

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, February 6, 2013

No. 32 People v Gerard Ippolito, a/k/a Gerald Ippolito

In June 2003, an elderly Monroe County woman gave a full power of attorney to Gerard Ippolito, an accountant and businessman, to manage her affairs. The woman revoked the power of attorney in July 2006 and Ippolito was arrested for theft and forgery later that year, accused of taking nearly \$700,000 from the complainant's trust accounts, pension and social security checks for his own use.

After a jury trial, Ippolito was convicted of grand larceny in the second degree and 43 counts of criminal possession of a forged instrument in the second degree. Forty of those forgery counts were based on checks he signed with the complainant's name and without any notation that he was acting pursuant to a power of attorney. Ippolito was sentenced to 14½ to 29 years in prison and ordered to pay \$696,595.14 in restitution.

On appeal, Ippolito argued there was insufficient evidence to support 40 of the forgery counts because he had a valid power of attorney when he signed the checks; that he was entitled to a hearing on the amount of restitution; and that a new trial was necessary because County Court erred in responding to a juror's question without first consulting with the parties. Just prior to the jury charge, a juror had said, "Can I ask a question?" The court replied, "You're not supposed to, but go ahead." The juror said, "I just want to know if we would have a copy of the law in the room." The court replied, "Good question. The answer to that is no. I'll read it to you as many times as you request, but you cannot get a copy to go back there."

The Appellate Division, Fourth Department modified in a 4-1 decision by reversing his conviction of 40 counts of possessing a forged instrument. "Those 40 counts involve the checks on which defendant signed the victim's name while he was her attorney-in-fact pursuant to the power of attorney....," it said. "[W]e conclude that the ostensible maker of the checks, i.e., the victim, authorized the actual maker of the checks, i.e. defendant, to make the checks, 'which purport [] to be [the] authentic creation[s]' of the victim (§ 170.00[4]). Thus, it cannot be said that the checks in question were falsely made...., although 'recitals in the instrument may be false' or defendant may have exceeded the scope of authority delegated to him by the victim...."

The dissenter argued the checks "were forgeries inasmuch as they 'purported to be what [they were] not, [i.e.], the personal act[s] of [the victim]' in signing each check.... The checks at issue bore no indication that defendant was acting in a representative capacity or under the authority of a power of attorney. Indeed, by signing the victim's name to the checks without any such indication and presenting the checks to third-party banking institutions, defendant denied those institutions the right and opportunity to inquire into the validity of his authority or the instrument under which he claimed such authority...." The justices ruled unanimously that Ippolito was entitled to a restitution hearing and that his claim regarding the trial court's response to the juror was unpreserved.

For appellant-respondent: Monroe County Asst. District Attorney Leslie E. Swift (585) 753-4564
For respondent-appellant Ippolito: James Eckert, Rochester (585) 753-4431

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No. 33 Overstock.com, Inc. v New York State Department of Taxation and Finance

No. 34 Amazon.com, LLC v New York State Department of Taxation and Finance

Internet retailers Amazon.com and Overstock.com are challenging the constitutionality of Tax Law § 1101(b)(8)(vi), an amendment enacted in April 2008 to require out-of state vendors to collect sales tax on New York transactions when they use New York residents to solicit business within the state through Internet websites. The statute creates a presumption that a seller is "soliciting business [in New York] through an independent contractor or other representative" if: (1), the seller enters into an agreement to pay "a commission or other consideration" to a New York resident who "directly or indirectly refers potential customers, whether by a link on an internet website or otherwise, to the seller;" and (2), if all such referrals result in more than \$10,000 in gross sales to New Yorkers by the seller during the preceding year. The statute also provides that the presumption may be rebutted by "proof that the resident with whom the seller has an agreement did not engage in any solicitation in the state on behalf of the seller that would satisfy the nexus requirement of the United States constitution" during the prior year.

Neither Amazon nor Overstock have offices, employees, or property in New York. They take orders from customers solely through their websites and they ship purchases directly to customers from distribution centers outside the state. Both companies permit owners of websites around the world to place advertising banners and links on their sites that redirect visitors from the affiliate to the Amazon or Overstock site. If the visitor makes a purchase, the affiliate is paid a commission. After Tax Law § 1101(b)(8)(vi) was enacted, Overstock suspended its agreements with all of its affiliates in New York, but Amazon did not.

Amazon and Overstock brought these separate actions against New York State and its Department of Taxation and Finance, alleging the statute violates the federal Commerce, Due Process and Equal Protection Clauses, among other claims. Supreme Court granted the State's motions to dismiss the complaints, ruling the statutory presumption "is not constitutionally defective and can be rebutted."

The Appellate Division, First Department upheld the dismissal of the companies' facial challenges to the statute. There is no Commerce Clause violation because the law applies only when an Internet vendor contracts with a New York affiliate to refer customers and then pays commissions based on sales in New York, satisfying the nexus requirement, it said. The law applies only to "solicitation, not passive advertising," and it provides "a ready escape hatch or safe harbor" by permitting the in-state affiliates to certify they are not soliciting. Rejecting the due process claims, it said the presumption is both rational and rebuttable.

