State of New York Court of Appeals

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To be argued Wednesday, June 1, 2016

No. 109 People v Charles Smith
No. 110 People v Tyrell Ingram
No. 111 People v Isma McGhee

These appeals raise the issue of whether and under what circumstances criminal defendants should be allowed to use allegations made in civil rights lawsuits against police witnesses to question their credibility during cross-examination.

Charles Smith was arrested in 2011 by narcotics officers who said they saw him sell a bag of crack cocaine on a street corner in Manhattan. He sought to cross-examine two of the officers about allegations in civil rights suits that they had fabricated drug sale charges in prior cases. Supreme Court barred the questioning and the Appellate Division, First Department affirmed Smith's conviction, saying, "Although defendant was entitled, assuming good faith, to ask the officers about acts of misconduct bearing on their credibility, the proposed line of questioning went into accusations, subsequent remedial changes in police procedures, and other irrelevant or collateral matters...."

Tyrell Ingram was arrested in 2008 by Bronx narcotics officers who said they saw him running and gave chase, exchanged gunfire with him, and recovered an illegal handgun. When his attorney asked one of the arresting officers "... have you ever been sued?" the court sustained the prosecutors's objection. Defense counsel explained at a sidebar that she wanted to ask about allegations in a federal suit against the officer and other members of his team that they fabricated evidence, made a false arrest, and used excessive force in a prior case. The court denied the request. The First Department affirmed Ingram's weapon possession conviction, saying the trial court "correctly precluded inquiry regarding the existence of a federal lawsuit ... because the mere existence of the lawsuit was not a proper subject for cross-examination.... Defendant did not seek to ask the officer anything about the underlying facts of the lawsuit ..."

Isma McGhee was arrested on drug sale charges in 2012, after a year-long investigation of drug trafficking in Manhattan. His attorney sought to question the lead detective about allegations in three lawsuits that he and other officers "arrested people who committed no crimes" in prior cases. "It is my position in this case that my client was falsely arrested." He said the lawsuits "give me a good faith basis to ask the questions," but he would ask only about the allegations and not the suits themselves. The court precluded the questions and the First Department affirmed, saying McGhee "failed to establish a good faith basis for eliciting the underlying facts of these lawsuits..., as defendant did not specify any factual allegations supporting the assertion that this detective had participated in false arrests."

The defendants argue the preclusion of valid impeaching evidence of the prior bad acts of crucial prosecution witnesses deprived them of their rights to confront witnesses and present a defense. They say the Second Department, in People v Jones (193 AD2d 696), and the Third Department, in People v Daley (9 AD3d 601), have held that allegations made in civil rights suits may be used in cross-examination of law enforcement witnesses when there is a good faith basis for it.

For appellant Smith: Claudia B. Flores, Manhattan (212) 577-2523 ext 535
For respondent: Manhattan Assistant District Attorney Patricia Curran (212) 335-9000
For appellant Ingram: Elsa Mitsoglou, Manhattan (212) 790-0410
For respondent: Bronx Special Assistant District Attorney Raffaelina Gianfrancesco (914) 995-3496
For appellant McGhee: Mark W. Zeno, Manhattan (212) 577-2523 ext 505
For respondent: Manhattan Assistant District Attorney Sylvia Wertheimer (212) 335-9000

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To be argued Wednesday, June 1, 2016

No. 112 Pasternack v Laboratory Corporation of America Holdings

Fred Pasternack was a physician and pilot for Northeastern Aviation Corp. and a Senior Aviation Medical Examiner for the Federal Aviation Administration (FAA) in 2007, when he reported to a Laboratory Corporation of America (LabCorp) facility in Manhattan for an FAA-mandated random drug test. He produced a urine sample, but LabCorp's specimen collector told him it was too small to test and asked him to wait. He said he had an appointment elsewhere and would return later. She said she would have to advise Northeastern that he left the lab, but did not tell him his leaving would be deemed a "refusal to test." Pasternack returned three hours later and Northeastern authorized LabCorp to take a second sample, which tested negative. A Medical Review Officer (MRO) at ChoicePoint Inc., which administered Northeastern's drug testing program, determined from Pasternack's chain-of-custody form that he left the lab before the test was completed and notified the FAA that Pasternack refused a drug test.

The FAA conducted an investigation, during which LabCorp's specimen collector allegedly made false statements about Pasternack's conduct. The FAA revoked his pilot licenses and his Aviation Medical Examiner designation. His licenses and examiner designation were restored and the test refusal expunged from his record five years later, after a final ruling in his favor by the D.C. Circuit Court of Appeals in 2013.

Meanwhile, in 2010, Pasternack brought this action in U.S. District Court for the Southern District of New York against LabCorp and ChoicePoint (which had become LexisNexis Occupational Health Solutions Inc.). He asserted claims for negligence based on the companies' alleged violation of FAA and Department of Transportation regulations in conducting "shy bladder" procedures after his initial inadequate sample, determining he refused the drug test, and informing the FAA; and claims for fraud based on the false statements allegedly made by LabCorp's collector to FAA investigators, which led to the loss of his licenses.

