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, November 15, 2016

No. 196 Turturro v City of New York

Anthony Turturro was 12 years old in December 2004, when he was struck by a speeding car while riding his bicycle on Gerritsen Avenue in Brooklyn. The police report says the car was traveling at least 54 miles per hour in a 30 mile-per-hour zone. Turturro suffered severe brain injuries and was in a coma for five months. His mother brought this personal injury action on his behalf against New York City, among others, alleging that the City had received complaints about vehicles speeding on Gerritsen Avenue prior to the accident and that it was negligent in failing to address the problem.

At the trial, evidence showed that, for several years prior to the accident, the City received numerous complaints from neighborhood residents and elected officials about chronic speeding on Gerritsen and about a lack of traffic lights at certain intersections. The evidence showed the City conducted several studies of the need for traffic signals at specific intersections, but the studies did not address the separate issue of speeding along the length of the road. The jury found the City 40 percent at fault for the accident, the driver of the car 50 percent at fault, and Turturro 10 percent at fault. Turturro was ultimately awarded $3 million for past pain and suffering, $7 million for future pain and suffering, $7 million for future medical expenses and $3 million for lost earnings.

Supreme Court denied the City's motion to set aside the verdict on the grounds that it was entitled to qualified immunity under Weiss v Fote (7 NY2d 579), and that Turturro failed to establish that it owed him a special duty.

The Appellate Division, Second Department affirmed the liability verdict, saying Turturro did not have to prove the City owed a special duty because it was not acting in a governmental capacity, since "a municipality's duty to keep its roads and highways in a reasonably safe condition is proprietary in nature." It said the doctrine of qualified immunity did not apply because, given the evidence, "there was a rational process by which the jury could have found that the City had notice that excessive speeding along the length of Gerritsen Avenue created a dangerous condition and that the City failed ... to conduct a study which 'entertained and passed on [this] very same question of risk' ... posed by excessive speeding.... Similarly, there was a rational process by which the jury could have found that the frequency of speeding cars ... was unreasonably dangerous, and that the City's negligence in terms of studying the problem and implementing a plan to mitigate or resolve the problem was a proximate cause of the accident...."

The City argues the plaintiff failed to establish proximate cause because the speeding driver was entirely responsible for the accident and the City "cannot be held liable in tort for failing to prevent criminally reckless speeding on public roads." It says Turturro was required to show it owed him a special duty because "protecting the public from criminally reckless speeders is a classic governmental function," not a proprietary one; and it is entitled to qualified immunity because it responded appropriately to the complaints of speeding.

For appellant City: Assistant Corporation Counsel Susan P. Greenberg (212) 356-2484
For respondent Turturro: Robert J. Walker, Mineola (516) 248-2002

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To be argued Tuesday, November 15, 2016

No. 197 People v Immanuel Flowers *(papers sealed)*

Immanuel Flowers was arrested for attempted second-degree murder and related assault and weapon possession charges after allegedly shooting a man in the leg during a dispute on a Brooklyn street in June 2008. A witness saw Flowers discard a gun as he ran away immediately after the shooting, and police investigators linked the gun and two spent shell casings to the shooting. The victim did not testify at trail, and Supreme Court dismissed the attempted murder and assault charges for insufficient evidence. Flowers was convicted of one count of second-degree weapon possession.

Supreme Court sentenced him to 20 years to life in prison as a persistent violent felony offender. The court cited, among other things, "the impact that [the incident] had on the victim," who "was shot in the leg."

The Appellate Division, Second Department vacated the sentence and remitted the case for resentencing because "the remarks of the sentencing court demonstrated that it improperly considered a crime that was dismissed at trial for lack of legally sufficient evidence as a basis for sentencing...."

At the resentencing, Supreme Court imposed the same term of 20 years to life. Defense counsel sought the minimum term of 16 years to life, saying, "The sole count of the convict[ion] is plain possession without any intent to use the firearm unlawfully. Mr. Flowers should not receive a punishment usually reserved for homicides or sex crimes." The court said its sentence was based on evidence that "the defendant was seen throwing a gun away after that gun had been fired," as well as Flowers' history of felony convictions and parole violation and the conclusion of the probation report that he posed "a significant risk to the safety of the community."

The Appellate Division affirmed, saying "defendant's contention that the resentence imposed was improperly based on counts which were dismissed at trial for lack of legally sufficient evidence is unpreserved for appellate review...."

