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 8, 2014

No. 119 Lynch v City of New York

New York City is appealing an order that declared it in violation of Retirement and Social Security Law § 480(b)(i) and (ii) for failing to pay a portion of employee pension contributions on behalf of police and firefighters in tier 3 of the City's pension system. Since 1963, the City has made such payments for police and firefighters in tiers 1 and 2 under the "increased-take-home-pay" (ITHP) program pursuant to Administrative Code §§ 13-226 and 13-326. Retirement benefits for tiers 1 and 2 include a pension component and an annuity component, and ITHP covered a portion of the members' annuity contributions. In 1974, the temporary ITHP benefit was extended and recodified as Retirement and Social Security Law § 480, which applied to "[a]ny program under which an employer in a public retirement system ... assumes all or part of the contribution which would otherwise be made by its employees toward retirement...." ITHP was made permanent in 2009, with the City's ITHP contribution rate set at 5 percent of salary. Since July 1, 2009, the City has placed newly hired police and firefighters into the tier 3 retirement plan. Tier 3 provides a pension benefit, but has no annuity component. In 2010, Patrick Lynch, as president of the Patrolmen's Benevolent Association, brought this suit against the City, alleging that its failure to make ITHP contributions for tier 3 members violated section 480, among other things. The Captain's Endowment Association and the Uniformed Fire Officers' Association subsequently joined the suit.

Supreme Court granted partial summary judgment for the Unions, declaring the City violated section 480 by failing to make ITHP contributions for tier 3 members. It dismissed the Unions' other claims, including one for conversion.

The Appellate Division, First Department, on a 3-1 vote, affirmed the declaration that the City is in violation of section 480. It also reinstated the conversion claim and granted judgment against the City on liability. "Unlike Administrative Code § 13-226," which created the ITHP benefit, Retirement and Social Security Law § 480, which extended ITHP in 1974, "makes no reference to any 'annuity contribution,'" it said. "By its own language, section 480 is not restricted to tier 1 or 2, or to annuity contributions. Rather, it applies to '[a]ny program' under which a government employer makes a 'contribution which would otherwise be made by its employees toward retirement'.... [T]he plain language indicates a legislative policy to apply ITHP to any government employee, regardless of pension tier...."

The dissenter argued that all the Unions' claims should be dismissed. He said the decision gives to tier 3 members an ITHP "benefit that, as enacted in the 1960s and 1970s..., applies only to tiers 1 and 2 of the retirement system. In a nutshell, the operative language creating the ITHP benefit (a reduction of annuity contributions) cannot be applied to tier 3 members, whose retirement plan lacks any annuity component.... [T]he majority takes the 1974 law that extended the preexisting ITHP benefit to tier 1 and 2 employees and applies it to police officers and firefighters hired in 2009 or later, who belong to the entirely dissimilar tier 3...."

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For respondents Hagan and Richter: Philip H. Seelig, Manhattan (212) 766-0600

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No. 116 Matter of Antwaine T. *(papers sealed)*

In November 2010, 15-year-old Antwaine T. was arrested in Brooklyn for possessing a machete. He was charged with weapon possession and with juvenile delinquency under Penal Law § 265.05, which states, "It shall be unlawful for any person under the age of sixteen to possess ... any dangerous knife...." In support of the delinquency petition, the Corporation Counsel's Office attached a sworn statement by the arresting officer, who said that at about 11:23 p.m. "... I was working in my official capacity as a police officer, when I recovered a machete from the Respondent. The blade of the machete was approximately 14 inches in length..... Later, the Respondent's mother informed me that the Respondent ... is 15 years old. The Respondent's mother also provided me with a photocopy of the Respondent's birth certificate, which confirmed this information."

In Family Court, Antwaine ultimately admitted to unlawful possession of a dangerous knife by a person under the age of 16. The court adjudicated him a juvenile delinquent and placed him on probation. On appeal, he argued the delinquency petition must be dismissed for facial insufficiency because it "failed to allege any facts to establish that the knife [he] possessed ... was a 'dangerous knife' under Matter of Jamie D., 59 NY2d 589 (1983)."

The Appellate Division, Second Department reversed, ruling the petition was facially insufficient to support the charge "because it did not contain allegations which, if true, would have established that the knife he possessed was a 'dangerous knife'" under Penal Law § 265.05. "The supporting deposition merely described the unmodified, utilitarian knife which [Antwaine] possessed, and contained no allegations as to the 'circumstances of its possession,' so as to 'permit a finding that on the occasion of its possession it was essentially a weapon rather than a utensil,'" the court said, quoting Jamie D.

The Corporation Counsel's Office argues the petition was sufficient to establish the elements of the charge because a machete on an urban street is inherently dangerous. "As to whether the weapon itself constituted a 'dangerous knife,' the police officer described it in his deposition as 'a machete,' the blade of which was 'approximately 14 inches in length,'" it says. "Moreover, the police officer recovered this inherently dangerous knife from Antwaine T. ... late at night on the streets of the Bedford-Stuyvesant neighborhood in Brooklyn." It says the First Department, in People v Campos (93 AD3d 581), "held that a machete may be found to be a 'dangerous knife' when, *inter alia*, it is possessed 'at a time and place where its use for a lawful purpose such as agriculture was highly unlikely.'"

