

# State of New York Court of Appeals

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## NEW YORK STATE COURT OF APPEALS

### Background Summaries and Attorney Contacts

**March 19 & 20, 2019**

**March 26 & 27, 2019**

# State of New York Court of Appeals

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To be argued Tuesday, March 19, 2019

**No. 21 Matter of National Energy Marketers Assn. v NYS Public Service Commission**

**No. 22 Matter of Retail Energy Supply Association v Public Service Commission of NYS**

The State Legislature, seeking to increase competition in the natural gas industry and reduce costs for consumers in the 1980s, authorized the Public Service Commission (PSC) to require regulated gas utilities to deliver gas to customers for competing energy service companies (ESCOs) that did not have their own distribution networks. In 1996, the PSC adopted a similar scheme for the electric power industry, requiring utilities to deliver electric power for competing ESCOs over the utilities' transmission systems. In 2016, after finding that ESCOs were generally charging their customers higher rates than the regulated utilities were charging, the PSC issued a "Reset Order" governing gas and electric service for residential and small commercial customers, which required ESCOs to "guarantee that the customer will pay no more than were the customer a full-service customer of a utility" unless the contract was for electric power "derived from at least 30% renewable sources." More than a half-dozen ESCOs and two trade associations brought these suits to challenge the Reset Order, contending the PSC lacked authority to impose the price controls and acted in violation of the State Administrative Procedure Act.

Supreme Court held that the PSC had authority to impose the rate restrictions on ESCOs in its Reset Order. However, it vacated the challenged portions of the order on the ground the PSC did not give the ESCOs adequate notice and an opportunity to be heard, as required by the Administrative Procedure Act, and it remitted the matters for further proceedings in compliance with the act.

The Appellate Division, Third Department affirmed, saying "the PSC's broad statutory jurisdiction and authority over the sale of gas and electricity authorized it to impose the limitations set forth in the Reset Order. Pursuant to Public Service Law § 5, '[t]he jurisdiction, supervision, powers and duties of the [PSC] shall extend ... [t]o the manufacture, conveying, transportation, *sale* or distribution of gas ... and electricity ... to gas plants and to electric plants and to the persons or corporations owning, leasing or operating the same....' The emphasized language speaks to general authority over the sale of gas and electricity, followed by the specific extension of the PSC's jurisdiction over gas and electric plants.... In fact, it is the PSC's broad jurisdiction that enabled it to allow ESCOs access to utility systems in the first place."

The plaintiff ESCOs argue that, whatever the PSC's general jurisdiction and authority, its specific rate-making authority is provided by Public Service Law article 4 and is limited to utilities that produce gas or electricity. Article 4 authorizes the PSC to set and regulate rates charged by "gas corporations" and electric corporations," which are defined as corporations "owning, operating or managing any gas plant" or "any electric plant." Since ESCOs do not own or operate gas or electric plants, they say article 4 authorizes the PSC to regulate only the rates charged by public utilities, not the rates of ESCOs acting simply as retailers.

For appellants National Energy et al: Jason C. Cyrulnik, Armonk (914) 749-8200

For appellants Retail Energy et al: David G. Burch, Jr., Syracuse (315) 425-2700

For respondent PSC: D. Scott Bassinson, Albany (518) 474-5597

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To be argued Tuesday, March 19, 2019

## No. 23 People v Boris Brown

In October 2010, a gunman fired randomly into a crowd in the courtyard of the AK Houses in Manhattan, killing 17-year-old Cheyenne Baez and wounding another bystander. The police quickly focused on three suspects -- Boris Brown, Devon Coughman and Ahmed Salaam -- who had been at the scene together. One eyewitness identified Brown as the shooter. Brown and Coughman were arrested for the murder. Salaam was questioned but was not charged.

Salaam hired a lawyer, Jeffrey Chabrowe, to defend Brown in the murder case and paid his fees. When Salaam was later arrested in an unrelated fraud case, Salaam hired Chabrowe to defend him against criminal charges. The trial court in Brown's case, although not aware of Salaam's payments to Chabrowe for Brown's defense, appointed independent counsel to consult with Brown about the potential conflict of interest that could arise if Salaam were called as a witness in the murder case by the prosecutor or by Coughman, Brown's co-defendant. The court told Brown, "There would be a problem that your lawyer would have to cross-examine someone else that he represents on an unrelated matter. You understand that?" Brown said, "Yes." The court asked, "You're willing to waive any potential conflict?" Brown said, "Yes." The court said, "To be even more specific, if you get convicted of anything, you then couldn't say, 'Well, my lawyer didn't properly represent me because he had loyalty to his other client, Mr. [Salaam], also known as Ock.' Do you understand that?" Brown said, "Yes." He proceeded to trial with Chabrowe as his counsel. Salaam was not called as a witness. Brown was convicted of second-degree murder and weapon possession, and was sentenced to 32 years to life in prison. He filed a CPL 440.10 motion to set aside his conviction, arguing he had been deprived of his right to conflict-free representation. Supreme Court denied the motion without a hearing.

