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 Wednesday, January 13, 2016 (arguments begin at 9 a.m.)

No. 15 Aetna Health Plans v Hanover Insurance Company

Luz Herrera was injured in an accident on the Hutchinson River Parkway in the Bronx in April 2008 while driving a car insured by Hanover Insurance Company. Hanover provided no-fault benefits, paying medical bills that were submitted to it by Herrera or her doctors. However, some of her medical providers erroneously billed Aetna Health Plans, Herrera's medical insurer, instead of Hanover for treatment of her accident-related injuries. Aetna paid $19,649.10 for such treatment in 2008. After Hanover stopped providing no-fault benefits in 2009, Aetna paid an additional $23,525.73 for continuing treatment of Herrera's injuries through 2011. Herrera submitted documentation for some of those costs to Hanover in 2010 and demanded reimbursement for bills paid by Aetna that should have been paid by Hanover.

When Hanover did not respond, Herrera commenced a no-fault arbitration against Hanover. The arbitrator denied her claim, saying the medical records she submitted to Hanover to document the bills paid by Aetna "were not bills" because she had no legal obligation to pay them. "[I]f any person and/or entity [has] a claim against [Hanover] in this matter it is [Aetna], not [Herrera]." Herrera assigned her right to recover no-fault benefits to Aetna, which brought this action against Hanover to recover the $43,174.83 it had paid for her treatment.

Supreme Court dismissed Aetna's complaint, saying its claim was barred by 11 NYCRR 65-3.11(a), which provides for the payment of no-fault benefits "directly to the applicant ... or, upon assignment by the applicant ... to [the] providers of health care services." The court said Aetna, "a health insurer, is not a 'provider of health care services' contemplated under 11 NYCRR 65-3.11." Aetna's breach of contract claim fails because it "is not in privity of contract" with Hanover, it said, and Aetna "cannot sustain a cause of action under subrogation principles" because there is "no authority permitting a health insurer to bring a subrogation action against a no-fault insurer for sums the health insurer was contractually obligated to pay to its insured."

The Appellate Division, First Department affirmed, saying Aetna "is not a 'health care provider' under [under 11 NYCRR 65-3.11], but rather a health care insurer.... While the No-Fault Law provides a limited window of arbitration between no-fault insurers (see Insurance Law §§ 5105, 5106[d] ...), the statutory language does not pertain to a health insurer such as Aetna. Thus, Aetna cannot maintain a claim against defendant under the principle of subrogation.... Nor may Aetna assert a breach of contract claim..., since it is not in privity of contract with Hanover, and there has been no showing that it was an intended third-party beneficiary of the contract."

Aetna argues it is entitled to recover from Hanover "under the doctrines of subrogation, indemnification, or both" because it paid the medical costs of Herrera, which Hanover was obligated to pay, and it therefore stands in place of Herrera with the same rights she would have to recover from Hanover. Even though it is not a "health care provider," Aetna says 11 NYCRR 65-3.11 does not bar its claim because it is Herrera's subrogee and has the same right to payment from Hanover as she has under the regulation. It argues, "Privity of contract is not required where, as here, the health insurer's claim is made under principles of subrogation or indemnity."

For appellant Aetna: Jonathan A. Dachs, Mineola (516) 747-1100
For respondent Hanover: Barry I. Levy, Uniondale (516) 357-3000

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No. 16 People v Freddie Thompson

Freddie Thompson, serving 15 years in prison for first-degree robbery, is challenging his sentencing as a second violent felony offender under Penal Law § 70.04, which requires an enhanced sentence for defendants who commit a violent felony within 10 years of their sentencing for a prior violent felony, excluding any time the defendant was incarcerated.

Thompson previously pled guilty in Brooklyn to first-degree assault, a violent felony, and was sentenced in June 1994 to five years of probation. His probation was revoked 18 months later when he pled guilty to a drug possession charge and in December 1995 he was re-sentenced on the assault conviction to two to six years in prison. In February 2010, Thompson stole prescription drugs at gunpoint from two pharmacies on Staten Island and he was convicted by a jury of two counts of first-degree robbery, a violent felony offense. Excluding the time he spent in prison for the Brooklyn assault conviction, the current robbery offenses were committed within 10 years of his 1995 re-sentencing to prison in the assault case, but more than 10 years after his 1994 sentencing to probation.

