

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, April 25, 2013

No. 102 People v Jay J. Barboni

(papers sealed)

Jay Barboni was charged with killing 15-month-old Nicholas Gage Taylor, the son of his girlfriend, in the apartment they shared in the City of Fulton, Oswego County, in August 2008. Barboni had been alone with the child for about three and a half hours when he called the mother at work and told her to come home because Nicholas was not breathing. The mother asked a co-worker to call 911 and rushed home, where she found Barboni in the kitchen and Nicholas upstairs in his crib. Emergency personnel were unable to revive the child.

At trial, medical experts testified that Nicholas suffered four skull fractures caused by blunt force trauma and hemorrhaging in his eyes consistent with shaken baby syndrome, among other injuries, and that he lived for about two hours after he was injured. Barboni was convicted of second-degree murder (under circumstances evincing a depraved indifference to human life) and first-degree manslaughter. He was sentenced to 25 years to life on the murder count.

The Appellate Division, Fourth Department affirmed, rejecting Barboni's claim that there was insufficient evidence that he acted with depraved indifference. The testimony of prosecution experts "demonstrates that the child sustained at least five traumatic blows to the head, which led to brain swelling that caused his death, and that he sustained other injuries that would have resulted in legal blindness had he survived," injuries that occurred while "he was in the sole care of defendant," the court said. "The record further establishes that the child's suffering yielded an apathetic response from defendant," who "did not seek medical attention" for the child. The court also rejected Barboni's claim that he was denied effective assistance of counsel during jury selection when his attorney failed to challenge a juror who said he was unsure that he would apply the same standard to the testimony of police officers and civilians. It said Barboni failed to show this was not a "strategic" decision.

Barboni argues that the evidence showed he "did care about the outcome of Nicholas' condition." The child vomited in the apartment, he says, and his "efforts to clean Nicholas, change his diaper, feed him and put him to bed, showed an attempt to remedy what had occurred. The fact that Mr. Barboni went upstairs later to check on him demonstrated his concern as well. The fact that he telephoned the mother showed that he was seeking help for Nicholas." He says there was no proof that Nicholas was subjected to prolonged abuse or that Barboni "recognized the extent of the injuries at the time he put Nicholas to bed. His failure to obtain immediate medical help should not be viewed as sufficient to support a finding of depravedly indifferent." He also argues he was denied effective assistance of counsel when his attorney failed to challenge a juror who could not promise to be fair.

For appellant Barboni: Mary P. Davison, Canandaigua (585) 905-0164

For respondent: Oswego County District Attorney Gregory S. Oakes (315) 349-3200

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No. 103 People v James E. Guilford

James E. Guilford was convicted of murdering his former girlfriend Sharon Nugent, who was last seen leaving a party in Syracuse on Feb. 6, 2007. Guilford filed a missing person report two days later and moved with their three children to Georgia, where he was questioned by Syracuse detectives investigating the disappearance. Guilford returned to Syracuse on March 20, 2007, and was questioned by teams of detectives for about 49 hours, apparently without sleep. He did not directly implicate himself, but near the end of the interrogation he offered to make a deal to tell them where Nugent's body was if he was given an attorney. Counsel was appointed, and the prosecutor told him Guilford's sentence would be capped at 18 years to life if he revealed the location of the body. Guilford met with his attorney, was booked for murder, and placed in a holding cell for about eight hours. He was arraigned the next morning, March 23, and then, accompanied by his attorney, he spoke with the detectives. He told them, "I killed her" and left her body in a dumpster, which he later pointed out to them, but Nugent's body was not recovered.

County Court suppressed as involuntary the statements Guilford made during the 49 hour interrogation, but not those he made after the break and in the presence of counsel on March 23. He was convicted of second-degree murder and sentenced to 25 years to life in prison.

The Appellate Division, Fourth Department affirmed in a 3-2 decision. "[A]ny taint from the prior interrogation was dissipated by the break in the interrogation, by the assignment of an attorney and opportunities to consult with that attorney before the March 23, 2007 statements were made, by defendant's removal from the interrogation room and his opportunity to sleep the remainder of the night before being arraigned..., " said two justices in the majority. "In particular, we note that, once an attorney was appointed for defendant and defendant had the opportunity to consult with the attorney before again speaking with the detectives, in the presence of his attorney, it cannot be said that the statements were involuntary or the 'product of compulsion'" under *Miranda*. The third concurring justice wrote separately to "clarify" that he viewed the March 23 statements as voluntary "not only because they were sufficiently attenuated from statements determined to be involuntary..., but also, independently of the attenuation, because they were made following consultation with his counsel and in the presence of his counsel."