The Appellate Division, First Department affirmed, saying, "We find that the record supports the conclusion that defendant validly waived his counsel's potential conflict of interest.... Defendant, who was represented by independent counsel for purposes of the conflict waiver, indicated his 'awareness of the potential risks involved in that course' and that he had 'knowingly chosen it'..., even in the absence of a more detailed explanation of how the potential conflict might affect the defense strategy.... We have considered and rejected defendant's argument that the conflict was not waivable."

Brown argues, "Here, the conflict was so extreme that it was unwaivable, and, in any event, it presented an unwaived actual conflict as well as potential conflict that operated upon the defense. Chabrowe was being paid by and concurrently representing Salaam, a suspect in the killing with which Mr. Brown was charged. Mr. Brown's strongest defense would have been to point the finger at Salaam, but Chabrowe was unable to investigate that defense or to present evidence suggesting that Salaam was the guilty party. Chabrowe's professional obligations towards Salaam precluded him from providing the zealous representation to which Mr. Brown was entitled." Brown says his conviction should be reversed or the matter remanded for a hearing to determine the facts.

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

For respondent: Manhattan Assistant District Attorney Sylvia Wertheimer (212) 335-9000

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To be argued Wednesday, March 20, 2019

**No. 25 Williams v Beemiller, Inc.**

*(papers sealed)*

In August 2003, as he played basketball outside his home in Buffalo, 16-year-old Daniel Williams was shot by Cornell Caldwell, who apparently misidentified him as a member of a rival gang. The pistol Caldwell used was manufactured by an Ohio company, Beemiller, Inc., which sold it to MKS Supply, Inc., an Ohio wholesaler of firearms. MKS sold the gun to Charles Brown, who had a federal license to sell guns at retail in Ohio. In 2000, Brown sold more than 180 guns, including the one used to shoot Williams, to James Nigel Bostic and his associates at gun shows in Ohio. Williams alleges that Bostic regularly used "straw purchasers" to buy handguns in Ohio for illegal resale in Buffalo. Bostic later pled guilty to federal firearms trafficking crimes. Williams and his father brought this negligence action against Beemiller, MKS and Brown, among others, seeking damages for his injuries. Brown moved to dismiss the claims against him on the ground that he was not subject to personal jurisdiction in New York.

Supreme Court ultimately denied Brown's motion to dismiss, finding Williams met the requirements of CPLR 302(a)(3) for exercising long-arm jurisdiction over Brown. It said Brown "did derive substantial revenue from guns used in [New York] and ... he did derive substantial revenue from interstate commerce. Plaintiff has shown that Brown had some knowledge that guns would end up in New York. The fact that significant number of guns sold by Brown to ... Bostic have been found to be used in criminal activity here in Buffalo and the fact that the statement to Brown that Bostic ... planned to open a store in Ohio and one in Buffalo, all of that establishes that statute applies."

The Appellate Division, Fourth Department reversed and dismissed the claims against Brown. It agreed with Supreme Court that the requirements of the long-arm statute were met, but held that applying CPLR 302(a)(3) to Brown would violate federal due process because he "lacks the minimum contacts with New York that are a prerequisite to the exercise of jurisdiction over him." Brown established that his company "was an Ohio retailer permitted to sell guns within Ohio only and, during the relevant period from 1996 to 2005, it did not maintain a website, had no business telephone listing, did not advertise in New York, and made its retail sales and transfers to customers present in Ohio," it said, citing World-Wide Volkswagen Corp. v Woodson (444 US 286). The plaintiffs' evidence did "not tend to establish that Brown 'purposefully' reach[ed] out beyond" Ohio and into New York.... Instead, Bostic and his associates came to Ohio gun shows where they purchased guns from Brown and then unilaterally elected to transport them to Buffalo for resale on the illegal market...." It also rejected Williams' alternative argument that New York had jurisdiction on the theory that MKS was Brown's agent.

