

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, February 11, 2016

No. 71 People v Anthony Badalamenti

(papers sealed)

In October 2008, Anthony Badalamenti was living with his girlfriend and her six-year-old son, J.T., in the second-floor apartment of a house in Merrick. Their downstairs neighbors heard Badalamenti angrily shouting at J.T.; the boy crying and calling out, "Please, Anthony, stop, stop. You're hurting me;" and what sounded like a strap striking the boy. The neighbors called the police, who said the boy's mother told them she and Badalamenti had been spanking him with belts as punishment for bad behavior at school. The officers arrested Badalamenti and the mother and seized two belts, one black and the other white, from the apartment.

About five months earlier, in May 2008, J.T.'s biological father had called the mother, who pressed the answer button on her cell phone without speaking to him, then left the line open. The father heard Badalamenti and the mother berating and threatening J.T., who was crying. Without speaking to anyone on the phone or obtaining their consent, the father recorded the goings-on for about 20 minutes and later gave the recording to the police.

Badalamenti moved to preclude use of the father's recording at his trial under CPLR 4506. The statute bars the use of eavesdropping evidence obtained in violation of Penal Law § 250.05, which provides, "A person is guilty of eavesdropping when he unlawfully engages in ... mechanical overhearing of a conversation," which is defined as "the intentional overhearing or recording of a conversation or discussion, without the consent of at least one party thereto, by a person not present thereat, by means of any instrument, device or equipment." Supreme Court admitted the recording into evidence. Badalamenti was convicted of three counts of second-degree assault, two counts of fourth-degree criminal possession of a weapon (one for each belt), and endangering the welfare of a child. He was sentenced to seven years in prison.

The Appellate Division, Second Department affirmed. It relied on Pollock v Pollock (154 F3d 601 [6th Cir 1998]), which adopted a "vicarious consent" exemption to the federal wiretap statute allowing a parent to consent to the recording of a conversation on his child's behalf when there is a "good faith" reason to believe it is "necessary for the welfare of the child." The Appellate Division said, "While ... Penal Law § 250.05 serves the strong public policy goal of protecting citizens from eavesdropping, we are not persuaded that the New York Legislature intended to subject parents to criminal penalties when, 'out of concern for the best interests of their minor child, they record that child's conversations'.... Given the similarity between the federal wiretap statute and New York's eavesdropping statute, and recognizing that the 'vicarious consent' exemption is rooted on a parent's need to act in the best interests of his or her child..., we deem it appropriate to adopt it as an exemption to Penal Law § 250.05."

Badalamenti argues Penal Law § 250.05 clearly prohibits the recording of a conversation without the consent of a party to it, and nothing in the "language or legislative history makes any provision for a parent consenting to a recording on behalf of a child." Neither "the existence of a vicarious consent exemption" nor the factual basis to invoke it were litigated at the trial, so "the Appellate Division was not empowered to rule as it did," he says. The exemption should not apply here, where the father's testimony showed "he did not make the recording under circumstances where he was concerned about his son's safety, and where ... he did nothing with the tape except give it to the prosecution months later to use in its litigation against appellant." Among other claims Badalamenti, who was charged with acting with intent to injure the boy, says the trial court's "erroneous" instructions allowed the jury to convict him for failing to act to protect the child.

For appellant Badalamenti: Marianne Karas, Thornwood (914) 434-5935

For respondent: Nassau County Assistant District Attorney Jason R. Richards (516) 571-3800

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, February 11, 2016

No. 31 People v Rashid Bilal

Shortly after receiving a report of shots fired in December 2008, plainclothes officers in upper Manhattan saw two men come out of the Dunbar apartment complex. One matched the description of the gunman, "a black male wearing a black bubble jacket," and the other wore a gray jacket. Without identifying themselves as police, the officers called them over and the man in the black jacket stopped. The other man, Rashid Bilal, began to run. The officers gave chase and saw him throw a loaded revolver over a fence before he was caught.

Bilal was charged with second-degree weapon possession. His trial attorney never moved to suppress the gun, later explaining to appellate counsel that he mistakenly believed Bilal would not have standing to challenge the seizure unless he admitted possessing the gun. Bilal was convicted of the charge at trial and sentenced to five years in prison. He then filed a CPL 440.10 motion to vacate his conviction for ineffective assistance of counsel based on his trial attorney's failure to move for suppression.

Supreme Court denied the motion. "[C]ounsel's failure to move for a suppression hearing was error, particularly in a case where suppression of the gun would in all likelihood have meant the end of the case," it said, but it found the error did not adversely affect Bilal because it was not "reasonably probable" he would have prevailed. It said the officers had a level two common-law right to question Bilal under People v DeBour (40 NY2d 210) when they first approached him. Because he fled, "a court would likely find that defendant's flight, added to the police's right to make a common-law inquiry, increased the level of suspicion to reasonable suspicion, justifying pursuit, and the recovery of the gun abandoned in flight was therefore not the product of any unlawful police activity."

The Appellate Division, First Department affirmed. "Although counsel's failure to move to suppress the weapon had no strategic justification but was based on a misunderstanding of the law, that error did not cause defendant any prejudice" because he "would not have prevailed on a suppression motion," it said. "Unlike the situation in People v Clermont (22 NY3d 931 [2013]), this was not a 'close' suppression issue ... where a properly litigated motion might have been successful, or where a suppression hearing is now warranted in the interest of fairness. Instead, the undisputed facts establish that, when added to the information already known to the police, defendant's flight created reasonable suspicion warranting pursuit (see People v Moore, 6 NY3d 496 ...), and that the seizure was lawful, in any event, under the doctrine of abandonment...."

