

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 Tuesday, May 31, 2016

No. 103 People v Glenn S. Smith

No. 104 People v Norman E. Ramsey

The issue in these cases is whether low-level offenders, appealing convictions obtained in local justice courts where the proceedings were recorded electronically, must file an affidavit of errors instead of a transcript in order to comply with Criminal Procedure Law § 460.10.

Glenn Smith was arrested for allegedly causing a disturbance and struggling with court officers at the Orange County Courthouse in October 2011. After a jury trial in Goshen Village Court, he was convicted of misdemeanor counts of resisting arrest and disorderly conduct and sentenced to a year in jail.

Norman Ramsey was charged with misdemeanor counts of forcible touching and unlawful imprisonment based on an alleged sexual assault on a neighbor in Hudson Falls in September 2014. After a series of appearances in Hudson Falls Village Court, he pled guilty to forcible touching and was sentenced to four months in jail.

The proceedings in both cases were recorded electronically pursuant to a 2008 Order of the Chief Administrative Judge, which requires Town and Village Courts "to mechanically record all proceedings." Neither defendant submitted an affidavit of errors in taking their appeals, but instead filed a transcript of the audio recording of their proceedings.

Prosecutors in both cases moved to dismiss the appeals for failure to comply with CPL 460.10(3), which applies when "the underlying proceedings were not recorded by a court stenographer" and requires the appellant to file an affidavit of errors describing the alleged errors or defects in the proceedings. The trial court then files a return summarizing "evidence, facts or occurrences" relating to the alleged errors. The defendants argued that their transcripts of the audio recordings obviated the need for an affidavit of errors and that their appeals were properly perfected pursuant to CPL 460.10(2), which applies when "the underlying proceedings were recorded by a court stenographer" and the stenographer's transcript provides the record.

The Appellate Term, Ninth and Tenth Judicial Districts, denied the prosecutor's motion to dismiss Smith's appeal based on its 2013 ruling in People v Finklea (41 Misc 3d 41), which held that "the process of recording court proceedings electronically is the functional equivalent of a 'record[ing] by a court stenographer.'" The court then reversed Smith's conviction "due to multiple deficiencies in the trial court's charge regarding the presumption of innocence, reasonable doubt, and the elements of the crime of resisting arrest."

Washington County Court granted the motion to dismiss Ramsey's appeal, rejecting the view that electronic recordings "are the functional equivalent of stenographic transcripts." It said CPL 460.10 requires "either the stenographer who actually recorded the proceedings or the court that presided over them" to authenticate the record. "Only the person, present in court when the record was made, can attest to [its] accuracy on appeal." The court also said some "critical" portions of the recording were inaudible, rendering the record incomplete.

For appellant: Orange County Assistant District Attorney Andrew R. Kass (845) 615-3640

For respondent Smith: Richard N. Lentino, Middletown (845) 342-4866

For appellant Ramsey: Robert N. Gregor, Lake George (518) 222-1535

Respondent: Washington County Asst. District Attorney Brandon P. Rathbun (518) 746-2525

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 Tuesday, May 31, 2016

No. 105 People v Jamell R. McCullough

Jamell McCullough and four other men were charged with robbing a Rochester barbershop and fatally shooting the owner, Vincent Dotson, in December 2008. An eyewitness testified he was sitting in the shop when the first man entered, asking for a haircut, and three more soon followed. He later identified the last man to enter, wearing an orange jacket and cap, as McCullough. He said the men forced him and Dotson to the floor at gunpoint and pistol whipped them, demanding money and drugs. After taking about \$200 from Dotson, one of the men shot him and the group fled. The shooter returned briefly and the witness, who closed his eyes, heard a "clicking sound" over his head before the shooter left. Willie Harvey, the getaway driver, was arrested the same evening. He initially denied knowing about the crime and failed to identify McCullough's photograph in an array, but he identified McCullough as a participant more than a year later, just before Harvey accepted a favorable plea bargain. Harvey testified at trial that he drove McCullough and the others to and from the barbershop.

Supreme Court denied McCullough's request to present expert testimony on the reliability of eyewitness identifications and denied his motion for a Frye hearing, saying the expert "is not needed" because the eyewitness's testimony was corroborated by that of Harvey and other witnesses. McCullough was convicted of second-degree murder, first-degree robbery and attempted robbery, and was sentenced to 25 years to life.

The Appellate Division, Fourth Department reversed in a 3-2 decision, ruling the trial court abused its discretion in precluding the expert testimony. "Here, the People concede that this case hinges upon the accuracy of the eyewitness's identification of defendant, and we agree with defendant that there was little or no corroborating evidence connecting him to the crime" due to the "dubious credibility" of Harvey, it said. "The only testimony corroborating the eyewitness's identification ... came from Harvey, who even the prosecutor characterized as 'a liar'.... Harvey only identified defendant as one of the perpetrators minutes before he pleaded guilty to robbery in the first degree in exchange for the minimum sentence of 10 years." It also found the proposed expert testimony "'satisfies the general criteria for the admissibility of expert proof'.... [W]e 'must assume on this record' that [the expert's] proposed testimony is based on principles that are generally accepted in the scientific community because 'defendant sought, and was denied, a Frye hearing on that issue'...."