Williams argues that New York's exercise of personal jurisdiction would not violate due process because "Brown purposefully availed himself of the New York market" when he "chose to sell 182 handguns - over one-third of his sales during the year ... -- knowing that those guns were being purchased to be re-sold and used in New York and Ohio.... Brown could have refused to make those sales when the buyer told him that he planned to re-sell guns in New York.... But Brown chose to supply the New York market, profit from such sales, and violate federal law. By doing so, Brown supplied a gun trafficker and, ultimately, a criminal who shot New Yorker Daniel Williams in New York."

For appellant Williams: Jonathan E. Lowy, Washington, DC (202) 370-8104

For respondent Brown: Scott L. Braum, Dayton, Ohio (937) 396-0089

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To be argued Wednesday, March 20, 2019

## No. 26 159 MP Corp. v Redbridge Bedford LLC

In 2010, 159 MP Corp. and 240 Bedford Ave Realty Holding Corp.(tenants) entered into two leases for space in a Brooklyn building for a supermarket and related storage. The leases were to run for 20 years with a 10-year renewal option. Paragraph 67(h) in the rider of each lease states that the tenant "waives its right to bring a declaratory judgment action with respect to any provision of this Lease or with respect to any notice sent pursuant to the provisions of this Lease. Any breach of this paragraph shall constitute a breach of substantial obligations of the tenancy, and shall be grounds for the immediate termination of this Lease. It is further agreed that in the event injunctive relief is sought by Tenant and such relief shall be denied, the Owner shall be entitled to recover the costs of opposing such an application, or action, including its attorney's fees actually incurred, it is the intention of the parties hereto that their disputes be adjudicated via summary proceedings."

Redbridge Bedford LLC bought the building in 2012, subject to the leases, and in 2014 it issued the tenants notices to cure alleged breaches of the leases, giving them 15 days to cure before their tenancies would be terminated. The tenants brought this action against Redbridge for declaratory and injunctive relief seeking, among other things, a declaration that there were no lease violations. One day before the cure period expired, the tenants moved for a Yellowstone injunction tolling the cure period and enjoining Redbridge from terminating their leases. Redbridge raised an affirmative defense that the plaintiffs had contractually waived their right to seek injunctive relief and moved to dismiss the suit based on the waiver in paragraph 67(H).

Supreme Court granted Redbridge's motion to dismiss the suit, saying, "[A] Yellowstone injunction is intended to stay the cure period, along with any proceeding to terminate the lease and evict the tenant, pending the court's determination of a declaratory judgment action relating to the alleged breach(es) of the lease. Because plaintiffs may not maintain a declaratory judgment action in this court under the terms of the waiver clause, there is no underlying basis upon which this court may grant a Yellowstone injunction."

The Appellate Division, Second Department affirmed on a 3-1 vote, rejecting the plaintiffs' claim that the waiver violates public policy. It said, "The right to a declaratory judgment, inclusive of the Yellowstone relief sought here, is not so vaulted as to be incapable of self-alienation.... To hold that the waiver of declaratory judgment remedies in contractual leases between sophisticated parties is unenforceable as a matter of public policy does violence to the notion that the parties are free to negotiate and fashion their contracts with terms to which they freely and voluntarily bind themselves.... Declaratory and Yellowstone remedies are rights private to the plaintiffs that they could freely, voluntarily, and knowingly waive."

The dissenter argued that "the right to bring a declaratory judgment action is not personal to an individual, but, rather, such action serves important societal functions.... The declaratory judgment action serves an important public policy function in resolving controversies before they escalate into a breakdown of the contractual relationship.... [B]ecause enforcement of the contractual waiver at issue in this action would deprive the plaintiffs of any affirmative and meaningful means of accessing the courts, it violates public policy."

For appellants 159 MP & 240 Bedford: Meryl L. Wenig, Brooklyn (718) 797-5700  
For respondent Redbridge Bedford: Jonathan D. Lupkin, Manhattan (646) 367-2771

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To be argued Wednesday, March 20, 2019

## No. 27 People v Nicholas Hill

A team of police officers were patrolling for trespassers at the Polo Grounds public housing complex in upper Manhattan in May 2011 when they spotted Nicholas Hill, who was behaving in what they considered to be a suspicious manner. Two officers approached him and asked if he knew anyone in the building, and he replied that he was visiting his girlfriend at her apartment. They asked him for identification, which Hill provided, and he offered to go with them to the apartment he had visited. Instead, the officers stayed outside with Hill and gave his identification to a third officer, who they sent inside to go to the apartment and determine whether the occupant knew him. The occupant told the officer that she did not know anyone by Hill's name nor recognize him from his identification. The third officer then rejoined the others and reported that Hill's story was false. Hill was arrested for criminal trespass and, when he was searched at the precinct, the police recovered 42 bags of crack cocaine.