Flowers argues, "The post-appeal imposition of a sentence that is the same as a sentence that was found by an appellate court to have relied on improper criteria, absent reliance on any new bad facts, is fundamentally unfair. This Court should adopt a presumption that ... the reimposition of the same sentence violates due process" because it "constitutes a rejection of the appellate court's binding direction to refrain from relying on the improper criteria." He says, "The proposed presumption is analytically comparable to the presumption of vindictiveness" adopted in People v Van Pelt (76 NY2d 156), which "applies when a sentencing court, following an appeal, enhances a sentence in the absence of new, bad facts."

For appellant Flowers: Lawrence T. Hausman, Manhattan (212) 577-7989
For respondent: Brooklyn Assistant District Attorney Avshalom Yotam (718) 250-3492

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To be argued Tuesday, November 15, 2016

No. 198 Matter of Newcomb v Middle Country Central School District

On March 23, 2013, 16-year-old Austin Newcomb suffered severe head trauma when he was struck by a car as he attempted to cross Route 25 in the Town of Brookhaven. The car fled, but the police ultimately identified the driver and the car owner and they pled guilty to criminal charges. Within days of the accident, Newcomb's father reported it to his son's high school, Centereach, in the Middle Country Central School District. He also served timely notices of claim on the State, Suffolk County and Town of Brookhaven, but not on the School District. The Suffolk County Police Department, which refused to provide access to its accident file until its investigation was closed, released full-size photographs of the accident scene on November 5, 2013. The photos showed an over-sized sign at the intersection advertising a musical production at the School District's Newfield High School. Newcomb served a proposed notice of claim on the School District on November 25, five months after the 90-day notice period provided by General Municipal Law § 50-e expired, alleging the District contributed to the accident by negligently placing the sign where it obstructed the views of pedestrians and motorists passing through the intersection. He commenced this proceeding for permission to file a late notice of claim under General Municipal Law § 50-e (5).

Supreme Court denied the petition, although it said the severity of Newcomb's injuries and the delayed release of the police photographs provided "a reasonable excuse" for the filing delay. It said the "most important factor" in its decision was its conclusion that the District did not acquire "actual knowledge of the essential facts constituting that claim" within a reasonable time after the accident. It further held that the filing delay prejudiced the District's ability to defend against the suit, since the "graduation of students and personnel changes presumably hinder the school district's ability to gather information about the creation of the sign and the decision about where and how to position it."

The Appellate Division, Second Department affirmed. It said, "Even assuming that the School District was responsible for the placement of the sign, [Newcomb] failed to establish that the School District became aware, within 90 days after the claim accrued or a reasonable time thereafter, that the placement of the sign was connected with the happening of the accident in a way that would give rise to liability" on its part. It said Newcomb failed to show that the delay in serving the notice of claim "would not substantially prejudice" the District's ability to defend against the claim.

Newcomb argues, "The necessary actual knowledge of the facts and circumstances of the claim is established as a matter of law because [the District] created the condition and subsequently removed such condition prior to 90 days following the accident.... The Second Department erred in finding prejudice because [Newcomb] placed undisputed evidence into the record demonstrating how [the District] is able to conduct a full investigation of the claim and defend on the merits while [the District] offered no admissible evidence showing prejudice."

For appellant Newcomb: Paul A. Montuori, Mineola (516) 338-4714
For respondent School District: Christine Gasser, Uniondale (516) 542-5900

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To be argued Tuesday, November 15, 2016

No. 199 People v Robert Patterson

Robert Patterson was arrested for a home invasion robbery committed in the Bronx in September 2007. The victim told police he was in his apartment with a woman he knew only as Michele when two masked men with guns burst in, tied him up, and stole cash and jewelry. He said the woman helped the men tie him up and then left the apartment. He gave her cell phone number to a detective, who subpoenaed the subscriber information from the service provider along with a list of calls made on the day of the robbery. Investigators learned that the phone belonged to Daichelle Goree and that she had made and received calls from a certain number immediately before and after the robbery. They subpoenaed the subscriber information and call logs for the new number and found the prepaid cell phone account was registered under an alias used by Robert Patterson and listed his address. The victim identified Patterson in a lineup.

