

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 or gspencer@nycourts.gov.

To be argued Tuesday, October 17, 2023

No. 86 Matter of Black v New York State Tax Appeals Tribunal

Christopher Black was working as a carpenter for Nastasi & Associates (N&A) when, in 1994, he formed New England Construction Company (NECC) to gain access to state contracts as a minority business enterprise (MBE), and it soon began handling N&A's minority subcontracts. Black was the president and 51% shareholder of NECC. Anthony Nastasi took control of NECC's financial affairs in 2005, and NECC entered into an agreement with N&A providing that, upon Nastasi's written demand, Black would resign as NECC's president. Nastasi exercised his right to terminate Black as president in February 2015 and purchased his shares. Meanwhile, NECC had been incurring federal and state liability for unpaid employee withholding taxes since 2012. In early 2015 the Internal Revenue Service issued Black an assessment holding him personally liable for NECC's unpaid federal taxes, but it canceled the assessment against him on appeal, finding he was not a person responsible for paying NECC's taxes under federal law. It based its decision, in part, on sworn affidavits in which Nastasi said he himself had sole authority to pay NECC's accrued liabilities, including tax obligations, and that Black's authority over NECC's bank account was limited to paying the costs of its field operations.

In December 2015, the State Division of Taxation issued Black notices of deficiency for unpaid withholding taxes under New York's parallel delinquent tax statutes, asserting that he was a person responsible for paying NECC's taxes. Using language similar to the federal statutes, Tax Law § 685(g) provides that a person may be held personally liable for a business's tax liability if he or she is "required to collect, truthfully account for, and pay over such tax" and "willfully fails to collect ... or truthfully account for and pay over such tax." Section 685(n) states that a person responsible for paying a tax includes "an officer or employee of any corporation ... who ... is under a duty to perform the act in respect of which the violation occurs." The Tax Appeals Tribunal rejected Black's challenge to the assessment, saying it was not bound by the federal determination, and that he was responsible for the tax and willfully failed to pay it.

The Appellate Division, Third Department upheld the assessment in a 3-2 decision. It said, "Notwithstanding evidence that could support a contrary determination, it is undisputed that [Black] was president, the majority shareholder, had check signing authority, was involved in daily field operations and derived a substantial part of his income from NECC. In addition, it said Black "held himself out" to tax officials as the "responsible person for New York taxes by signing state tax returns and checks accompanying the returns" and "executing a sales tax certificate of authority listing himself as the corporation's responsible person." It further found that his failure to pay was willful. "Although [Black] might not have initially known that the taxes were not paid due to Nastasi writing and directing the checks that [he] should sign, it is undisputed that [he] became aware of the tax liabilities..., yet failed to take affirmative steps to ensure payment."

The dissenters argued the tax assessment should be annulled. While Black, "by his own account, engaged in a highly inappropriate scheme of falsely holding himself out as NECC's financial decision-maker for purposes of retaining its status as a [MBE]," they said the issue here is not the propriety of that conduct but of the determination holding him personally liable, which turns on whether he had authority over NECC's finances. They said Black "effectively ceded control of the business to Nastasi" in his 2005 agreement with N&A, and it was Nastasi, not Black, "who had significant control over NECC's finances during the tax years in question." Regarding willfulness, they said Black "had no actual authority to compel Nastasi to make the required payments once he learned that NECC was in default.... [T]he Tribunal's determination that 'petitioner's continued reliance' on Nastasi constituted willfulness is not rational, for by that point [Black] had no authority to intervene."

For appellant Black: Henry M. Greenberg, Albany (518) 689-1400

For respondent Tribunal: Assistant Solicitor General Owen Demuth (518) 776-2053

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No. 74 **People v Yoselyn Ortega**

Yoselyn Ortega was a 50-year-old nanny for a Manhattan couple in October 2012 when she killed two of the children in her care, a two-year-old boy and six-year-old girl, with a kitchen knife and placed their bodies in a bathtub in the back of their Upper West Side apartment. When their mother returned home with her third child, she found her children's bodies in the tub and the nanny standing nearby. Ortega immediately stabbed herself in the neck and collapsed. She never denied that she killed the children and instead raised an insanity defense.