Supreme Court denied Hill's motion to suppress the drugs, saying the officers had an objective, credible reason to ask why he was in the housing complex, a level one encounter under People v De Bour (40 NY2d 210). When the officers found his explanation to be false, the court said, they had probable cause to arrest him, which led to a lawful recovery of the drugs. Hill pled guilty to third-degree possession of cocaine and was sentenced to two years in prison.

The Appellate Division, First Department affirmed in a 4-1 decision, rejecting Hill's argument that the police unlawfully seized him when they held onto his identification instead of returning it to him. "Defendant was not seized when he provided his identification to the police so they could investigate his explanation for visiting the building. The police did not engage in any other coercive or intimidating conduct that would elevate the encounter to a seizure.... Defendant's identification was only used for a short time to investigate and defendant provided the identification voluntarily. Moreover, he was not in handcuffs or threatened during this time, and the officers did not draw their weapons." It said Hill "knew the officers were going to verify his explanation for being in the building, and defendant raised no objection to the officers retaining his identification for this limited purpose."

The dissenter said, "Identification is a necessity for navigating daily life in contemporary society. Accordingly, I would find that the police officers' retention of defendant's identification while they undertook an investigation was a significant limitation on his freedom, and thus elevated their encounter with defendant to a seizure. Since the People did not argue that the officers' actions were justified by a reasonable suspicion of criminal conduct, I would grant defendant's motion to suppress the crack cocaine" and reverse his conviction. She said the encounter "began at level one of the De Bour framework," but "shifted" when the officer took his identification into the building. "This action significantly interrupted defendant's liberty of movement in that it prevented defendant from going about his business and deprived him of the right to be let alone. Accordingly, it raised the encounter from level one of the De Bour framework to level three and required the support of reasonable suspicion."

For appellant Hill: Susan Epstein, Manhattan (212) 577-3620

For respondent: Manhattan Assistant District Attorney John T. Hughes (212) 335-9000

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To be argued Tuesday, March 26, 2019

## No. 29 Fasolas v Bobcat of New York, Inc.

Elias Fasolas was killed by a tree in March 2007 while operating a Bobcat S175 skid-steer loader with a front bucket attachment, which he had rented to clear trees and debris behind his family's house in Suffolk County. The tree that killed him pushed past the front bucket and into the open operator's cab, crushing him against the back and ceiling of the cab. Fasolas had rented the loader from Taylor Rental Center in Port Jefferson. His estate brought this wrongful death action against Taylor as well as the manufacturer of the loader, Bobcat Company, and its local distributor, Bobcat of New York (Bobcat NY), which sold the loader to Taylor. Among other things, the plaintiff argued that the loader was defectively designed -- making the Bobcat defendants strictly liable -- because it was sold without installation of a "special applications kit," an optional safety package that includes a thick front door designed to prevent objects from intruding into the cab. The estate contended that loaders sold for rental to the public should be equipped with the special applications kit as a standard safety feature. The Bobcat defendants moved to dismiss the claims against them based on Scarangella v Thomas Built Buses (93 NY2d 655), which created an exception to the general rule of strict liability for design defects when "the buyer is thoroughly knowledgeable regarding the product and its use and is actually aware that the safety feature is available;" there are circumstances "in which the product is not unreasonably dangerous without the optional equipment;" and "the buyer is in a position, given the range of uses of the product, to balance the benefits and the risks of not having the safety device in the specifically contemplated circumstances of the buyer's use of the product." When those three elements are present, Scarangella said, "the buyer, not the manufacturer, is in the superior position to make the risk-utility assessment, and a well-considered decision by the buyer to dispense with the optional safety equipment will excuse the manufacturer from liability."

Supreme Court denied the Bobcat motions to dismiss and refused to instruct the jury on the Scarangella exception. The jury found the loader was defectively designed for rental to the public without a front door. It awarded \$1 million for pain and suffering, apportioning 25% of fault to Bobcat, 25% to Bobcat LI, and 50% to Taylor.