At trial, the prosecutor sought to introduce records from both prepaid cell phone accounts as business records to corroborate the victim's identification of Patterson as one of the robbers. Patterson moved to preclude the subscriber information as inadmissible hearsay, arguing that, because the accounts were prepaid, subscribers were not required to provide truthful identifying information and the service providers did not verify the information given. Supreme Court admitted the phone records of Patterson and Goree. Patterson was convicted of robbery and burglary in the second degree and sentenced to 10 years in prison.

The Appellate Division, First Department affirmed, saying, "Authenticated records showing that the person who purchased a particular prepaid cell phone, which was linked to the crime, supplied pedigree information linked to defendant were properly admitted as circumstantial evidence of defendant's identity as the purchaser of the phone.... [T]he pedigree information did not constitute assertions of fact, but circumstantial evidence that the declarant was, in all likelihood, defendant.... Rather than being factual, the pedigree information was analogous to a fingerprint left on a document, tending to show the true identity of its author.... Although the purchaser of the phone was not under a business duty to provide the pedigree information, that requirement of the business records exception to the hearsay rule did not apply, because the initial declaration was independently admissible...."

Patterson argues the Appellate Division "erred in holding that subscriber information from pre-paid cell phone records ... was independently admissible, where that argument was not addressed by the trial court" and, because the Appellate Division "exceeded its statutory authority by affirming on a ground that was not decided adversely to appellant," this Court's review is limited to his claim that the subscriber information was improperly admitted under the business records exception. He says the information did not qualify for the exception because the prepaid cell phone subscribers had no business duty to provide accurate identifying information to service providers and, therefore, the information was inadmissible hearsay.

For appellant Patterson: Ellen Dille, Manhattan (212) 577-3285
For respondent: Bronx Assistant District Attorney Marianne Stracquadanio (718) 838-6100

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To be argued Tuesday, November 15, 2016

No. 200 People v Rodolfo Hernandez *(papers sealed)*

School bus driver Rodolfo Hernandez was charged with molesting a three-year-old girl on his Staten Island route in March 2007. The girl arrived home late, between 3 and 3:30 pm, and was crying and screaming. She opened her pants and her mother, seeing her underwear was pushed down below her hips, asked what happened and had someone done something to her. The girl finally replied "señor bus," meaning bus man. The father arrived a short time later and asked the girl what happened. She said "señor bus," stuck out her tongue and moved it up and down. The parents took her to the hospital at about 4 pm, still screaming and crying, and they held her down while a doctor performed a pelvic examination. After the doctor left, at roughly 6:30 pm, the parents continued to ask what happened. She said "señor bus." They asked if he did something to her and she nodded. Asked what he did, she stuck out her tongue in a licking gesture. Asked where, the girl gestured toward her vaginal area.

The girl, who had delayed speech development, was five years old when the trial was held. Supreme Court found she was capable of giving unsworn testimony, but the prosecutor did not call her to the stand. Instead, he sought to have her parents testify about her statements and gestures under the excited utterances exception to the hearsay rule.

Supreme Court ruled the statements and gestures were admissible as excited utterances. "Considering the child's age, her uncontrollable crying and emotional state throughout the events from the time she exited the bus until the hospital..., considering the abbreviated questions [--] essentially 'what happened' [--] put to her, considering the time frame, which is minimal, as to the statements in the house and less than three hours approximately as to the statements in the hospital..., I am satisfied that at the times her utterances were made ... the child was ... under the influence of the excitement precipitated by an external startling event ... and she lacked the reflective capacity essential for fabrication," it said. Hernandez was convicted of first-degree sexual abuse and endangering the welfare of a child. He was sentenced to seven years in prison.

The Appellate Division, Second Department affirmed, ruling the girl's communications qualified as excited utterances. It said, "The surrounding circumstances reasonably justify the conclusion that the child's communications were not made under the impetus of studied reflection.... Further, because the communications were nontestimonial in nature, the admission of this evidence did not violate the defendant's right to confront a witness against him...."

Hernandez argues the trial court erred in admitting the testimony because "the complainant's communications to her parents were not 'spontaneous' 'excited utterances' prompted by a 'startling event.' Rather, they were reluctant, mostly non-verbal replies to her parents' relentlessly persistent questions, and were unreliable given the young complainant's cognitive limitations and susceptibility to suggestion, as evidenced by her performance" at the hearing on her ability to testify.

For appellant Hernandez: Anna Pervukhin, Manhattan (212) 693-0085
For respondent: Staten Island Assistant District Attorney Anne Grady (718) 876-6300