showing of actual prejudice based on a demonstrated conflict of interest," as required by County Law § 701.

For appellant Working Families Party: Avi Schick, Manhattan (212) 768-6700
For respondent Fisher: Lee Alan Adlerstein, Manhattan (212) 428-2150
For respondent Donovan: Richmond County Asst. Dist. Atty. Morrie I. Kleinbart (718) 556-7010

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 Wednesday, April 30, 2014 (arguments begin at 2:30 p.m.)

No. 97 People v Neil Gillotti *(papers sealed)*
No. 98 People v George Fazio *(papers sealed)*

In these appeals, child pornography offenders are challenging the risk levels assigned to them under the Sex Offender Registration Act (SORA). The issues concern the appropriate scoring of points on the Risk Assessment Instrument (RAI) for factor 3, "number of victims," and factor 7, "relationship with victim."

Neil Gillotti was serving in the Air Force in 2010, when authorities found about 1000 pornographic videos and photos of children he had downloaded to his computer as a teenager. He pled guilty in a military court to possession of child pornography and served eight months confinement. When he returned to his home in Niagara County, the Board of Examiners of Sex Offenders determined he was a presumptive level one offender based on his RAI score, but sought an upward departure to level two due to the number and graphic nature of the images. County Court granted the prosecution's request to assess him an additional 30 points under factor 3, because three or more children were depicted, and 20 points under factor 7, because they were strangers to him, making him a level three offender. It denied his request for a downward departure to level one. The Appellate Division, Fourth Department affirmed, saying Gillotti "failed to present clear and convincing evidence of special circumstances justifying a downward departure" of his risk level. Gillotti argues County Court abused its discretion by failing to consider whether a downward departure was justified under People v Johnson (11 NY3d 416), which said a downward departure would be appropriate when strict application of risk factor 7 in a child pornography case "produces a seemingly anomalous result."

George Fazio pled guilty to felony sex offenses in Pennsylvania in 2008, based on pornographic videos and photos of children police discovered on his computer. He served three years in prison and then moved to Albany County. The Board of Examiners assessed no points on his RAI for factors 3 and 7, recommending that he be designated a level one offender. At the prosecutor's request, County Court assessed him an additional 50 points under factors 3 and 7 because there were multiple images of children and they were strangers to Fazio, making him a level two offender. Fazio did not request a downward departure, but challenged the points assessed for factors 3 and 7. The Third Department affirmed, saying, "Children depicted in pornographic images may be found to constitute multiple separate victims for the purposes" of SORA, and Fazio "did not dispute that three or more children were depicted in the images and videos he possessed." Fazio argues child pornography offenders should not be assessed points under factors 3 and 7 because they do not accurately predict increased risk. He cites Johnson, which said offenders who knew the children depicted in such photos "would seem to present a greater threat" than those who had no contact with them, "[y]et, under factor 7, previous acquaintance with the children would ... decrease defendant's risk score, not increase it. It does not seem that factor 7 was written with possessors of child pornography in mind." Fazio says "the Court's rationale is equally applicable to the multiple victim factor."

For appellant Gillotti: Joseph G. Frazier, Lockport (716) 439-7071
For respondent: Niagara County Assistant District Attorney Laura T. Bittner (716) 439-7085
For appellant Fazio: Christopher Ritchey, Albany (518) 447-7150
For respondent: Albany County Assistant District Attorney Steven M. Sharp (518) 487-5460

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 Wednesday, April 30, 2014 (arguments begin at 2:30 p.m.)

No. 99 **Matter of New York State Commission on Judicial Conduct v Rubenstein** *(record sealed)*

Attorney Seth Rubenstein and a Manhattan judge were indicted on criminal charges stemming from alleged campaign finance fraud during the judge's election campaign in 2008. After a jury trial, they were acquitted of all counts in April 2010 and the case file was sealed in accordance with CPL 160.50, which provides that records of a criminal action resolved in favor of the accused "shall be sealed and not made available to any person or public or private agency...." In May 2010, Supreme Court granted the Commission on Judicial Conduct's application for an ex parte order releasing the sealed criminal records to the Commission for use in a disciplinary proceeding against the judge. In May 2012, Rubenstein filed an order to show cause and moved to vacate the 2010 order, preclude the Commission from using any information obtained from the criminal records, and return the records to the sealed file.