The Appellate Division, Second Department affirmed, ruling the Scarangella exception does not apply where "the product is sold to a rental company." It said, "When the loader was sold to Taylor, the Bobcat defendants knew that Taylor would rent it out to consumers for their personal use. In other words, the Bobcat defendants knew that Taylor would be renting the loader to persons over whom Taylor had no control, and who might lack any experience operating heavy equipment." In that situation, "it would be inappropriate to apply an exception to liability that is premised on the buyer being in a superior position to make the risk-utility assessment."

The Bobcat defendants argue the lower courts "abandoned precedent when they carved out an exception to Scarangella ... for manufacturers who sell to purchasers that then rent the products. No court has ever parsed Scarangella and found it inapplicable merely because the purchaser was a rental company." They say no legal authority supports a "distinction between so-called general and rental markets." They argue that they satisfied all three elements of the exception and should be excused from liability. If not, they say the Court should remand the matter "for a new trial with specific instructions that the Scarangella charge be given to the jury."

For appellant Bobcat: Brendan T. Fitzpatrick, Garden City (516) 281-9800  
For respondent Fasolas: Andrew H. Pillersdorf, Manhattan (212) 406-4848  
For respondent Taylor: Scott C. Watson, Woodbury (516) 496-1919

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To be argued Tuesday, March 26, 2019

## No. 30 People v Agape A. Towns

Two armed men wearing masks robbed employees of a Buffalo Wild Wings restaurant in the Town of Henriette shortly after closing time in September 2011. The three victims were unable to identify the robbers. Prior to trial in Monroe County Court, the prosecution sought make a plea deal with one of the gunmen, Tashmere Lamar, to obtain his testimony against his co-defendant and half-brother, Agape Towns. When the negotiations stalled, the trial judge directly negotiated a cooperation agreement with Lamar, promising him a sentence of at least 9 years and no more than 15 years in exchange for his guilty plea. As for the actual sentence, the judge said, "That would be up to my sole discretion. My discretion is going to be entirely based upon your level of cooperation in the prosecution of Mr. Towns.... I can tell you that if you testify candidly and honestly and you cooperate with the District Attorney's Office in telling the truth, I have every intention of giving you the lowest end of that term, which is nine years. If you don't cooperate or ... I determine that you are not being truthful, it would be greater than nine years." After Lamar testified against Towns and the jury was made aware that the judge had a sentencing agreement with him, the court instructed jurors, "That agreement in no way suggests to you that I have an opinion as to the truthfulness or lack of truthfulness of Mr. Lamar's testimony, nor should the agreement suggest to you that I have any opinion as to the lack of guilt or guilt of Mr. Towns.... It is for you alone as jurors to determine the credibility of Mr. Lamar's testimony...." Towns was convicted of six counts of first-degree robbery and sentenced to 17 years in prison. Lamar was ultimately sentenced to seven years.

The Appellate Division, Fourth Department affirmed. "We criticize, in the strongest possible terms, the conduct of the court in this case in personally negotiating and entering into a quid pro quo cooperation agreement" with Lamar, it said. "We nevertheless cannot conclude on this record that defendant was deprived of a fair trial by [Lamar's] testimony, nor can we conclude that the court in essence vouched for the truth of that testimony. Because the court's conduct in this case occurred wholly outside the presence of the jury, we conclude that the court did not assume the appearance and role of a prosecutor in the course of defendant's trial."

Towns argues the trial court's "role as an actual participant in the prosecution," in entering into a sentencing agreement to obtain Lamar's testimony against Towns, violated his right to due process. He says the Appellate Division's reasoning that he "was not deprived of a fair trial because the trial court's conduct occurred outside the presence of the jury ... completely misidentifies the constitutional harm inflicted by the judge's conduct. A criminal defendant is denied due process under any circumstance and at any stage of the proceeding in which the judge actively participates in the prosecution, because at the heart of the due process guarantee is the right to a neutral and detached magistrate.... By initiating and entering into this agreement, the trial judge shed his cloak of neutrality and stepped directly into the role of prosecutor...."

