

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, October 15, 2015 (arguments start at 1 p.m.)

No. 162 People v Alma Caldavado

Alma Caldavado was charged with first-degree assault and endangering the welfare of a child for allegedly shaking and injuring a seven-month-old girl she was babysitting at her home in Queens in 2006. Physicians testifying for the prosecution said the child suffered subdural hematomas (bleeding between the brain and skull), multiple brain contusions, and extensive retinal hemorrhages in both eyes, which they attributed to "shaken baby syndrome." Caldavado's attorney cross-examined the medical experts, using information he obtained from a pediatric neurologist that the child's records indicated pre-existing hematomas that could have caused seizures and caused new bleeding without significant shaking; but he did not present expert testimony to rebut the prosecution experts. He presented character witnesses and Caldavado's own testimony. She was convicted on both counts and sentenced to eight years in prison.

After her conviction was affirmed, Caldavado brought this CPL 440.10 proceeding to vacate her conviction based on newly discovered evidence from two pediatric neurological experts, who opined that the child suffered from "benign enlargement of the subarachnoid spaces" (BESS), a condition that could make the child susceptible to subdural hematoma with minimal trauma. She also argued that her trial attorney was ineffective in not presenting any expert testimony, and she asserted her actual innocence.

Supreme Court denied her motion without a hearing, saying the articles authored by the new experts "were written between 2004 and 2008" and, therefore, the experts' articles and opinions "would have been available to the defense at the time of the trial, and do not constitute newly discovered evidence." It said her trial attorney had a "strategy to attack the prosecution's medical evidence ... and to suggest through character evidence and testimony by defendant that defendant would not and did not shake the baby under circumstances evincing a depraved indifference to human life. This strategy was not successful, but it does not rise to the level of constitutional ineffective assistance of counsel."

The Appellate Division, Second Department affirmed, saying, "Defendant failed to demonstrate the absence of a strategic explanation for trial counsel's decision not to present certain expert testimony and instead to cross-examine the People's witnesses based on the opinion of a medical expert he received prior to trial, and also to focus on the mens rea element of assault in the first degree...." It said her claim "based on newly discovered evidence was properly denied, since the evidence defendant offered was not newly discovered within the meaning of CPL 440.10(1)(g)...."

Caldavado argues that where "newly discovered expert medical evidence ... forms the basis of a motion to vacate judgment ... and where such information could easily have been presented at trial but for counsel's indolence or ineptitude, it seems unfair, and certainly not constitutionally appropriate, to hold an apparently innocent person to a strict standard of due diligence." She also argues that, "where the prosecution ... relied solely on the classic triad symptoms of retinal hemorrhaging, cerebral edema and subdural hematoma" to establish shaken baby syndrome, "it amounted to ineffective assistance of counsel, per se..., for defense counsel not to have offered affirmative evidence ... that, at least since 1998," a growing body of medical opinion had "discredited the theory that the triad symptoms, without more," could prove an infant was shaken.

For appellant Caldavado: Mark M. Baker, Manhattan (212) 750-7800

For respondent: Queens Assistant District Attorney John M. Castellano (718) 286-5801

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No. 163 Davis v South Nassau Communities Hospital

Edwin Davis and his wife are asking this Court to reinstate their suit to recover damages from South Nassau Communities Hospital and other medical providers for injuries he suffered in March 2009, when a vehicle driven by Lorraine Walsh crossed the center line and collided with the school bus Davis was driving. Walsh had driven herself to South Nassau Communities Hospital prior to the accident, complaining of abdominal pain. She was examined by the emergency room staff, who administered a powerful painkiller, Dilaudid, and an anti-anxiety sedative, Ativan, among other things. She was discharged 90 minutes after the drugs were administered. The accident occurred about 20 minutes later when, the Davises allege, the drugs caused Walsh to lose consciousness at the wheel of her vehicle. The Davises initially asserted a claim for medical malpractice against the Hospital, Island Medical Physicians, P.C., and two members of the emergency room staff, alleging they committed malpractice by discharging Walsh in an impaired condition and by failing to warn her that the drugs she was given could impair her ability to drive. They later moved for leave to amend their complaint to add a claim for ordinary negligence.

Supreme Court granted defense motions to dismiss the suit, saying "the absence of a doctor/patient relationship between plaintiffs and defendants precludes a cause of action based on medical malpractice." It also denied the Davises' motion to add a claim for ordinary negligence. "In the absence of a special relationship between plaintiffs and defendants and no direct duty owed by defendants to plaintiffs," it said, "there is no basis" for such a claim.

The Appellate Division, Second Department affirmed. Regarding ordinary negligence, it said, "the proposed amended complaint failed to allege that the defendants possessed sufficient authority and ability to control Walsh's conduct so as to give rise to a duty to protect Davis, a member of the general public.... Thus, the proposed amendment was palpably insufficient and patently devoid of merit...." The malpractice claim was properly dismissed because "only Walsh, and not Davis, had a physician-patient relationship with the defendants."

