State of New York Court of Appeals

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To be argued Thursday, November 14, 2013

No. 249 Matter of Honorable Glen R. George v State Commission on Judicial Conduct

Glen R. George, a justice of the Middletown Town Court in Delaware County since 1985, is challenging a determination of the State Commission on Judicial Conduct that he should be removed from office for dismissing a friend's ticket for a seatbelt violation and for engaging in ex parte communication with a prospective litigant in a small claims matter, which the Commission found had the effect of discouraging the litigant from filing a claim against a long-time acquaintance of the judge. George's friend with the seatbelt ticket, Lynn Johnson, appeared before him at a regularly scheduled court session in June 2009. The ticket stated that Johnson was driving was a 2000 Mercedes Benz, but Johnson showed George his certificate of title to a 1976 Mercedes and said the ticket was incorrect. George dismissed the ticket based on that discrepancy, without disclosing his long relationship with Johnson and members of his family, including the fact he had been employed part-time by the Johnson family business until the previous day. Neither the prosecutor not the trooper who issued the ticket were present.

The Commission voted 8-2 to remove George from office, saying he "engaged in serious misconduct by dismissing a ticket issued to his former employer and long-time friend, contrary to fundamental ethical precepts and procedural rules. Such behavior 'demonstrate[s] an unacceptable degree of insensitivity to the demands of judicial ethics'...." It said the fact that he was cautioned by the Commission in 2000 for presiding over cases involving another member of the Johnson family "exacerbates his misconduct." His handling of the ticket and the small claims matter "bear the unmistakable taint of favoritism, which damages public confidence in his integrity and impartiality and in the judiciary as a whole...."

Two members concurred in the finding of misconduct, but argued that George should be censured. His handling of his friend's seatbelt ticket, "while undeniably creating an appearance of impropriety and deserving of a severe rebuke, falls well short of the standard set by the Court of Appeals for imposing the extreme sanction of removal from office 'only in the event of truly egregious circumstances'..., they said. [R]emoving this judge under these circumstances lowers the bar for removal too much and sets a troubling precedent for the future."

George, a retired state trooper whose term expires at the end of this year, argues his sanction should be reduced to censure because his "conduct did not rise to the level of being 'truly egregious.' It was the product of poor or extremely poor judgment...." He handled the seatbelt violation, "a zero point charge that is not a speeding ticket," in open court and "properly recorded the entire proceeding," he says. The ticket contained an error "for which documentary evidence existed. The Judge was hard on clerical errors ... and it was well known that he dismissed tickets with clerical errors. This minimizes or eliminates any question that Johnson received special treatment not associated with the case."

For petitioner George: Thomas K. Petro, Kingston (845) 338-1162
For respondent Commission: Edward Lindner, Albany (518) 453-4613

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To be argued Thursday, November 14, 2013

No. 232 People v Wendell Payton

Wendell Payton was charged with robbing a man in Riverhead in 2007. Two weeks before his trial began in Suffolk County Court in February 2008, the Suffolk County District Attorney's Office executed a search warrant at the office of Payton's assigned counsel, Robert Macedonio. Neither the district attorney nor Macedonio informed the trial court or Payton of the search. The trial proceeded to verdict and Payton was found guilty of second-degree robbery. Two months later, when Payton appeared for sentencing, County Court was informed of the investigation of Macedonio and, at Payton's request, adjourned the sentencing and assigned him new counsel. Payton filed a CPL 330.30 motion to set aside the verdict on the ground that the criminal investigation of his trial counsel created a conflict of interest that deprived him of his right to effective assistance of counsel. The court denied the motion, ruling that the investigation created only "a potential conflict of interest" and that Payton failed to show that it affected the conduct of his defense in view of "the fully competent manner in which trial counsel represented" him. Payton was sentenced to 13 years in prison. He then filed a CPL 440.10 motion to vacate the conviction on the ground of conflict of interest, which the court denied. In December 2008, two months after the sentencing, Macedonio was arrested on a felony charge of criminal possession of a controlled substance in the fifth degree. He pled guilty the same day pursuant to a sealed plea agreement that called for a conditional discharge, admitting that he possessed at least 500 milligrams of cocaine in 2004.

The Appellate Division, Second Department affirmed, in a 3-1 decision, Payton's conviction and the denial of his CPL 440.10 motion. It said, "[E]ven if it is assumed that trial counsel was aware that he was a target of the investigation so as to [create a potential conflict], the defendant has failed to come forward with any evidence establishing that the conduct of his defense was in fact affected by the operation of the conflict of interest, or that the conflict operated on the representation.... [W]e decline to adopt the per se rule advocated by the dissent, which would require reversal absent a showing of any effect which the conflict may have had on the representation, as expressly contrary to clear and established precedent...."

The dissenter said, "Given the conflict alleged by the defendant in this case, he need not satisfy the prejudice prong of Strickland (466 US 668 [1984]) to demonstrate that he was deprived of the effective assistance of counsel.... Simply stated, when defense counsel is under indictment or the subject of a criminal investigation by the same office prosecuting his or her client, absent a valid waiver by the client, there is a per se conflict of interest. As the facts of this case well demonstrate, a per se rule is appropriate inasmuch as an attorney's decision to conceal such matters from the client demonstrates that the attorney has already placed his or her own self-interest before the interests of the client...."