For appellant Towns: Dianne C. Russell, Rochester (585) 330-6106

For respondent: Monroe County Assistant District Attorney Joseph Plukas (585) 753-4618



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To be argued Tuesday, March 26, 2019

## No. 33 People v Fidel Vega

When this case arose in June 2013, Fidel Vega was living at his mother's Manhattan apartment with his 73-year-old mother, his 29-year-old daughter, and his daughter's 4-year-old son. During an altercation, Vega chased after his daughter with a belt. She ran to her bedroom, where her son was sleeping, and locked the door. Vega broke through the door and struck his daughter repeatedly with the belt. She reported the incident to the police, who arrested Vega a month later on charges of burglary and assault.

Vega raised a justification defense at his trial, testifying that he had acted to protect his mother from being harmed by his daughter. His mother also testified on his behalf. Supreme Court instructed the jury on the justification standards for use of ordinary physical force and use of deadly physical force. It then directed the jurors to consider only the stricter standard for justifiable use of deadly physical force if they determined that the belt constituted a "dangerous instrument" under Penal Law § 10.00(13), which says the term "means any instrument, article or substance ... which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or other serious physical injury." After finding the belt Vega used was a dangerous instrument, the jury convicted him of first-degree burglary, second-degree assault and child endangerment. He was sentenced to 11 years in prison.

The Appellate Division, First Department affirmed, saying evidence "established that defendant's belt was a dangerous instrument under the circumstances in which it was used, since defendant repeatedly beat his daughter using the metal belt buckle, causing facial swelling, bruising on her arm and leg, a cut to her knee, and an imprint that remained visible for at least one month.... In its justification charge, the court properly instructed the jury to apply the deadly force standard if it found that defendant used a dangerous instrument, because, given the relationship between the relevant statutory definitions (Penal Law § 10.00[11], [13]), the latter finding would necessarily imply that defendant used deadly force...." Penal Law § 10.00(11) defines "deadly physical force" as "physical force which, under the circumstances in which it is used, is readily capable of causing death or other serious physical injury."

Vega argues, "The court's conflation of the elements of dangerous instrument and deadly force resulted in a justification charge that was erroneous as a matter of law (U.S. Const. Amend. XIV; N.Y. Const. Art. I § 6).... Penal Laws 10.00(11) and 10.00(13) are not analogous.... The court's justification instruction improperly invaded the jury's fact-finding province.... The court's bifurcated justification defense tethered the charge to the elements of the crime in contravention of [People v McManus (67 NY2d 541)]." He also contends that his burglary convictions "were not supported by legally sufficient evidence where the 'unlawful entry' was into his daughter's bedroom in the family home that he shared with her and his mother."

For appellant Vega: Arielle I. Reid, Manhattan (212) 577-2523 ext. 549

For respondent: Manhattan Assistant District Attorney David P. Stromes (212) 335-9000

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To be argued Wednesday, March 27, 2019

**No. 31 People v Hassan Rkein**

*(papers sealed)*

Hassan Rkein was in a crowded Greenwich Village bar in May 2011, when a woman standing next to him told him to stop touching her. Rkein responded in a sarcastic tone and Emran Riaz, a friend of the woman, shoved Rkein in the face, pushing him back toward the bar. Rkein threw a pint glass at Riaz, hitting him in the head, and Riaz then threw Rkein to the floor, got on top of him and pinned his arms. While pinned, Rkein bit Riaz on the chest. Rkein was charged with second-degree assault, on the theory that the beer glass he threw was a dangerous instrument, and with third-degree assault for the bite.

Supreme Court refused to instruct the jury on justification regarding the second-degree assault charge, saying, "New York law is clear that the person may not respond to the use of ordinary force, which Mr. Riaz's push arguably was, with deadly force." The court explained that "deadly force" is defined by Penal Law § 10.00(11) as "force which, under the circumstances in which it is used, is readily capable of causing death or other serious physical injury." It said "another relevant and overlapping statutory definition is that of dangerous instrument" under Penal Law § 10.00(13). "And that term is defined, quote, as any instrument or article which under the circumstances in which it is used is readily capable of causing death or other serious physical injury. In other words, the use of a dangerous instrument constitutes a deadly force. And numerous cases in New York law have held that striking a person in the head with a glass constitutes use of a dangerous instrument.... It is likewise clear under New York law that a defendant is not entitled to a justification charge where the uncontroverted evidence is that he used a dangerous instrument, here the glass, against an unarmed person." The court charged the jury on justification for the third-degree assault count, but not the second-degree assault count. Rkein was convicted of both counts and sentenced to five years in prison.