Supreme Court denied Rubenstein's motion for lack of standing and on procedural grounds. It also held the release of the criminal records was authorized by Judiciary Law § 42(3), which permits the Commission to "request and receive from any court, department, division, bureau, commission or other agency of the state or political subdivision thereof or any public authority such assistance, information and data as will enable it properly to carry out its functions, powers and duties." The court said, "The Commission's authority and the preservation of the integrity of the state's judiciary may not be stymied by the statutory constraints of CPL 160.50; to conclude otherwise would dangerously undermine the ability of the Commission to meet its constitutional mandate."

While Rubenstein's appeal was pending, the judge under investigation agreed to accept public censure as a penalty. The Commission issued the censure in October 2012.

Four months later, the Appellate Division, First Department granted the Commission's motion to dismiss the appeal as moot. It also directed that all of the records released to the Commission "be returned forthwith to the court and be resealed for all purposes."

Rubenstein argues his appeal is not moot "because the continuing presence of the State Commission's determination on its website, with no steps to protect Mr. Rubenstein's identity, has 'enduring consequences' for his credibility and reputation.... In publishing its decision censuring Judge Doe..., the State Commission has done the very thing CPL 160.50 was designed to prevent -- the sullying of Mr. Rubenstein's personal and professional reputation." CPL 160.50 contains no exception giving the Commission access to sealed records, he says. "Had the Legislature intended that Judiciary Law § 42(3) override CPL 160.50's explicit proscription against disclosure, it would have said so, given 'the strong public policy in favor of sealing dismissed actions' embodied in CPL 160.50." Even if the appeal is moot, he says the mootness exception should apply because the issue "is novel and substantial, likely to recur and to continue to evade review."

For appellant Rubenstein: Gary B. Freidman, Manhattan (212) 818-9600
For respondent Commission: Assistant Solicitor General Won S. Shin (212) 416-8808

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 Wednesday, April 30, 2014 (arguments begin at 2:30 p.m.)

No. 100 People v Hazel E. Gordon

Hazel Gordon was accused, along with two accomplices, of stealing jewelry from an Albany County department store in May 2009. Prosecution witnesses testified that Gordon threatened loss prevention officers with two pens when they tried to detain her and that she injured another store employee with her car when he tried to stop her in the parking lot. No stolen property was found in the possession of Gordon or her accomplices. She was convicted of first-degree robbery, two counts of second-degree robbery, and second-degree assault.

The Appellate Division, Third Department modified by reducing all three robbery convictions to petit larceny, finding they were not supported by sufficient evidence. The robbery counts, as charged in the indictment, required proof that Gordon forcibly stole property, it said. "As relevant here, forcible stealing is defined as using or threatening to use 'physical force upon another person for the purpose of ... [p]reventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking' (Penal Law § 160.00[1]...)." The court said, "Where a defendant is found to be in possession of stolen property, a jury may infer that he or she threatened or used force to prevent or overcome resistance to its taking or retention...; however, when such evidence is lacking, 'it is impossible to conclude beyond a reasonable doubt that defendant's conscious objective in threatening to use physical force was to prevent or overcome resistance to the retention of the property'...." Since no stolen property was recovered from Gordon or her accomplices, it said, the evidence of robbery was insufficient.

The prosecution argues that it proved Gordon's guilt of robbery beyond a reasonable doubt even though no stolen property was found in her possession at the time of her capture. Loss prevention officers saw her remove and discard the packaging from earrings, place the jewelry in her pockets, and leave the store. When they confronted her and asked her to return the earrings, she threatened them with the pens. "The plain inference from defendant's conduct was that defendant was using force to retain the earrings" at the time she was confronted, even if she disposed of them later, the prosecution says. "Following the charge and based on common sense..., the jury concluded that defendant used force in an effort to retain the earrings. This inference was reasonable and should not be disturbed on appeal," since "intent is the exclusive domain of the jury."

Gordon argues in her cross-appeal that the assault and petit larceny convictions should be reversed because they are not supported by sufficient evidence.

For appellant-respondent: Albany Co. Asst. District Attorney Steven M. Sharp (518) 487-5460
For respondent-appellant Gordon: Aaron A. Louridas, Delmar (518) 598-7695

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 Wednesday, April 30, 2014 (arguments begin at 2:30 p.m.)