Supreme Court initially sentenced Thompson to 20 years as a second felony offender for the robbery convictions, but after his transfer to prison, the state Department of Corrections and Community Supervision advised the court and the parties that he should be adjudicated a second violent felony offender. The prosecution filed an affirmation in support of treating Thompson as a second violent felony offender, arguing that his 1995 re-sentencing in the assault case was the operative date for the 10 year look-back period in Penal Law § 70.04 because his 1994 sentence of probation "was in fact revoked" and the 1995 "re-sentencing replaced the earlier sentence."

Supreme Court granted the prosecution's application and re-sentenced Thompson as a second violent felony offender to the same 20-year term. Adopting the 1995 re-sentencing as the controlling date, it found that Thompson's robbery offenses "fall within the ten-year period as extended by the incarceration time." The Appellate Division, Second Department reduced Thompson's sentence to 15 years "in the interest of justice" and otherwise affirmed.

Thompson argues he was improperly sentenced as a second violent felony offender because the date of his original 1994 sentence of probation in the prior assault case, "rather than the re-sentencing, determines whether the [robbery] conviction falls within the 10-year look-back period" in the statute. He says Penal Law § 70.04(1)(b)(iii) "specifically states that, '[f]or the purpose of determining whether a prior conviction is a predicate violent felony conviction ... a sentence of probation ... shall be deemed a sentence."

For appellant Thompson: A. Alexander Donn, Manhattan (212) 693-0085
For respondent: Staten Island Assistant District Attorney Anne Grady (718) 876-6300

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To be argued Wednesday, January 13, 2016 (arguments begin at 9 a.m.)

No. 17 People v Christopher A. Nicholson *(papers sealed)*

Christopher Nicholson was charged in 2008 with sexually abusing a girl at his home in Rochester from October 1998 to November 2000, when the girl was five to seven years old. The girl first disclosed the abuse to a high school counselor in November 2008. At trial, Supreme Court allowed the girl to testify that Nicholson repeatedly beat and threatened her and her brother, saying such Molineux evidence was admissible to explain the girl's eight-year delay in reporting the sexual assaults. The court also permitted the prosecutor to present expert testimony about child sexual abuse accommodation syndrome (CSAAS) to explain the delayed disclosure. Defense counsel presented testimony of Jill Marincic, who said she was Nicholson's girlfriend from 1995 to about 2003 and lived with him during the time of the alleged sexual abuse. She testified that she never saw Nicholson use violence or threats with the victim or her brother. On cross-examination, Marincic said she did not maintain a romantic relationship with Nicholson after they broke up, but she remained friends with him even after he married Donna Nicholson in 2005. In rebuttal, the prosecutor called Donna Nicholson to testify that, to her knowledge, the defendant had no contact with Marincic from 2003 until her marriage ended in 2008. The defendant was convicted of first-degree course of sexual conduct against a child and sentenced to 16 years in prison.

The Appellate Division, Fourth Department affirmed in a 3-2 decision, ruling the trial court properly allowed the prosecutor to call Donna Nicholson as a rebuttal witness "to give testimony that was relevant to [Marincic's] bias or motive to fabricate, which is not collateral.... Reading the prosecutor's colloquy with the court on this issue, together with her cross-examination of [Marincic], we conclude that the purpose of calling the rebuttal witness was to show that defendant and [Marincic] were romantically involved at the time of the trial, which the prosecutor believed could be inferred if [Marincic] and defendant had not been friends when he was married to the rebuttal witness." The court said its ruling did not violate People v Concepcion (17 NY3d 192) because "we are not affirming on a ground that is different from that determined by the [trial] court," but instead holding the court properly allowed rebuttal testimony "for the 'limited purpose' of whether [Marincic] and defendant were friends.... Whereas the dissent infers nothing from that testimony other than that defendant and [Marincic] were not friends after 2003, we conclude that a permissible inference ... was that ... [Marincic] never lost her romantic feelings for defendant, even at the time of trial." The court rejected defense claims that the Molineux evidence and expert testimony on CSAAS were improperly admitted.