The Appellate Division, First Department affirmed. Rkein was not entitled to "a justification charge regarding the second-degree assault count, because there was no reasonable view of the evidence, viewed in the light most favorable to defendant, to support either the objective or subjective aspects ... of that defense," it said. "Under the facts presented, there was no reasonable view that defendant used anything less than deadly physical force as defined in Penal Law § 10.00(11) when he struck the victim in the head with a pint beer glass, or that defendant was justified in using such force against the unarmed victim, who had merely pushed defendant...."

Rkein argues that "Riaz struck first, hitting ... Rkein in the face and starting a bar fight. The jury should have been allowed to consider whether ... Rkein's use of a pint glass during the fight was justified. But the court erroneously applied a *per se* rule that an allegation of the use of a 'dangerous instrument' -- here, the pint glass -- against an unarmed complainant prohibits an ordinary force justification charge. Mr. Rkein was entitled to this justification charge for the second-degree assault because there was a reasonable view of the evidence, viewed in the light most favorable to Mr. Rkein, that his use of a pint glass was an immediate and proportionate reaction to being shoved in the face by Mr. Riaz in a bar fight."

For appellant Rkein: Mandy E. Jaramillo, Manhattan (212) 402-4100

For respondent: Manhattan Assistant District Attorney Jared Wolkowitz (212) 335-9000

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To be argued Wednesday, March 27, 2019

## No. 32 People v Darryl Brown

Darryl Brown was charged with murder for fatally shooting Vonde Cabbagestalk in March 2014 during a confrontation outside the Bronx apartment that Brown shared with his daughter and grandchild. Cabbagestalk was the boyfriend of Brown's daughter. Brown, a New York City correction officer, was armed with a licensed semiautomatic handgun.

Three eyewitnesses -- two residents of the building and a postal carrier -- testified at Brown's trial. Both residents testified that they saw the men were engaged in a heated argument, but could not make out what was being said, and the men walked down the hall and out of their sight before they heard the gunshot. They said they saw no weapons during the encounter, and one of them said the men were six or seven feet apart when they went out of sight. The postman, Raymond Wolf, testified that as the dispute grew louder Brown said, "[S]tay away from my daughter, don't come around here;" and Cabbagestalk replied, "[Y]ou can't tell me where to be." Wolf said Cabbagestalk was "getting in the older guy's face a little bit" and Brown stepped back. After Cabbagestalk began swinging his fists at Brown's face, Wolf noticed that Brown was holding a gun by his waist, but was not pointing it at Cabbagestalk. As Brown moved backwards, Wolf said, Cabbagestalk continued to advance, swinging his fists and "grabbing" for the gun, saying, "[Y]ou going to pull a gun out, you better use it." Wolf said the men were about two feet apart when he heard the shot and saw Cabbagestalk fall.

Prior to summations, Brown asked the court to instruct the jury on the defense of justification. The court refused, saying, "I see no reasonable view of the evidence that permits legal force being justified...." Brown was acquitted of murder, but convicted of first-degree manslaughter and sentenced to 18 years in prison.

The Appellate Division, First Department reversed and ordered a new trial in a 3-2 decision, ruling Brown was entitled to a justification charge. "The trial evidence, when viewed in the light most favorable to defendant, supports a conclusion that defendant feared for his life, and reasonably believed that deadly physical force was necessary to defend himself against Cabbagestalk's imminent use of deadly physical force. Wolf, the postal carrier, who was the only eyewitness to the actual shooting, described an escalating series of aggressive actions and verbal threats made by Cabbagestalk immediately before defendant fired his weapon.... Based on Wolf's testimony, a jury could conclude that defendant reasonably believed that Cabbagestalk, who was younger and taller than defendant, and just two feet away, would gain control of defendant's gun;" and that "Cabbagestalk's statement ... -- '[Y]ou going to pull a gun out, you better use it' -- constituted a threat that if defendant did not use the gun, Cabbagestalk would take the gun and use it to shoot defendant," the majority said.

The dissenters said the record "is devoid of any evidence supporting the view that at the time defendant introduced deadly physical force into the altercation, by drawing his firearm, he actually believed he was in danger of being subjected to deadly physical force by Cabbagestalk, and that his use of deadly physical force was necessary to avert Cabbagestalk's imminent use of such force." Cabbagestalk's conduct "could be seen, at most, as an effort to intentionally place defendant in fear of imminent harmful or offensive contact, but by the use of ordinary physical force, not deadly physical force.... [A]n objectively reasonable person in defendant's circumstances would harbor no belief that the use of deadly force was necessary...."

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