The dissenters said, "[T]he relatively brief 'break' in interrogation, following a continuous 49½-hour interrogation, was not sufficient to return defendant to the status of one who is not under the influence of questioning. We consider not only the extraordinary and draconian length of the interrogation, but we also consider the fact that defendant may have believed himself 'so committed by a prior statement that he [felt] bound to make another'.... In our view, the police exploited defendant's lengthy detention in such a way that it can be said to have 'produced' his later inculpatory statements...." They said Guilford's confession was not made voluntary by the fact that his attorney was present. "First, although defendant was represented by counsel during his post-arraignment statements, defendant was given comparatively little time to speak to defense counsel and in fact testified that he was concerned that the attorney was a disguised police officer, a suspicion that, given the rotating teams of police interrogators during the 49½-hour period, appears somewhat reasonable.... In addition, the presence of counsel did nothing to improve defendant's cognitive functioning, which necessarily was adversely affected by the prolonged lack of food and sleep."

For appellant Guilford: Piotr Banasiak, Syracuse (315) 422-8191 ext. 0137

For respondent: Onondaga County Assistant District Attorney James P. Maxwell (315) 435-2470

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No. 104 Matter of Chenango Forks Central School District v New York State Public Employment Relations Board

When the Chenango Forks Central School District notified employees in June 2003 that it would end its practice of reimbursing retirees' Medicare Part B premiums, the Chenango Forks Teachers Association filed a grievance under its Collective Bargaining Agreement (CBA). The union also filed an improper practice charge with the Public Employment Relations Board (PERB). Although the CBA did not explicitly require the District to make the reimbursements, it had done so since at least 1980, when reimbursement of Part B premiums was required by its health insurer. In 1990, the District changed its health coverage to Blue Cross/Blue Shield, which did not require reimbursement, but the District continued to make the payments.

In 2004, the arbitrator of the grievance found the District did not violate the CBA. The arbitrator said the District had no contractual obligation to reimburse the premiums and there was "not sufficient evidence of a mutual agreement to establish a binding past practice." In 2010, however, PERB sustained the union's improper practice charge, finding the District violated the Taylor Law (Civil Service Law § 209-a[1][d]) by unilaterally ending an enforceable past practice without negotiation. PERB found that the Teachers Association and its members had "a reasonable expectation" that the reimbursements would continue and that the prior arbitration award was not binding.

The Appellate Division, Third Department confirmed PERB's determination on a 3-2 vote, holding that reimbursement of the premiums is "a binding past practice" and PERB did not abuse its discretion in declining to defer to the arbitrator. "The issue before PERB was whether, irrespective of any contractual obligation in the parties' CBA, a past practice of reimbursing retirees for Medicare Part B premiums was established such that [the District] was barred from discontinuing that practice without prior negotiation.... In stark contrast, the specific issue before the arbitrator was whether [the District] was under a contractual obligation to make Medicare Part B reimbursement payments to retirees.... Thus, the arbitrator's statement in the award that there was no past practice [of reimbursement] was entirely dicta and ... was neither convincing nor binding upon it...." While PERB has a policy of deferring to an arbitrator's decision, the majority said, the arbitrator's decision here "was repugnant to the Civil Service Law" and PERB's refusal to defer "was neither arbitrary nor capricious."

The dissenters said, "[I]t has long been the policy, both of PERB and in national labor relations matters, to accord post-arbitral deference to an arbitrator's decision.... Here, the Association sought arbitration, it urged past practice as supporting its position..., there is no allegation that it did not have a full opportunity to advocate its position..., and the arbitrator's decision was not clearly repugnant to PERB's purpose.... Under these circumstances, PERB abused its discretion in disregarding its established post-arbitral deference policies. Such arbitrary disregard resulted in a procedure that was unduly protracted, and a determination that is not free of constitutional concern...."

For appellants School District: Lars P. Mead, Endicott (607) 723-9511

For respondent PERB: David P. Quinn, Albany (518) 457-2678

For respondent Teachers Association: Frederick K. Reich, Latham (518) 213-6000

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No. 105 People v George Oliveras

(papers sealed)

George Oliveras was found guilty of fatally shooting Marvin Thompson in the Bronx in November 1999. No witness identified Oliveras as the shooter and there was no forensic evidence connecting him to the crime. The primary evidence against him consisted of incriminating statements he made to police after he waived his right to counsel and was subjected to a lengthy interrogation. Defense counsel argued the statements were involuntary and unreliable because Oliveras -- who has an IQ of 78, an eighth grade education, a history of psychiatric hospitalization and was receiving Social Security disability benefits -- was vulnerable to manipulation and his statements were the product of "coercion, subterfuge and trickery on the part of the police." Defense counsel did not raise a formal psychiatric defense, but elicited some lay testimony about Oliveras' background and disabilities from his mother. Oliveras was sentenced to 25 years to life for second-degree murder.