The Davises argue they should be allowed to assert a claim for ordinary negligence because the defendants had a "special relationship" with Walsh, who "voluntarily submitted to [their] authority" and "would have done anything they told her to do," and the defendants accepted this "actual control" by treating her, thus giving rise to a duty to protect Davis and other members of the public. They say the defendants' negligence occurred in their "misuse of 'control,'" when they discharged Walsh to drive home in an impaired state and without warnings. Even if there is no special relationship, the Davises say, the defendants owed a duty of reasonable care to any person foreseeably put at risk by their conduct in creating Walsh's impairment and then discharging her without proper warnings.

For appellants Davis et al: Joseph G. Dell, Garden City (516) 880-9700

For respondents Island Medical et al: James W. Tuffin, Islandia (516) 359-6420

For respondent Hospital: Robert G. Vizza, Mineola (516) 877-2900

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No. 164 People v Davon Harris

In 2002, a woman sleeping at her cousin's apartment in Far Rockaway, Queens, woke in the middle of the night to find a man standing over her and masturbating. She screamed and kicked him and he fled. She told the police that cash and jewelry were stolen, but officers made no mention of that in their report. The perpetrator was not identified until 2010, when a sample of semen he left at the scene was matched with the DNA profile of Davon Harris.

In 2011, Harris was charged in a two-count indictment with second-degree burglary, a felony count that was still timely, and petit larceny, a misdemeanor count for which the statute of limitations had expired. During jury selection, Supreme Court denied defense counsel's request to strike, for cause, a prospective juror who "didn't seem to be accepting the possibility" that a witness might lie under oath. At trial, defense counsel argued Harris was not guilty of burglary because there was no evidence he intended to commit a larceny when he entered the apartment, but counsel did not move to dismiss the petit larceny charge as time-barred. Harris was convicted of both counts and sentenced to concurrent terms of ten years for burglary and one year for petit larceny.

The Appellate Division, Second Department affirmed, rejecting Harris's claim that his attorney's failure to raise a statute of limitations defense to petit larceny constituted ineffective assistance of counsel. "The defendant has failed to demonstrate 'the absence of strategic or other legitimate explanations' for counsel's alleged shortcoming...", the court said. It also said the trial court properly denied his challenge to the juror because the "record does not support a finding that the prospective juror possessed 'a state of mind that [was] likely to preclude him from rendering an impartial verdict based upon the evidence adduced at the trial'...."

Harris argues, "Because the record is devoid of any strategic reason for defense counsel's failure to raise the 'clear-cut and winning' argument that the petit larceny count was time-barred, this is one of the 'rare' cases in which a single substantive error constituted ineffective assistance of counsel," and so his petit larceny conviction should be reversed. He says both convictions should be reversed because the trial court violated his rights to due process and an impartial jury "when, without conducting its own inquiry, it denied defense counsel's for-cause challenge of a juror who showed an inability to accept that a witness could purposely lie under oath."

For appellant Harris: Alexis A. Ascher, Manhattan (212) 693-0085

For respondent: Queens Assistant District Attorney Christine DiSalvo (718) 286-5837

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No. 165 People v Nugene Ambers

(papers sealed)

In 2010, Nugene Ambers was charged with sexually abusing two young sisters in Ozone Park, Queens, more than three years earlier. One of the girls said Ambers began to abuse her in December 2002, when she was 8 years old, and continued the abuse until April 2007. Her sister said Ambers first abused her in September 2003, when she was 11 years old, and continued until August 2005. One of the girls first revealed the abuse in November 2009 to a friend from a bible study group, who urged her to tell the police. In May 2010, Ambers was charged with felony counts of course of sexual conduct against a child in the first and second degrees and second-degree rape, all of which were timely, and two misdemeanor counts of endangering the welfare of a child for which the statute of limitations had expired. Defense counsel did not move to dismiss the misdemeanor counts as time-barred or on any other ground. Ambers was convicted of most of the charges, including both misdemeanors, and sentenced to an aggregate term of 17 years in prison.

The Appellate Division, Second Department affirmed, rejecting Ambers' claim that he was deprived of effective assistance of counsel by his attorney's failure to move for dismissal of the misdemeanor counts on statute of limitations grounds and his failure to properly object to the prosecutor's alleged misconduct during her summation. "The defendant has failed to demonstrate 'the absence of strategic or other legitimate explanations' for counsel's alleged shortcoming...", it said. It said his claim that the prosecutor's remarks in summation deprived him of a fair trial was unpreserved "as the defendant either did not object to the remarks at issue, made only a general objection, or failed to request further curative relief or make a timely motion for a mistrial...."

Ambers says both misdemeanor counts "were clearly time-barred" and, because his trial attorney "actively sought acquittal on all charges, he could not have had any strategic reason for failing to advance a defense that would have resulted in the dismissal" of those charges. He says that "error, standing alone," deprived him of effective assistance of counsel, a deprivation compounded by "the cumulative effect of counsel's errors" in failing to object to "a barrage of improper and unfair argument" by the prosecutor in summation.

For appellant Ambers: Mark W. Vorkink, Manhattan (212) 693-0085

For respondent: Queens Assistant District Attorney Anastasia Spanakos (718) 286-5928