At trial, Ortega's counsel objected to the admission of autopsy reports on the children because they were introduced through the testimony of a medical examiner who did not conduct the autopsies, and who based her expert opinions regarding the injuries and causes of death on the autopsy findings, photographs and dictation tapes of the examiner who conducted them. Ortega argued that this violated her Sixth Amendment right to confront witnesses under the U.S. Supreme Court's 2004 decision in Crawford v Washington (541 US 36) and subsequent rulings. The trial court admitted the autopsy reports and medical examiner's testimony under the business records exception to the hearsay rule, and also rejected defense claims of alleged Miranda violations and objections to its jury charge on the insanity defense. Ortega was convicted of two counts each of first- and second-degree murder and sentenced to life without parole.

The Appellate Division, First Department dismissed the second-degree murder counts and otherwise affirmed, ruling there was no Confrontation Clause violation. The autopsy report "was not testimonial, because it '[did] not link the commission of the crime to a particular person' (People v John, 27 NY3d 294, 315 [2016]; see People v Freycinet, 11 NY3d 38, 42 [2008])," the court said. "In any event, any error was harmless.... The cause of death was undisputed. Nothing in the autopsy report had any bearing on defendant's defenses of insanity and lack of intent, and to the extent anything in it could be viewed as such, it was cumulative to evidence already before the jury...."

Ortega says federal courts, including the U.S. Court of Appeals for the Second Circuit, have held that introducing an autopsy report through testimony of a medical examiner who did not conduct the autopsy violates a defendant's right to confrontation, and she argues that this Court's conflicting decisions in John and Freycinet "must be overruled. Their consideration of whether the out-of-court statement 'link[s] the commission of the crime to a particular person' is, as the Second Circuit recently held in Garlick [v Lee] (1 F4th 122 [2021]) inconsistent with established Supreme Court law." She says her "right to confront the maker of the autopsy report ... was not satisfied by calling a surrogate witness who provided expert opinions based on the factual findings of the absent doctor." She also raises other arguments for reversal.

For appellant Ortega: Abigail Everett, Manhattan (212) 577-2523 ext 508

For respondent: Manhattan D.A. Senior Appellate Counsel Dana Poole (212) 335-9000

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No. 75 People v Donna Jordan

Donna Jordan was accused of robbing a Queens party store in April 2017. The store owner, who identified Jordan at trial, said Jordan and a female accomplice chatted with her for a few minutes then grabbed cash from the register and, after a struggle with the owner, fled to a waiting car. Jordan told police officers after her arrest that she had driven two friends, “Eleshia Redfern” and “Nina,” to the vicinity of the store, but said she did not leave the car and said the other women robbed the store without her knowledge.

At trial, a criminalist from the city’s Office of the Chief Medical Examiner testified that Jordan was the “major contributor” to DNA found on a cell phone that was left behind at the crime scene. Jordan objected to admission of the DNA lab report and criminalist’s testimony, arguing that it would violate her Sixth Amendment right to confront witnesses because the criminalist did not perform the DNA tests himself. The trial court allowed the criminalist to testify that he made his own “independent interpretation of the testing data” and based his conclusions on his own analysis. To explain the presence of her DNA, Jordan testified she had been using Redfern’s phone on the day of the robbery because she had lost her own. She also sought to introduce New York Police Department records of Redfern – including photos, physical description and pedigree information – to show that Redfern was an actual person who more closely matched the initial description provided by the store owner. The court admitted a photo, but precluded the other information because it would reveal that Redfern had a criminal history, which would be prejudicial to the prosecution. During summation, the prosecutor told the jury that Jordan had “created a person,” suggesting she had fabricated Redfern. The court denied Jordan’s mistrial motion based on prosecutorial misconduct. She was convicted of second-degree robbery and petit larceny and was sentenced to five years in prison.