No. 101 Wittorf v City of New York

In November 2005, Rhonda Wittorf and a companion, Brian Hoberman, rode their bicycles to the entrance of the Central Park transverse road at West 65th Street. A New York City Department of Transportation (DOT) crew supervisor was setting up warning cones to close off the transverse road to vehicular traffic before beginning repairs on damaged sections of the road. Hoberman asked the supervisor if they could ride through and he responded, "Go ahead." Hoberman crossed the transverse safely, but Wittorf struck a large pothole and suffered severe facial injuries.

Wittorf brought this personal injury action against the City, claiming the DOT supervisor had been negligent in allowing her to ride through the barrier without warning her of the hazards ahead. At trial, the jury found that the supervisor was negligent and that his negligence was a substantial factor in causing Wittorf's injuries, assigning 60 percent of the fault to the City.

Supreme Court granted the City's motion to set aside the jury verdict for failure to state a prima facie case and dismissed Wittorf's complaint, finding the DOT supervisor was acting in a "discretionary governmental" capacity and. therefore, the City was immune from liability.

The Appellate Division, First Department affirmed in a 4-1 decision. "[A]t the time of plaintiff's accident, the repair work had not begun, and the supervisor was engaged in traffic control, which is 'a classic example of a governmental function undertaken for the protection and safety of the public pursuant to the general police powers'...," it said. "Thus, the City is entitled to governmental function immunity because the specific act or omission that caused plaintiff's injuries was the supervisor's discretionary decision to allow plaintiff to proceed since his crew had not completed its preparations for the road work, and not the City's proprietary function in maintaining the roadway.... The fact that the supervisor was a DOT employee and not a police officer is of no consequence. Controlling traffic is a governmental function."

The dissenter argued the City is not immune because the DOT supervisor's negligent conduct "occurred while he was engaged in physical maintenance of the road, a proprietary act.... The decision to allow plaintiff to proceed along the transverse cannot be viewed separately from the City's proprietary function in maintaining the roadway. Here, the DOT employee was in the process of barricading an entrance to the traverse, an activity integral to his overall assignment of repairing hazardous roadway conditions. The fact that the specific function of barricading a street as part of a maintenance project might be one performed by a police officer, in my view, is not determinative of the governmental or proprietary nature of the activity."

For appellant Wittorf: Brian J. Shoot, Manhattan (212) 732-9000
For respondent City: Assistant Corporation Counsel Ronald E. Sternberg (212) 356-0840

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 Thursday, May 1, 2014 (arguments begin at noon)

No. 102 Capruso v Village of Kings Point (Action No. 1)
State of New York v Village of Kings Point (Action No. 2)

In the late 1920s, the Village of Kings Point acquired 173 acres for the purpose of creating a public park known as Kings Point Park, most of which is densely forested and contains wetlands, hiking and skiing trails, ball fields, picnic areas and playgrounds. In 1936, the Village began leasing the park to the Great Neck Park District. In 1946, the Village and Park District amended the lease to exclude a 5.5-acre parcel of Kings Point Park known as the "Western Corner," which the Village has used for storage of highway materials, dumping of tree stumps, a police pistol range and other non-park purposes. In November 2008, the Village approved a plan to move its Department of Public Works (DPW) facilities to the Western Corner, which would entail construction of a 12,000-square foot building, removal of old growth trees, and regrading and paving a significant portion of the parcel, among other things.

Daniel Capruso and two other residents living near the Western Corner brought Action No. 1 against the Village and its officials in March 2009, contending the Village's current use and future plans for the parcel violate the public trust doctrine, which requires approval by the State Legislature to use public parkland for non-park purposes. The Village moved to dismiss the suit as barred by the six-year statute of limitations. Supreme Court denied the Village's motion and granted the plaintiffs' motion for a preliminary injunction, on condition they post a $400,000 undertaking. In September 2009, with the plaintiffs unable to post the undertaking, the State brought Action No. 2 against the Village, as parens patriae on behalf of its citizens. The State sought a declaration that the entire park, including the Western Corner, is dedicated parkland, and sought an injunction barring the Village from proceeding with its proposed DPW project without legislative approval. Supreme Court denied the Village's motion to dismiss Action No. 2 as time-barred, and granted the State's motion for a preliminary injunction.

The cases were consolidated and the Appellate Division, Second Department affirmed. The challenge to the Village's longstanding use of the parcel for non-park purposes in Action No. 1 is timely because such conduct "is a continuing wrong that the municipality has the ability to control and abate," it said. The challenges to the proposed DPW project in both actions are timely because they were brought within six years of the Village's public announcement of the plan in November 2008.