The dissenters argued the rebuttal witness's testimony "related solely to collateral matters" and should not have been admitted. "The rebuttal witness's testimony -- that [Marincic] did not have contact with defendant after 2003 -- served only to show that [Marincic] was not being truthful when she testified that she and defendant remained friends. In our view, that constitutes impermissible impeachment testimony on a collateral matter." They argued the majority's affirmance violated Concepcion because "the prosecutor did not say anything about seeking to show that [Marincic] was romantically involved with defendant" and the trial court's ruling was not based on that ground.

For appellant Nicholson: Mary P. Davison, Canandaigua (585) 394-5222
For respondent: Monroe County Assistant District Attorney Geoffrey Kaeuper (585) 753-4674

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To be argued Wednesday, January 13, 2016 (arguments begin at 9 a.m.)

No. 18 People v Marcus D. Hogan

Marcus Hogan was arrested on drug possession charges in May 2005, when police executed a search warrant at his girlfriend's apartment in Rochester. After breaking down the door officers found six "dime" bags of crack cocaine and about 50 unused ziplock bags on a counter in the kitchen, where the girlfriend was standing, along with some loose cocaine and a razor blade on the floor. The seized cocaine weighed 2.54 grams. The officers found a small bag of marijuana in the bedroom. Hogan was arrested in a hallway near the bathroom. He moved to dismiss the indictment on the ground the prosecution provided insufficient notice of the grand jury proceeding. Supreme Court denied the motion as untimely.

At Hogan's non-jury trial, the prosecutor pursued theories based on constructive possession and on the "drug factory" presumption in Penal Law § 220.25(2), which provides, "The presence of a narcotic drug ... [or] marijuana ... in open view in a room ... under circumstances evincing an intent to unlawfully mix, compound, package or otherwise prepare for sale such controlled substance is presumptive evidence of knowing possession thereof by each and every person in close proximity to such controlled substance...." Hogan argued the drug factory presumption did not apply because there was insufficient proof the cocaine was being packaged for sale, that it was in open view, or that he was in close proximity to it. Defense counsel said, "[T]he court needs to find there was a drug factory going on in this premises, six bags, personally using, not a drug factory. Loose rock. Razor blades. Okay. Baggies. But are we talking about a drug factory here sufficient to invoke the ... presumption? I don't believe so." The court said there was insufficient proof of constructive possession, but it applied the drug factory presumption and found Hogan guilty of criminal possession of a controlled substance in the third and fifth degrees. It sentenced him to nine years in prison.

The Appellate Division, Fourth Department affirmed., saying, "We reject defendant's contention that the presumption ... in Penal Law § 220.25(2) was inapplicable because he was not in proximity to the packaged and unpackaged drugs and drug trafficking paraphernalia that were found in open view in the kitchen/living room area of the small apartment in question.... [T]he police observed defendant running from the kitchen/living room area not more than 15 feet from where the drugs and drug trafficking paraphernalia were found. Although defendant was apprehended in a hallway bathroom of the apartment, 'proximity is not limited to the same room'...." It also rejected his ineffective assistance of counsel claims.

Hogan argues the drug factory presumption does not apply because mere possession with intent to sell is insufficient to trigger it, and officers found no cutting agents like baking soda, additives like benadryl, pill grinders or screens that "could indicate an intent to mix or compound" the drugs and found no scale to show an intent to package them for sale. There was no "factory" operation, he says, because the "drugs appeared to be ready for sale or for an individual's personal use." He also argues he was deprived of effective assistance of counsel because his attorney did not discuss with him his right to testify before the grand jury or make a timely motion to dismiss the indictment for insufficient notice of the grand jury proceeding.

For appellant Hogan: Shirley A. Gorman, Brockport (585) 637-5645
For respondent: Monroe County Assistant District Attorney Robert J. Shoemaker (585) 753-4810