Amazon and Overstock argue the statute violates the Commerce Clause because it requires tax collection by out-of-state sellers "who merely cause advertisements to be placed in the state," conduct that "cannot rise to the level of a substantial nexus." It also violates due process because the presumption of solicitation is "irrational and effectively irrebuttable."

For appellant Overstock: Daniel S. Connolly, Manhattan (212) 508-6100

For appellant Amazon: Randy M. Mastro, Manhattan (212) 351-4000

For respondent State: Steven C. Wu, Special Counsel to the Solicitor General (212) 416-6312

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No. 35 People v Dayshawn P. Handy

Dayshawn P. Handy was in the Monroe County Jail in November 2006, when he got into an altercation with a deputy over his possession of prohibited boxer shorts and sandals in his cell. The deputy subdued and handcuffed him and, with the help of other deputies, took him from C Block through B Block on the way to the special housing unit. As Handy continued to struggle, Deputy Timothy Schliff reached for one of his legs to help control him. Deputy Schliff said Handy kicked backwards, injuring his thumb. Handy was charged with assault.

Prior to trial, Handy's attorney sought any video recordings that might exist of the events, but did not learn there were recordings until a deputy testified at trial that he had watched a video that captured a "very small part" of the incident. The deputy could not recall what the video portrayed nor remember if there were recordings from other cameras. No videos were available at the time of the trial because the routine procedure at the jail was to reuse the tapes, thereby erasing any prior recording. County Court denied Handy's request for an adverse inference charge regarding the prosecution's failure to preserve and disclose recordings. He was convicted of second-degree assault based on the injury to Deputy Schliff, was acquitted of two other assault counts, and was sentenced to five years in prison.

The Appellate Division, Fourth Department affirmed. "[A]n adverse inference charge was not warranted inasmuch as defendant failed to establish that the alleged videotape was discoverable evidence that the People were required to preserve..." it said. "There is no support in the record for defendant's assertion that the alleged videotape was exculpatory and thus his contention that the alleged videotape was Brady material is merely speculative...." It also ruled there was legally sufficient evidence of Handy's intent to cause injury.

Handy urges this Court to impose an obligation on law enforcement to preserve and disclose recordings of events that form the basis of criminal charges. Otherwise, he says, "[A] recording that captures some or all of the actual crime ... may intentionally or negligently be destroyed or lost by the party who has it, with no consequence and no remedy for the loss unless defendant is able to show that the recording he does not have and has never seen contains Brady material." He also argues there was insufficient evidence he intended to injure Deputy Schliff.

For appellant Handy: Janet C. Somes, Rochester (585) 753-4329

For respondent: Monroe County Assistant District Attorney Geoffrey Kaeuper (585) 753-4674

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No. 36 People v Austin Cornelius

Austin Cornelius was charged with illegally entering a Duane Reade pharmacy in midtown Manhattan and attempting to steal disposable cameras in January 2009, allegedly injuring a store detective who tried to detain him. At trial, Supreme Court allowed the prosecutor to introduce three trespass notices that were issued to Cornelius after previous shoplifting incidents. The notices barred him from ever entering any Duane Reade store and contained an account of his conduct, reporting that he "was observed removing and conceal[ing] 33 boxes of Visine" in one case and was "observed concealing store merchandise" in another. Two of the trespass notices were prepared by Duane Reade employees who did not testify at the trial. The court also issued Molineux and Sandoval rulings allowing the prosecutor to introduce evidence of convictions for two prior thefts from Duane Reade and to cross-examine Cornelius about four prior convictions. He was found guilty of second-degree burglary and sentenced to 10 years.

The Appellate Division, First Department reduced the sentence to seven years and otherwise affirmed, rejecting Cornelius' Confrontation Clause claim. "The trespass notices barring defendant from entering a chain of drugstores were properly admitted as business records and did not violate defendant's right of confrontation...," it said. "Those documents were 'not created in order to memorialize witness testimony,' but for business purposes...." The evidence of prior convictions and uncharged crimes "was probative of defendant's knowledge and intent with regard to the burglary in this case, and helped establish that defendant knew that his entry into the store was unlawful."

Cornelius argues that the admission of two trespass notices prepared by absent witnesses violated his Sixth Amendment right to confront witnesses against him "because the trespass notices were akin to formal affidavits as they were signed, dated, and witnessed, they contained direct accusations of criminal activity, and they were prepared in contemplation of use in a criminal prosecution.... These statements were entered for their truth." He also argues the Molineux and Sandoval rulings admitted evidence that "was cumulative, excessive, and overwhelmingly prejudicial in its similarity to the crime charged."

For appellant Cornelius: Margaret E. Knight, Manhattan (212) 402-4100

For respondent: Manhattan Assistant District Attorney Allen J. Vickey (212) 335-9000