Supreme Court subsequently granted summary judgement to the plaintiffs in both actions, declaring the Western Corner is dedicated parkland protected by a public trust, permanently enjoining the Village from proceeding with the DPW project, and ordering it to discontinue all non-park uses of the parcel. The Second Department affirmed.

The Village argues both actions are time-barred because they "belatedly challenge Village Board actions taken in 1938 and 1946" to approve leases reserving the "DPW site" for its non-park use. It says the "continuing wrong" doctrine does not apply because it has "openly and notoriously" used the site for non-park purposes since at least 1946 and, in any case, it should not apply to "public acts of a legislative body" as a matter of public policy. The proposed DPW facility is not a new use, triggering a new limitations period, because it is "nothing more than a change in the nature and scope of an ongoing non-park use of the same park land."

For appellants Kings Point et al: John M. Brickman, Great Neck (516) 829-6900
For respondents Capruso et al: Reed W. Super, Manhattan (212) 242-2355
For respondent State: Assistant Solicitor General Bethany A. Davis Noll (212) 416-6184

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 Thursday, May 1, 2014 (arguments begin at noon)

No. 103 People v Joseph Dumay

A police officer in Brooklyn arrested Joseph Dumay in August 2009 after Dumay stood behind his patrol car and struck the trunk with his hand. Dumay was charged with a misdemeanor count of obstructing governmental administration in the second degree, among other things. In the accusatory instrument, the arresting officer said Dumay "slammed the trunk of deponent's radio mounted patrol vehicle with an open hand and prevented said vehicle from moving by standing behind it and preventing deponent from patrolling the neighborhood." In a plea proceeding, defense counsel waived prosecution by information, and Dumay pled guilty to the obstruction charge in exchange for a sentence of 15 days in jail. On appeal, he argued the accusatory instrument was jurisdictionally defective because it did not include any allegation that the police communicated their need for him to move so they could leave and, thus, failed to establish that he intended to prevent them from performing their duties.

The Appellate Term, 2nd, 11th and 13th Judicial Districts, affirmed. It found Dumay validly waived his right to prosecution by information and, therefore, the accusatory instrument need satisfy only the facial sufficiency standard that applies to misdemeanor complaints. "'[A]n accusatory instrument must be given a reasonable, not overly technical reading'...," it said. "When the misdemeanor complaint herein is given such a reading, the 'fair implication' ... of uts averments support, or tend to support, the charge of obstructing governmental administration in the second degree."

Dumay argues the accusatory instrument was facially insufficient because it contained no allegations showing his intent to physically interfere with the police. "There were absolutely no allegations that any police officer communicated in any way to appellant that the officer needed him to move so that they could move their car out of that space and that appellant's location was preventing the officer from doing so. Indeed, there was no allegation that the police spoke to him at all." He says the instrument also failed to allege that he actually interfered with the officer's patrol. The allegations "show merely that appellant was blocking the vehicle in only one direction. They do not show that he was preventing the car from moving in all directions and that the officer driving the police vehicle could not have exited the spot by driving forward or moving around appellant."

For appellant Dumay: Amy Donner, Manhattan (212) 577-3487
For respondent: Brooklyn Assistant District Attorney Adam M. Koelsch (718) 250-3823

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 Thursday, May 1, 2014 (arguments begin at noon)

No. 104 People v Sharmelle Johnson *(papers sealed)*

In February 2008, the complainant spent a night drinking on the Upper East Side. Due to her intoxication, she did not remember leaving the bar, nor did she have any recollection of a sexual encounter after she left. Walking home several hours later, she realized both her legs were in one pant leg and her purse and cell phone were missing. Later that day, suspecting she had been raped, she went to a hospital for examination. DNA from semen recovered with a rape kit matched Sharmelle Johnson, who also had her cell phone. Johnson ultimately told police that he found her on the sidewalk in front of the bar, helped her up and took her to the lobby of a nearby building, where they had sex.