District Court dismissed the negligence claims, saying they were "premised solely" on alleged violations of federal drug testing regulations and guidelines and, under New York law, the companies owed Pasternack no duty of care to properly apply the regulations. It dismissed the fraud claims because the complaint alleged that "only the FAA -- and not Pasternack -- relied on LabCorp's alleged misrepresentations." It held that under New York law a fraud claim cannot be based on a false representation made to and relied upon by a third party, whose reliance injures the plaintiff.

The U.S. Court of Appeals for the Second Circuit is asking this Court to resolve the key issues in a pair of certified questions: "First, whether drug testing regulations and guidelines promulgated by the FAA and DOT create a duty of care for drug testing laboratories and program administrators under New York negligence law; and Second, whether a plaintiff may establish the reliance element of a fraud claim under New York law by showing that a third party relied on a defendant's false statements resulting in injury to the plaintiff."

For appellant Pasternack: Cynthia S. Arato, Manhattan (212) 257-4880
For respondent ChoicePoint (LexisNexis): Frederick T. Smith, Atlanta, Georgia (404) 885-1500
For respondent LabCorp: Robert I. Steiner, Manhattan (212) 808-7800

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To be argued Wednesday, June 1, 2016

No. 113 People v Dennis J. Sincerbeaux *(papers sealed)*

In 2013, Dennis J. Sincerbeaux pled guilty in Wayne County Court to one count of incest in the third degree, admitting he had sexual intercourse with the victim in 2007. The victim told investigators in a statement that he began forcibly raping her in 1994, when she was 13 years old, and this continued until 2009, when she was 28. Investigators found that he fathered three of her five children. Sincerbeaux was sentenced to six months in jail and required to register under the Sex Offender Registration Act (SORA).

The State Board of Examiners of Sex Offenders prepared a Risk Assessment Instrument (RAI) and assessed Sincerbeaux 30 points under risk factor nine (prior criminal history) based on his 1992 conviction for violating Penal Law § 260.10, then called "failure to exercise reasonable control of a child" and now called "endangering the welfare of a child." The board also assessed 10 points under risk factor one, for use of forcible compulsion, and 20 points under risk factor five, for a victim under the age of 16. Sincerbeaux's total score was 115 points, making him a presumptive level three (highest risk) offender.

Sincerbeaux argued he should be assessed only five points under risk factor nine because his 1992 endangerment conviction was not sexual in nature, but was instead based on excessive corporal punishment of his son. He also contested the points under risk factors one and five because "the sole proof of those is statements made by the alleged victim." He said he did not admit to using forcible compulsion or to having intercourse with the victim before she was 19.

County Court adopted the board's RAI and designated Sincerbeaux a level three sex offender. The Appellate Division, Fourth Department affirmed, concluding that "'[i]t was within the court's discretion to [classify defendant as a level three risk] ... based upon clear and convincing evidence of the facts in support thereof'...." It ruled he was properly assessed points under risk factors one and five because the prosecution "presented 'reliable hearsay evidence, in the form of the victim's statement,' that she was 13 years old when the sexual abuse began and that defendant had used forcible compulsion...."

The District Attorney now concedes the 1992 endangerment conviction was not sexually related and Sincerbeaux should have been assessed only five points under risk factor nine, but says he will move for reassessment of Sincerbeaux's risk level based on his subsequent conduct, including failure to comply with requirements of SORA and his sex offender treatment program.

Sincerbeaux argues, among other things, that he was improperly assessed points under risk factors one and five because the prosecution failed to establish by clear and convincing evidence that he used force and the victim was under 17 years old. The only proof offered was the victim's statements, he says, and it was contradicted by his statements that the victim was 19 and "was a willing participant."

For appellant Sincerbeaux: Mary P. Davison, Canandaigua (585) 394-5222
For respondent: Wayne County Assistant District Attorney Bruce A. Rosekrans (315) 946-5905

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To be argued Wednesday, June 1, 2016

No. 114 Matter of Tonawanda Seneca Nation v Noonan

David Peters, a member of the Tonawanda Seneca Nation, died in August 2011 and left a will that bequeathed real property within the Seneca Nation's sovereign territory to his daughter and his brother, who are both members of the Nation. These properties included a parcel on Sandhill Road, a parcel on Bloomingdale Road, and Peters' business, the Arrowhawk Smoke and Gas Shop. A month later, the estate's executors sought probate of the will in Surrogate's Court, Genesee County, and County Court Judge Robert C. Noonan was assigned to the case because the county does not have a separately elected Surrogate.

In October 2013, the Seneca Nation commenced this article 78 proceeding in the Appellate Division, Fourth Department, seeking a writ of prohibition to enjoin Judge Noonan "from exercising jurisdiction over lands within the Nation's territory." While it was pending, the judge declined to assert jurisdiction over the real property on Sandhill and Bloomingdale Roads, but he concluded in February 2014 that his court could exercise jurisdiction over "the business and personal property" of Arrowhawk because there was no evidence the decedent's business operated as an "arm of the tribe." He later issued orders of assistance directing the estate to take control of Arrowhawk and take control of all personal property at the Sandhill Road house pending his determination of ownership in probate.