The dissenters argued that "the identification of defendant by the eyewitness was corroborated by the reliable testimony of the accomplice." They said Harvey explained on the stand that "he recognized defendant but did not identify him" in the first photo array "because he did not know at that time what part his brother played in the crimes," and his "dubious credibility" did not otherwise prevent him from providing sufficient corroboration. The trial court, "which observed Harvey and heard his testimony, is in the best position to determine whether the testimony with respect to Harvey's ability to identify defendant was sufficient to establish the reliability of that identification, and thus to constitute sufficient corroborating evidence of the eyewitness identification...." They also argued it has not been established that "expert testimony regarding the impact of 'event violence,' 'event duration,' and 'weapon focus' on the reliability of eyewitness identification is generally accepted in the scientific community."

For appellant: Monroe County Assistant District Attorney Scott Miles (585) 753-4541

For respondent McCullough: Brian Shiffrin, Rochester (585) 423-8290

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 Tuesday, May 31, 2016

No. 106 Matter of State of New York v Dennis K.

No. 107 Matter of State of New York v Anthony N.

No. 108 Matter of State of New York v Richard TT.

(papers sealed)

These defendants are sex offenders who, as their prison terms expired, were found to be dangerous sex offenders and were confined at secure treatment facilities after civil management proceedings under Mental Hygiene Law article 10. Among other issues raised, the common question is whether a diagnosis of borderline personality disorder (BPD) or paraphilia not otherwise specified (NOS) is legally sufficient to support a finding of mental abnormality under the statute. It defines "mental abnormality" as a condition "that affects the emotional, cognitive, or volitional capacity of a person in a manner that predisposes him or her" to commit sex offenses and "results in that person having serious difficulty in controlling such conduct."

The defendants cite Matter of State of New York v Donald DD. (24 NY3d 174 [2014]), which held that a diagnosis of antisocial personality disorder (ASPD) alone cannot support a finding of mental abnormality because, if it "is not accompanied by a diagnosis of any other condition, disease or disorder," the diagnosis "proves no sexual abnormality." This Court said, "The problem is that ASPD establishes only a general tendency toward criminality, and has no necessary relationship to a difficulty in controlling one's sexual behavior." The defendants argue that BPD and paraphilia NOS, like ASPD, are not sexual disorders.

Before Donald DD. was issued, a jury found Dennis K. suffered from a mental abnormality based on testimony of the State's psychologist, who diagnosed him as having "paraphilia NOS nonconsent" -- because he derived gratification from overpowering nonconsenting women -- and ASPD. Supreme Court ordered him confined in 2012, crediting the testimony of State experts that he posed a high risk of re-offending. The Appellate Division, Second Department affirmed, saying that paraphilia NOS and ASPD are legally sufficient bases for a finding of mental abnormality, and that clear and convincing evidence supported the court's conclusion that he posed a high risk of re-offending.

A jury found Anthony N. suffered from a mental abnormality based on diagnoses by State experts that he had BPD and ASPD, and on his history of forcible sex offenses. Supreme Court ordered him confined in 2013. The Fourth Department affirmed, ruling BPD could support a finding of mental abnormality because there was evidence the condition "predisposed him to commit sex offenses."

A State psychologist diagnosed Richard TT. with BPD, ASPD and psychopathy, which she said "predispose [him] to the commission of sex offenses." Supreme Court found he had a mental abnormality and ordered him confined in 2014. It vacated its confinement order after Donald DD. was issued nine months later, but said it still believed Richard TT. "suffers from a mental abnormality and that his disorders predispose him to commit sexual misconduct...."

The Third Department reversed on a 3-2 vote, saying "nothing in [Donald DD.] would bar" the lower court from relying on the State expert's testimony that Richard TT. "had a mental abnormality that seriously impaired his behavioral control." The expert's "portrait shows an individual whose various disorders create a toxic mix that have not only caused him to objectify women and feel 'entitled to sex regardless of impact,' but have also impelled him to satisfy those desires." The dissenters said "civil confinement is not justified" under Donald DD. The expert's admission "that she did not diagnose [Richard TT.] with a sexual disorder" and her failure to "testify that any of the three diagnoses had any sexual component" left the court without an "independent mental abnormality diagnosis to ground a finding of mental abnormality within the meaning of ... article 10...."

For appellant Dennis K.: Timothy M. Riselvato, Mineola (516) 493-3975

For respondent State: Assistant Solicitor General Karen W. Lin (212) 416-6197

For appellant Anthony N.: Mark C. Davison, Canandaigua (585) 394-5222

For respondent State: Assistant Solicitor General Jonathan D. Hitsous (518) 776-2044

For appellant Richard TT.: Shannon Stockwell, Albany (518) 451-8710

For respondent State: Assistant Solicitor General Allyson B. Levine, Albany (518) 776-2018