In exchange for a four-year prison sentence, Johnson pled guilty to second-degree rape pursuant to Penal Law § 130.30(2), which applies when a defendant has sexual intercourse with a "person who is incapable of consent by reason of being ... mentally incapacitated." Under Penal Law § 130.00(6), a person is "mentally incapacitated" if she "is rendered temporarily incapable of appraising or controlling [her] conduct owing to the influence of a narcotic or intoxicating substance administered to [her] without [her] consent...." At his plea allocution, Supreme Court asked, "Is it true, sir, that you knew she was too drunk to really make a decision about whether she did or did not want to have sex?" Johnson answered, "Yes." The court asked, "You could see she was mentally incapacitated apparently from drinking, is that right?" Johnson said, "Yes."

The Appellate Division, First Department affirmed on a 3-2 vote, rejecting Johnson's claim that his plea was involuntary because his allocution negated a key element of the crime -- that the victim is intoxicated "without [her] consent." The court said, "[T]he allocution's failure to address how the victim became intoxicated does not warrant vacatur of the plea. Indeed, 'all of the circumstances surrounding the plea' demonstrated that defendant 'understood the nature of the charges against him'.... Defendant's extensive experience with the criminal justice system, the favorable terms of the plea bargain, the allocution itself and the protracted history of this case -- including defendant's prior plea -- all indicate that defendant entered his plea voluntarily, knowingly and intelligently...."

The dissenters said the allocution negated an essential element of the crime, the victim's lack of consent to intoxication, because the "allocution and all of the pre-plea evidence ... indicates that the victim became intoxicated when she voluntarily consumed alcohol before defendant encountered her...." Supreme Court "indicated its own misunderstanding of the statutory definition of 'mentally incapacitated' when it asked defendant whether he had encountered the victim in an intoxicated state, and ... whether he knew that 'she was too drunk to really make a decision about whether she did or did not want to have sex'.... It is difficult to understand the majority's position that defendant's plea was knowing and voluntary when the court itself did not understand the nature of the charge to which defendant was pleading." They said the court's failure to explain "the critical element of 'mentally incapacitated'" requires vacatur of the plea, "especially under these circumstances where the technical, statutory definition of the crime does not conform with its common-sense meaning."

For appellant Johnson: Lauren Stephens-Davidowitz, Manhattan (212) 402-4100
For respondent: Manhattan Assistant District Attorney Andrew E. Seewald (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 Thursday, May 1, 2014 (arguments begin at noon)

No. 105 People v Roman Baret

Roman Baret argues that his 1996 drug conviction should be vacated under Padilla v Kentucky (559 US 356 [2010]), in which the U. S. Supreme Court held that the right to effective assistance of counsel includes the right to be advised of the deportation consequences of a guilty plea. The primary question is whether Padilla is retroactive under New York law.

Baret, an immigrant from the Dominican Republic, pled guilty in 1996 to criminal sale of a controlled substance in the third degree in Bronx Supreme Court, in exchange for a sentence of two to six years in prison. He absconded before sentencing, but the promised sentence was imposed when he was apprehended in 2004. His direct appeals were exhausted in 2008. In 2010, after the Supreme Court issued Padilla, Baret filed this CPL 440.10 motion to vacate his conviction, claiming he received ineffective assistance of counsel because his attorney did not inform him prior to his plea that it would subject him to deportation. He has since been ordered deported. Supreme Court denied the motion, saying it would not apply Padilla retroactively.

The Appellate Division, First Department reversed in 2012, holding that Padilla is retroactive. "We conclude that Padilla did not establish a 'new' rule under Teague; rather, it followed from the clearly established principles of the guarantee of effective assistance of counsel under Strickland, and 'merely clarified the law as it applied to the particular facts'...," the court said. "Rather than overrule a clear past precedent, Padilla held that Strickland applies to advice concerning deportation, whether it be incorrect advice or no advice at all...." The court remitted the matter for a hearing to determine "what advice, if any, counsel gave defendant regarding the immigration consequences of his plea," and whether Baret was harmed by it.

After the First Department's decision, the U.S. Supreme Court held in Chaidez v United States (133 S Ct 1103 [2013]) that Padilla is not retroactive under federal law.

The prosecution argues, "Under Chaidez v United States, the Appellate Division's decision applying Padilla v Kentucky to defendant's 1996 conviction is wrong as a matter of law, and must therefore be reversed." Baret asks this Court to rule that Padilla is retroactive in New York.

For appellant: Bronx Assistant District Attorney Clara H. Salzberg (718) 838-7101
For respondent Baret: Labe M. Richman, Manhattan (212) 227-1914