Judge Noonan moved to dismiss the article 78 proceeding on the grounds that his February 2014 determination rendered it moot and that the Appellate Division lacked jurisdiction because the suit was not commenced in Supreme Court. While article 78 proceedings must generally be commenced in Supreme Court, the Nation argued that it properly commenced its suit in the Appellate Division because CPLR 506(b)(1) gives that court original jurisdiction when an article 78 proceeding is brought against a judge of Supreme Court or County Court.

The Appellate Division initially denied the motion without decision, but ultimately dismissed the suit on the ground that it lacked subject matter jurisdiction because a "'CPLR article 78 proceeding against a Judge of the Surrogate's Court should be commenced in Supreme Court.'" It said, "Even if we assume, arguendo, that [Noonan] was elected as a County Court Judge and was thereafter assigned to 'be and serve as' a Surrogate..., [the Nation] is seeking to prohibit [him] from acting in the role of Surrogate. We thus conclude that jurisdiction remains in Supreme Court."

The Nation argues, [A]lthough ... Noonan may be serving as the Surrogate, he remains a County Court judge whose actions must be reviewed by the Appellate Division in an Article 78 proceeding." It says he only became eligible to serve as Surrogate by virtue of his election to County Court, and his "constitutional and statutory power to sit as the Surrogate ... is derived from his position as a County Court Judge."

For appellant Seneca Nation: Margaret A. Murphy, Orchard Park (716) 662-4186
For respondent Noonan: Assistant Solicitor General Kate H. Nepveu (518) 776-2016

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To be argued Wednesday, June 1, 2016

No. 50 230 Park Avenue Holdco, LLC v Kurzman Karelsen & Frank, LLP

The law firm Kurzman Karelsen & Frank, which had leased offices in the Helmsley Building in Manhattan for decades, in July 2011 signed a lease for new offices in a different building for a term beginning September 1, 2011. Its Helmsley lease did not expire until December 31, 2012. The Helmsley's owner, 230 Park Avenue Holdco, brought a nonpayment proceeding to recover disputed rent escalation charges from Kurzman. The proceeding was settled in August 2011 with a stipulation in which the suit was converted into a holdover proceeding and Kurzman agreed to pay a reduced amount for escalation charges and consented to a final judgment of possession in favor of 230 Park. The stipulation also provided, "Notwithstanding anything herein to the contrary, nothing herein shall prohibit [Kurzman] from locating and/or offering to [230 Park] a potential tenant for the Premises, subject to [230 Park's] approval of any such prospective tenant."

To reduce its liability for rent through the remainder of its lease at the Helmsley, Kurzman retained a broker to list its office space there as available for sublease from September 2011 through December 2012. On September 15, 2011, 230 Park's managing agent directed the listing service to remove Kurzman's sublease listing. In November 2011, 230 Park brought this action against Kurzman and individual guarantors of its lease obligations to recover all rent allegedly due under the lease from September 2011 through December 2012. Among other affirmative defenses, Kurzman argued that 230 Park breached the August 2011 stipulation of settlement by obstructing its search for a prospective tenant and that the landlord had assumed a duty to mitigate its damages through the stipulation.

Supreme Court denied 230 Park's motion for summary judgment dismissing the defense, saying Kurzman "clearly raised an issue of fact" regarding the alleged breach of the stipulation. "While Kurzman failed to present a prospective tenant, 230 Park says little to contradict the evidence that it prevented Kurzman from locating one. If ... the Stipulation does not obligate 230 Park to at least allow Kurzman to find a prospective tenant, then it is meaningless," it said.

The Appellate Division, First Department affirmed on a 3-2 vote, saying, "Although the stipulation prohibits [Kurzman] from subletting or assigning any of its rights or interests under the lease, it also provides that [Kurzman] is not prohibited 'from locating and/or offering [230 Park] a potential tenant for the Premises'.... [T]he import of this provision was clearly to provide [Kurzman] with an opportunity to cover all or some of the damages that [230 Park] is claiming are due under the lease. Otherwise the provision would have no meaning. There are triable issues of fact as to whether [230 Park] improperly interfered with [Kurzman's] efforts, in violation of the stipulation, to find a tenant, which would ... affect [its] liability for future rent."

The dissenters argued the stipulation "merely provided that it *did not prohibit* Kurzman from locating or offering potential tenants subject to [230 Park's] approval. This language does not provide for a right to do so." Because the stipulation was entered into "solely for the purpose of adjudicating [230 Park's] right to possession of the Premises...," they said, it did not impose "an obligation to mitigate damages consisting of rent unpaid for the balance of the lease term. Kurzman's vague assertions that [230 Park] otherwise sabotaged its efforts to identify prospective tenants and resisted [its broker's] efforts to show the premises to interested parties are insufficient to raise a triable issue of fact...."

For appellant 230 Park: Jay B. Solomon, Manhattan (212) 661-9400
For respondents Kurzman et al: Charles Palella, Manhattan (212) 867-9500