In 2007, he filed a CPL 440.10 motion to vacate his conviction on the ground, among others, that his trial attorney was ineffective in failing to obtain psychiatric, educational, and Social Security records to document his mental condition, failing to consult experts about how his mental and educational deficiencies could affect his ability to understand his Miranda rights and resist police pressure, and failing to file timely notice of intention to present psychiatric evidence. Supreme Court denied the motion, citing defense counsel's testimony at the motion hearing that Oliveras refused to allow him to pursue a psychiatric defense. Oliveras "clearly instructed [defense counsel] that he did not want to be portrayed as having a psychiatric illness or to spend time in a mental institution and, therefore, did not want a defense that could lead to such a result.... Counsel did the best that he could under the circumstances...."

The Appellate Division, First Department reversed in a 3-2 decision, granted the CPL 440 motion and ordered a new trial. The court said, "Defense counsel maintains that he thought there was enough in the record to make his case without resort to experts or to the medical records. However, defense counsel never consulted an expert or reviewed the medical records in arriving at this conclusion. His feeling that he was 'better off' not doing so cannot be deemed a reasonable trial strategy.... Defense counsel did not investigate the law or the facts, and in doing so deprived defendant of meaningful representation under both the New York and federal standards...."

The dissenters argued that "defense counsel's decision not to obtain the defendant's psychiatric records and his decision to rely on lay testimony to establish the defendant's mental deficiencies was a reasonable and legitimate defense strategy.... Given the constraints placed on defense counsel by the defendant and the potentially adverse consequences that might have resulted from pursuing a formal psychiatric defense, in my opinion the strategy that counsel adopted was reasonable under the circumstances. The jury heard testimony concerning the defendant's mental deficiencies, limited educational background, and psychiatric hospitalization," which "permitted counsel to advance a persuasive argument that the police exploited the defendant's deficiencies and that his confession and statements were not voluntary."

For appellant: Bronx Assistant District Attorney Mary Jo L. Blanchard (718) 838-7094

For respondent Oliveras: Richard M. Greenberg, Manhattan (212) 402-4100

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No. 106 K2 Investment Group, LLC v American Guarantee & Liability Insurance Co.

K2 Investment Group and ATAS Management Group made loans totaling nearly \$3 million to Goldan, LLC, a real estate company owned by New York attorney Jeffrey Daniels and a partner. When Goldan failed to repay the loans and declared bankruptcy in 2009, K2 and ATAS sued Goldan and its owners. Their claims against Daniels included legal malpractice, based on allegations that he agreed to represent them in the transactions and that he failed to record mortgages to secure the loans and failed to obtain title insurance. Among other claims, they also alleged that he breached his personal guarantees of the loans.

American Guarantee & Liability Insurance Company, Daniels' malpractice insurer, disclaimed coverage based on policy provisions stating that it would not cover "any Claim based upon or arising out of, in whole or in part: ... D. the Insured's capacity or status as ... an officer, director, partner ... or employee of a business enterprise" (the Insured's Status Exclusion), or "E. the alleged acts or omissions by any Insured ... for any business enterprise, whether for profit or not-for profit, in which any Insured has a Controlling Interest" (the Business Enterprise Exclusion). When Daniels forwarded a settlement offer of \$450,000, American Guarantee again disclaimed coverage. Daniels failed to appear in the malpractice action and the court entered a default judgment awarding \$2,404,378 to K2 and \$688,716 to ATAS. The court also, upon the plaintiffs' application, discontinued their personal guarantee claims. Daniels then assigned all of his claims against American Guarantee, including claims of bad faith, to K2 and ATAS.

K2 and ATAS brought this action, as assignees of Daniels' rights under the malpractice policy, to recover the amount of the default judgment and to recover for American Guarantee's alleged bad faith refusal to defend or indemnify Daniels. Supreme Court granted summary judgment to the plaintiffs on their cause of action to enforce the default judgment, but dismissed their claims of bad faith.

The Appellate Division, First Department affirmed in a 3-2 decision, saying the policy exclusions "are patently inapplicable." It said this action "was based exclusively on [Daniels'] obligation to plaintiffs, not to Goldan.... His liability to plaintiffs is premised solely on the attorney-client relationship between him and plaintiffs, not on any interest that he had in Goldan.... That Daniels was an owner of Goldan or might have been acting in the interests of Goldan instead of those of his clients may explain why Daniels acted as he did, but it does not change the essence of the complaint, or the basis of liability, which is that Daniels committed legal malpractice in his representation of plaintiffs." The court unanimously upheld the dismissal of the bad faith claims.

The dissenters said, "Although the default judgment ... established Daniels's liability to plaintiffs, ... it does not foreclose a finding that Daniels represented both Goldan and plaintiffs in connection with the mortgage transactions and that his conduct falls within the ambit of either the Insured's Status Exclusion or the Business Enterprise Exclusion, or both, because his failure to record the mortgages and obtain title insurance was a business decision to benefit his company, Goldan." The majority's "interpretation of the exclusions is too narrow."

For appellant-respondent American Guarantee: Robert J. Kelly, Manhattan (212) 483-0105
For respondents-appellants K2 and ATAS: Michael A. Haskel, Mineola (516) 294-0250