For appellant Payton: Kirk R. Brandt, Riverhead (631) 852-1650
For respondent: Suffolk County Assistant District Attorney Glenn Green (631) 852-2500

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To be argued Thursday, November 14, 2013

No. 233 People v Donald O'Toole

Donald O'Toole and an accomplice were charged with robbing the manager of a Harlem barbershop at gunpoint in 2004. The barber testified that the accomplice pointed a pistol at him. At O'Toole's first trial, the jury acquitted him of first-degree robbery, which requires proof that the defendant or an accomplice displayed what appeared to be a gun, but it convicted him of second-degree robbery. He was sentenced to 14 years in prison. The Appellate Division, First Department reversed, based on an error during jury selection, and ordered a new trial on the second-degree robbery count.

At his retrial, O'Toole moved to preclude evidence relating to the gun based on the doctrine of collateral estoppel, arguing that the jury at his first trial, in acquitting him of first-degree robbery, had determined that no gun was displayed. Supreme Court denied the motion and evidence of the gun was allowed. O'Toole was again convicted of second-degree robbery and was sentenced to 15 years in prison.

The Appellate Division, First Department reversed and ordered a third trial, ruling that Supreme Court erred in allowing evidence of the gun at the second trial. Because O'Toole's first jury acquitted him of first-degree robbery, "the People were barred by collateral estoppel from presenting evidence at the retrial that defendant's accomplice pointed what appeared to be a pistol at the complaining witness during the alleged robbery.... 'The doctrine of collateral estoppel ... operates in a criminal prosecution to bar relitigation of issues necessarily resolved in [a] defendant's favor at an earlier trial,'" the court said, citing People v Acevedo (69 NY2d 478).

The prosecution argues, "Because the essential element of 'force' with respect to both the first- and second-degree robbery charges filed against defendant was predicated on display of a gun by defendant's accomplice, when defendant was initially acquitted on the first charge and convicted on the second, the People could not properly be collaterally estopped from presenting evidence about the display of the gun at a retrial.... The acquittal on the first-degree count -- which very well might have resulted from an exercise of mercy on the part of the jurors -- ... cannot be interpreted as a specific factual finding of 'no gun' that is binding in defendant's retrial...."

For appellant: Manhattan Assistant District Attorney Timothy C. Stone (212) 335-9000
For respondent O'Toole: Katheryne M. Martone, Manhattan (212) 577-7993

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To be argued Thursday, November 14, 2013

No. 234 Ragins v Hospitals Insurance Company, Inc.

When Dr. Herzl Ragins was sued for malpractice in the Bronx, he had a primary professional liability insurance policy that provided coverage of up to $1 million per incident. The "supplementary payments" provision of the primary policy required the insurance company to pay "all expenses incurred by the company, all costs taxed against the insured in any suit defended by the company and all interest on the entire amount of any judgment therein which accrues after entry of the judgment and before the company had paid or tendered or deposited in court that part of the judgment which does not exceed the limit of the company's liability thereon." Dr. Ragins also had an excess liability policy, issued by Hospital Insurance Company, Inc. and HANYS Insurance Company, Inc. (collectively HIC), that provided additional coverage of $1 million per incident. The excess policy required HIC to pay "all sums in excess of the limits of liability of the Underlying Policy ... but only up to a total amount of the limits of liability provided herein."

The jury in the malpractice action returned a $1.1 million verdict against Dr. Ragins. Because his primary insurer was in liquidation, the state insurance superintendent paid $1 million toward the verdict, representing the full limit of the primary policy. HIC paid the remaining $100,000 of the verdict. The trial court subsequently entered an amended judgment against Dr. Ragins to impose $390,728.16 in accumulated interest and costs. HIC paid $35,418.46 toward the amended judgment, asserting that because it paid one-eleventh of the principal amount of the underlying judgment, it was required to pay only one-eleventh of the accrued interest. Dr. Ragins brought this action against HIC in Westchester County, alleging that the insurer breached the excess policy by refusing to pay the full amount of accrued interest and costs after the limit of the primary policy was exhausted.

Supreme Court denied HIC's motion to dismiss the suit, finding there were issues of fact regarding HIC's liability for the remaining portion of the amended judgment that was in excess of the primary policy. "HIC mistakenly contends that the primary policy required payment of interest in addition to and above the limit of $1 million, and therefore that a 'void [was] left by [the primary insurer's] insolvency'...," it said. "[T]he primary professional liability policy does not establish unambiguously that [the primary insurer] was required to make payment of pre and post-judgment interest and costs after the policy limit had been exhausted in satisfaction of the judgment."

The Appellate Division, Second Department reversed, holding that HIC met its obligations under the excess policy. "HIC was only responsible for prejudgment interest on that portion of the underlying judgment which it was obligated to pay under its policy..., and the excess policy conclusively established that HIC had no obligation to pay post-judgment interest or costs."