Bilal argues he was prejudiced by trial counsel's error, and thus deprived of effective assistance, because he has "at least a colorable -- if not 'close' -- argument that the police did not have reasonable suspicion to pursue him when they first encountered him, and his flight did not escalate the encounter because there was no evidence he knew he was fleeing from police," who wore plainclothes and did not identify themselves. He says his conviction should be set aside for a new trial or, "at the very least, held in abeyance pending the outcome of a suppression hearing."

For appellant Bilal: Rachel T. Goldberg, Manhattan (212) 577-2523 ext. 529

For respondent: Manhattan Assistant District Attorney Philip Morrow (212) 335-9000

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, February 11, 2016

No. 32 People v Roy Gray

(papers sealed)

A New York police detective, believing Roy Gray was involved in the November 2004 murder of Levi Bernard in the Bronx, asked North Carolina police to arrest him on an outstanding drug warrant in May 2005, then went to North Carolina to question him. The detective testified at a suppression hearing that he orally advised Gray of his Miranda rights shortly before Gray told him that he would "take the blame for this murder" because his brother "had served enough time in his life." The detective said he then read Gray his Miranda rights from a form used by the local police and waited another 45 minutes to receive a faxed form with Miranda warnings from the New York Police Department before taking a written statement from Gray, in which he gave a detailed account of shooting Bernard and discarding the gun.

Supreme Court suppressed the written statement. It found Gray made his oral statement after he was given incomplete Miranda warnings, and it ruled his written statement was not attenuated from his tainted oral statement.

The Appellate Division, First Department reversed the suppression order, finding the written statement was sufficiently attenuated from the oral statement. It said the written statement was when Gray "for the first time admitted being personally involved in the murder of Mr. Bernard." The written statement "was procured some 45 minutes after he initially offered to take the blame for the crime," which it called a "pronounced break in the interrogation.... It must also be noted that defendant's initial statement to the police -- that he would take the blame for the shooting to absolve his brother -- was on its face ambiguous, and is not necessarily an admission by defendant of any wrongdoing."

The detective testified at trial that Gray had given a second and more substantive oral confession, admitting that he shot Bernard, before he received the written Miranda warnings. Despite this change in the evidence for suppression, Gray's trial counsel did not move to re-open the suppression hearing. Gray was convicted of second-degree murder and sentenced to 25 years to life. Gray filed a CPL 440.10 motion to vacate his conviction for ineffective assistance of counsel based, in part, on counsel's failure to seek re-opening of the suppression hearing.

The Appellate Division affirmed the motion ruling and conviction, finding Gray was not prejudiced by his trial attorney's decision. "Defendant has not established a reasonable probability that the new evidence elicited at trial would have resulted in suppression of his written confession on the ground of lack of attenuation from an inadmissible oral confession...", it said. "[A]lthough the information that emerged at trial gave defendant a stronger argument that his written statement was not attenuated, it did not give him a winning one."

Gray argues the Appellate Division applied the wrong standard. "Where ... counsel's lapse is failure to present a suppression claim, this Court does not look to whether the claim would, ultimately, have been successful. Instead, counsel is ineffective where there are 'substantial arguments' overlooked by counsel and, had the motion been successful, the impact on the outcome would have been significant," he says, citing People v Clermont (22 NY3d 931 [2013]).

For appellant Gray: Sara Gurwitch, Manhattan (212) 402-4100

For respondent: Bronx Assistant District Attorney Justin J. Braun (718) 838-7111

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, February 11, 2016

No. 33 People v Nelson Miranda

Police officers arrested Nelson Miranda in Greenwich Village in October 2010 after watching him try, unsuccessfully, to saw through the locks on three bicycles with a hacksaw concealed in his sleeve. The officers arrested and handcuffed Miranda and found the hacksaw on the ground nearby. In patting him down, the officers felt a satchel under his jacket. They removed the satchel and searched it, recovering two screwdrivers, two pairs of pliers, and rubber gloves. Miranda moved to suppress the tools from the satchel, arguing the warrantless search was unjustified.

Criminal Court denied the motion. "This search incident to a lawful arrest was conducted for any number of reasons," the court said. "Most significantly, it was plain that it was appropriate for the officer to make this search given the fact that the defendant ... had secreted a very dangerous tool on his person, which he dropped at the time of his stop, but it was also quite appropriate for any number of other reasons which are abundantly clear given the types of tools that were recovered and the type of activity that the defendant was involved in..." Miranda was convicted of six misdemeanor counts of attempted possession of burglar's tools and three counts of attempted petit larceny. He was sentenced to 45 days in jail.

The Appellate Term, First Department affirmed, saying, "The police lawfully searched defendant's backpack as incident to what defendant concedes was a lawful arrest.... The arrest and search were contemporaneous, the backpack was large enough to contain a weapon and was within defendant's grabbable area at the time of his arrest soon after police saw him discarding a hacksaw, and the surrounding circumstance supported the reasonableness of the testifying officer's stated fear for his safety."

Miranda argues the exception to the warrant requirement for a search incident to arrest did not apply because the prosecution failed to demonstrate that exigent circumstances -- a need to search for a weapon to ensure the safety of the police or public, or to preserve evidence from destruction or concealment -- existed at the time the search was conducted. "Since at the time of the search, appellant was handcuffed and the satchel was in the hands of the police, the satchel was inaccessible to appellant, and neither exigency could exist," he says.

For appellant Miranda: Frances A. Gallagher, Manhattan (212) 577-7992

For respondent: Manhattan Assistant District Attorney Andrew E. Seewald (212) 335-9000