The Appellate Division, Second Department affirmed, saying the trial court “properly precluded evidence of third-party culpability,” Redfern’s police records. “The evidence did not sufficiently connect the third party to the crimes to overcome the risk of prejudice, or the risk that the evidence would mislead the jury...” It further found that “many of the prosecutor’s summation remarks ... were proper, as they were within the broad bounds of permissible rhetorical comment or fair comment on the evidence.... To the extent that some of the prosecutor’s remarks were improper, those remarks were not so flagrant or pervasive as to have deprived the defendant of a fair trial...” It ruled there was no Sixth Amendment violation. “The criminalist performed his own analysis of the DNA profiles and concluded that it was approximately 25.7 quadrillion times more likely that DNA recovered” from the phone “belonged to the defendant, rather than an unknown person, and this testimony was subject to challenge on cross-examination.”

Jordan argues that the criminalist’s testimony violated her confrontation rights because “he was not adequately involved in the DNA testing to testify. He was not present for the testing itself, played no role in the critical electrophoresis stage or editing process, and provided only conclusory statements regarding his analysis.” She says she was denied her right to present a defense by the preclusion of “certified NYPD records establishing that Redfern existed and fit the height description of the perpetrator.” She also argues the prosecutor committed misconduct. “Seizing upon the evidentiary rulings, with knowledge that Redfern was a real person whom appellant had consistently maintained was the robber, the prosecutor argued in summation that Redfern did not exist, appellant ‘created’ her, and she tailored her ‘ridiculous’ testimony to the People’s case.” She says “the prosecutor advanced a false position to the jury in reliance on evidence he successfully suppressed.”

For appellant Jordan: Sarah B. Cohen, Manhattan (212) 693-0085

For respondent: Queens Assistant District Attorney William H. Branigan (718) 286-6652

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No. 76 People v Jorge Espinosa

Jorge Espinosa was charged with breaking into an occupied second-floor apartment in Queens in 2013. He ran from the apartment when a resident confronted his accomplice and another resident saw him as he fled the building, but neither of them could identify him because he wore a ski mask. Investigating officers found a large screwdriver on the ground beneath the apartment's balcony, where a door had been pried open to gain entry. They obtained a DNA sample from the screwdriver and sent it to the Office of the Chief Medical Examiner (OCME) for analysis. Espinosa was arrested for the burglary after analysts matched the DNA from the screwdriver to his genetic profile, which had been added to the OCME's database after his arrest in a previous criminal case.

At trial, the DNA match was the only evidence linking Espinosa to the burglary. The lab reports analyzing the sample from the screwdriver and the profile in the database were introduced through the testimony of a supervising criminalist from the OCME, who said the analyst who tested the screwdriver sample had left the agency and was unavailable to testify. He said he had supervised the analyst and looked through the testing and results to make sure it was "scientifically sound and based on policies and procedures," but conceded on cross-examination that he did not conduct any of the testing and only read the analyst's reports. Espinosa's counsel argued in summation that the jury should discredit the testimony for that reason, but did not object to the admission of the DNA reports or the criminalist's testimony. Espinosa was convicted of second-degree burglary and related crimes and was sentenced to 15 years in prison. He argued on appeal that the DNA evidence was admitted in violation of his right to confrontation and that his attorney was ineffective in failing to object to it on that ground.

The Appellate Division, Second Department affirmed, saying his Confrontation Clause claim was unpreserved because defense counsel did not object to admission of the DNA evidence through testimony of a criminalist who did not perform the tests. "In any event," it said, the claim "is without merit.... 'The testifying criminalist performed a technical review of the analyst's report, independently reviewed the analyst's data interpretation, and reached an independent conclusion, and thus, was not merely 'functioning as a conduit for the conclusions of others'...." It found that Espinosa "was not deprived of the effective assistance of counsel...."

Espinosa argues that he "was denied the effective assistance of counsel when his attorney failed to object to the DNA evidence at the heart of the prosecution's case, which was admitted in violation of the Confrontation Clause through a criminalist who did not perform or witness the DNA testing or apply any independent analysis to the raw data." He says, "Without the DNA evidence, and in the absence of any statements by appellant or eyewitnesses identifying him, the prosecution would have no way of proving beyond a reasonable doubt that the fleeing man was appellant.... [B]y failing to make any objection to the DNA evidence, counsel forfeited the Confrontation Clause issue with no conceivable strategic purpose."

For appellant Espinosa: Sam Feldman, Manhattan (212) 693-0085 ext 273

For respondent: Queens Assistant District Attorney Amanda Iannuzzi (718) 286-6709