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To be argued Thursday, May 8, 2014

No. 117 People v Anner Rivera

After a gun fight in Red Hook, Brooklyn, in October 2007, Anner Rivera was charged with fatally shooting Andres Garcia and firing at two of Garcia's companions, who escaped. Rivera raised a justification defense, testifying that Garcia shot his friend five or six times and fired more than twice at him before he returned fire.

At the end of the second day of jury deliberations, a juror asked to speak to the judge. At the suggestion of the prosecutor and defense counsel, the judge spoke with the juror on the record in his robing room, with only the court reporter present. The juror sought to pursue the jury's prior request for guidance about when a defendant is considered to be in imminent danger. He said, "I just want to know by the law, when can we be considered to deem defendant, I guess, responsible? That's the big issue with some of us." The judge replied, "That's understandable, but I can't, there is no legal definition other than what I've given you. All the rest depends on an interpretation of the evidence, as I said, in the courtroom. This is a fact question for you to determine what the facts are from the evidence and make your determination. There is no help I can give you." After more discussion in a similar vein, the judge returned to the courtroom and told the attorneys, "I indicated that what I told him in court is exactly what I have to tell him now, that this is a fact question to be determined by the jury itself. And he asked me would tomorrow be the last day and I said I couldn't tell him and that was it." Realizing the defendant was not present, the judge had Rivera brought in and repeated the report he had just given the attorneys. The judge said they could request a read-back of his conversation with the juror, but no one did.

The jury acquitted Rivera of murder and manslaughter, but convicted him of criminal possession of a weapon in the second degree. He was sentenced to 12 years in prison.

The Appellate Division, Second Department reversed and ordered a new trial on weapon possession. It said Supreme Court "erred when it received and answered a series of questions from a juror ... outside the presence of the defendant, defense counsel, the prosecutor, and the other jurors," in violation of Rivera's constitutional and statutory rights to be present. "The juror's questions ... were not purely ministerial as they directly related to the substantive legal and factual issues of the trial.... Since the error affects 'the organization of the court or the mode of proceedings prescribed by law'..., preservation is not required, and the issue of law is presented for review 'even though counsel may have consented to the procedure'...."

The prosecution argues the trial court "substantially cured any violation of defendant's right to be present because, by explaining to defendant and his attorney what had happened in their absence, and by informing them that they could hear a readback of the court's discussion with the juror, the court gave defendant an opportunity to provide input regarding the instruction at a time when any appropriate further instruction could have been given." It says, "[T]he 'mode of proceedings' exception to the preservation requirement does not apply to defendant's claim, because the trial court substantially cured the alleged error"

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To be argued Thursday, May 8, 2014

No. 118 People v Lionel McCray

In October 2009, Lionel McCray was accused of entering two commercial areas housed in the Hilton Times Square Hotel in Manhattan: the hotel's employee locker room, where he fled when confronted by a cook; and Madame Tussaud's Wax Museum, where security cameras showed him placing electronic equipment into boxes. He left the building with televisions, computer monitors and other equipment in two boxes on a hand truck, all taken from the museum. Two hotel security officials followed him and flagged down a police officer, who made the arrest. McCray was indicted on two counts of second-degree burglary under Penal Law § 140.25(2), burglary of a "dwelling."

Before trial, defense counsel moved to dismiss the charges on the ground they "only apply to a dwelling and those areas that are not open to the public," while his charges were based on illegal entry into public areas of the building, "and there was no way to get from these lobby areas, these areas that were open to the public[,] into the Hilton Hotel, which is a dwelling...." The prosecutor responded, "If the commercial establishment is within the confines of the exterior walls of the residential location, then the commercial establishment is, for purposes of burglary in the second degree, considered residential." Defense counsel renewed the motion at the close of testimony. Supreme Court denied the motion. McCray was convicted of both counts and sentenced to consecutive terms of 7½ years, for an aggregate term of 15 years.

The Appellate Division, First Department affirmed the convictions "based on his entries into a hotel's employee locker room and a museum located in the same building as the hotel. Each location constituted a dwelling within the meaning of the burglary statute. A building is a dwelling if it is 'usually occupied by a person lodging therein at night' (Penal Law § 140.00[3]). Where, as here, 'a building consists of two or more units separately secured or occupied, each unit shall be deemed both a separate building in itself and part of the main building' (Penal Law § 140.00[2] ...). It is of no consequence that the employee locker room of the hotel was not used for residential purposes.... Similarly, the museum, which was 'under the same roof' as the hotel, is a dwelling irrespective of whether there was 'internal communication' between the two...."

McCray argues his convictions should be reduced to third-degree burglary because "unlawful entry into the public commercial portion of a multi-use high-rise structure is not an entry into a 'dwelling' for purposes of an aggravated charge of burglary in the second degree where there was no evidence that defendant intruded into the unconnected and severed residential area of the building, which, in any event, was not readily accessible from the commercial portion...." He also argues that imposition of consecutive sentences was illegal because his conduct "was all part of a single criminal scheme."

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