For appellant Ragins: Joseph T. Pareres, Manhattan (212) 557-1818
For respondents HIC et al: Christopher Simone, Lake Success (516) 488-3300

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To be argued Thursday, November 14, 2013

No. 235 Kolbe v Tibbetts

After the Newfane Central School District imposed significant increases in prescription drug co-payments for retirees and active employees in January 2010, pursuant to its new collective bargaining agreement (CBA) with the Civil Service Employees Association, Herbert Kolbe and three other retired employees brought this action for breach of contract and declaratory judgment against the School District and its officials. They argued the District was required to maintain health insurance coverage equivalent to the coverage that was in effect at the time each of them retired. In the "retirement benefits" portion of the CBAs in effect from 1990 through 1996, section 6.5.3 states, "The coverage provided shall be the coverage which is in effect for the unit at such time as it is provided to the employee." In subsequent CBAs, section 6.5.3 states, "The coverage provided shall be the coverage which is in effect for the unit at such time as the employee retires." Section 6.4 of the CBAs provides that retirees are eligible to "continue group health insurance" upon payment of a monthly premium to the District, sets forth the health plans that are available, and specifies prescription co-pay amounts.

Supreme Court granted the plaintiffs' motion for summary judgment. It found the language of the contracts is "plain and unambiguous," refused to consider parol evidence of the parties' intent, and declared that the School District is obligated to maintain health insurance coverage for the plaintiffs that is equivalent to the coverage they had when they retired.

The Appellate Division, Fourth Department reversed on a 3-2 vote and granted summary judgment for the District. The majority found the language of the CBAs was "unequivocal," and held that section 6.5.3 did not prevent the District from changing the prescription co-pays set forth in section 6.4. "The unambiguous language in section 6.5.3 provides that, at the time of his or her retirement, the retiree is entitled to the same coverage that is provided to the bargaining unit," it said. "The language does not specify that an equivalent level of coverage will continue during retirement...."

The dissenters argued that the language in section 6.5.3 is ambiguous and that it conflicts with the language in section 6.4, suggesting that section 6.5.3 "may have given retirees additional rights to health insurance coverage in addition to those provided in section 6.4" They said the matter "should be remitted to Supreme Court for a hearing at which parol evidence may be presented to establish the parties' intent."

For appellants Kolbe et al: Terry M. Sugrue, Buffalo (716) 856-0277
For respondents Newfane School District et al: Karl W. Kristoff, Buffalo (716) 856-4000

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To be argued Thursday, November 14, 2013

No. 236 People v Anthony Oddone

In August 2008, on ladies night at the Publick House in Southampton, Anthony Oddone was dancing with a woman on a table and a bouncer, Andrew Reister, asked him to get down. When Oddone refused, Reister pulled him down, the men began to scuffle, and Oddone placed Reister in a headlock or chokehold. Witnesses gave differing accounts of how long Oddone maintained his hold. When he released it, Reister fell to the floor and had no pulse. Reister was resuscitated at Southampton Hospital, but died two days later of cardiac arrest caused by overstimulation of the carotid sinus nerves in his neck. Oddone was charged with murder.

At trial, the prosecution's forensic pathologist testified that, in his opinion, Reister's neck must have been compressed for a period of two to four minutes. Oddone moved to strike the expert's testimony on the ground that his opinion was not based on generally accepted medical principles. County Court denied the motion to strike the testimony without holding a Frye hearing. The court denied, again without a Frye hearing, a defense request to present expert testimony on the psychology of eyewitness observations; in particular, that eyewitnesses often overestimate the duration of short, stressful events. The court said the topic was "well within the ordinary experience and knowledge of the average juror. After nine days of deliberations, the jury acquitted Oddone of murder and convicted him of first-degree manslaughter. He was sentenced to 22 years in prison.

The Appellate Division, Second Department reduced his sentence to 17 years and otherwise affirmed, finding that Frye did not apply to the pathologist's testimony about the duration of the chokehold. "Frye is only implicated where a question as to whether the expert's methodologies or deductions are based upon principles that are sufficiently established to have gained general acceptance as reliable...," it said. "The expert testified and made conclusions based on his personal observations and experiences as a forensic pathologist for many years. The defendant's factual disagreement with the expert's theory regarding the cause of the petechiae on the outside surface of the victim's eyelids and the fact that his face turned purple immediately after the incident did not require a Frye hearing."

Oddone argues that the trial court erred in refusing to strike the pathologist's testimony about the duration of the neck compression and in precluding the defense expert's testimony about the fallibility of eyewitness time estimates. He says his objection to the pathologist's testimony was not based on disagreement with the expert's "personal 'theory,'" but "with the fact that the medical principles [the expert] relied upon in making his 2- to 4-minute claim have been uniformly rejected by his peers." Among other claims, he argues that the trial court erred in refusing to give the jury an intoxication charge and that he was denied his right to an impartial jury, saying one juror was "biased by her mid-trial hiring by the Suffolk County Police Department" and another "was biased by the pending prosecution of her son by the Suffolk County District Attorney.

For appellant Oddone: Marc Wolinsky, Manhattan (212) 403-1000
For respondent: Suffolk County Assistant District Attorney Anne E. Oh (631) 852-2500