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, September 6, 2016

No. 127 People v Steven Henderson *(papers sealed)*
No. 128 People v Nnamdi Clarke

A key question in these appeals is whether delays by prosecutors in seeking analysis of DNA evidence qualify as "exceptional circumstances" that would make those periods excludable from speedy trial calculations under CPL 30.30. In felony cases, the statute requires prosecutors to be ready for trial within six months after the commencement of the criminal action.

Steven Henderson and Treymain Songster were charged with engaging in forcible intercourse and other sexual conduct with a 14-year-old girl in Songster's Brooklyn apartment in October 2008. Henderson was arraigned on first-degree rape and related charges the same month, and the prosecution obtained a sample of his DNA in January 2009. In June 2009, after the medical examiner reported that Henderson's DNA profile did not match semen samples in the rape kit, the prosecution sought testing of DNA evidence recovered from the victim's fingernails. The case was adjourned for a total of 86 days until September 2009 while the additional tests were conducted, which also found no match to Henderson. His attorney moved to dismiss on speedy trial grounds in April 2010. The prosecution argued the 86 days of adjournment for additional DNA tests should not be charged to it, and Henderson's attorney did not reply. Supreme Court denied the motion finding, in part, that the 86 days for testing was the result of exceptional circumstances. Henderson was convicted and sentenced to eight years in prison.

The Appellate Division, Second Department affirmed, saying Henderson did not preserve his speedy trial claim. "[A]fter the People set forth the statutory exclusions they intended to rely upon..., the defendant failed to raise before the Supreme Court the legal or factual impediments to the exclusions that he seeks to raise on appeal." It also said he failed to show he was deprived of effective assistance of counsel. Henderson argues the prosecution's "dilatory decision" to seek testing of the fingernail samples violated his right to a speedy trial, and that his attorney's failure to preserve the issue deprived him of effective assistance of counsel.

Nnamdi Clarke was arrested in November 2007 by police officers who said he fired a shot at them and then discarded the gun as they chased him on a street in Queens. He was arraigned four days later. In August 2008, he was indicted and the prosecutor declared she was ready for trial. In May 2009, the prosecutor moved to obtain a DNA sample from Clarke, saying the medical examiner had just informed her that a small amount of genetic evidence recovered from the gun could be tested with the new Low Copy Number DNA procedure. Clarke objected on speedy trial grounds, but agreed to provide the sample in June 2009. The lab report matching his DNA profile to the gun was filed in November 2009. Supreme Court denied his speedy trial motion to dismiss. Clarke was convicted of second-degree weapon possession and sentenced to 21 years to life in prison.

The Appellate Division, Second Department reversed, saying, "[B]ecause the People failed to exercise due diligence in obtaining the DNA sample from the defendant, the 161-day period between June 5, 2009, and November 13, 2009, was not excludable on the ground that their need to obtain the DNA test results constituted excusable, exceptional circumstances...." The prosecution argues the time spent on the DNA tests was excludable. "The People were not informed that this new form of DNA testing was available in this case until well into its pendency, the People were not otherwise on notice to request it, and the People acted diligently to obtain the testing and provide the results and the underlying file to defendant as expeditiously as possible."

No. 127 For appellant Henderson: Leila Hull, Manhattan (212) 693-0085
For respondent: Brooklyn Assistant District Attorney Ann Bordley (718) 250-2464
No. 128 For appellant: Queens Assistant District Attorney Sharon Y. Brodt (718) 286-5878
For respondent Clarke: William G. Kastin, Manhattan (212) 693-0085 ext. 240

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No. 129 People v Dru Allard

Dru Allard was charged with second-degree menacing as a hate crime for allegedly holding a knife toward a Muslim man and directing ethnic slurs at him in front of a Brooklyn mosque in September 2006. Supreme Court dismissed the felony counts on May 31, 2007, with leave for the prosecution to resubmit the case to a new grand jury. The second grand jury issued a new indictment on September 5, 2007, 97 days later, and the prosecutor filed a statement of readiness for trial. When Allard moved to dismiss the charges on speedy trial grounds in November 2008, he argued the entire 97 days preceding the second indictment should be charged to the prosecution. The prosecutor argued that 32 days of that period were excludable under the "exceptional circumstances" provision of CPL 30.30(4)(g) because the complaining witness was on vacation in Yemen and unavailable to appear before the second grand jury. Allard did not submit a reply. The court found the 32 days were excludable and denied the motion, saying, "The people contend and the defense does not dispute that the complaining witness was in Egypt between July 27 and August 28 and beyond the control of the people." Allard was convicted of second-degree menacing as a hate crime and sentenced to five years of probation.

On appeal, Allard argued the 32 days were not excludable because the witness's vacation in Egypt was not an exceptional circumstance and the prosecution did not exercise due diligence to obtain his grand jury testimony before he left the country. The prosecution contended this claim was unpreserved because he did not contest its assertion that the 32-day period was excludable. The Appellate Division, Second Department ruled Allard's claim was preserved for appellate review and remitted the matter for a hearing. After the hearing, Supreme Court found the prosecution was responsible for the delay because "the People failed to conclusively demonstrate that they attempted with due diligence to make the complainant available" for the grand jury.

The Appellate Division agreed and dismissed the indictment on speedy trial grounds, saying "the People failed to demonstrate that the 32-day period must be excluded from the time charged to them on the ground of 'exceptional circumstances' inasmuch as they failed to show that they 'attempted with due diligence to make the [complainant] available'...."

The prosecution argues the Appellate Division erred in holding the speedy trial claim was preserved "because, prior to the determination of the [CPL] 30.30 motion, defendant did not challenge the People's argument that the period at issue was excludable pursuant to [CPL] 30.30(4)(g), and because the trial court did not expressly decide the question that defendant raised on appeal regarding the excludability of that period."

For appellant: Brooklyn Assistant District Attorney Thomas M. Ross (718) 250-2534
For respondent Allard: Joshua M. Levine, Manhattan (212) 693-0085 ext. 212

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No. 130 Matter of Yoga Vida NYC, Inc. v Commissioner of Labor

Yoga Vida NYC, which has operated a yoga studio in Manhattan since 2009, is challenging a 2010 determination of the New York State Commissioner of Labor that its non-staff yoga instructors are employees, not independent contractors, and required Yoga Vida to make unemployment insurance contributions for those instructors. Yoga Vida also employs staff instructors who are allowed to teach only at its studio and are paid a flat rate. Non-staff instructors work under short-term contracts, choose whether they will be paid hourly or a percentage of the fees from their students, and receive no benefits. They inform Yoga Vida when they will be available for classes; they may provide their own substitutes if they become unavailable; and they are free to work at other studios, including competitors, and to solicit students at Yoga Vida to attend classes they teach elsewhere. Yoga Vida determines weekly class schedules, sets and collects fees from students, and addresses any safety concerns students raise about non-staff instructors.

An administrative law judge overruled the Commissioner and held the non-staff instructors are independent contractors, finding Yoga Vida "does not exercise a sufficient amount of direction, supervision and control ... to establish an employer-employee relationship." Although the studio set the student's fees and provided the space for classes, she said there was no evidence the instructors "are supervised and there are no prohibitions against them working for competitors. It is important to note that the non-staff yoga instructors are permitted to notify [Yoga Vida's] students of other locations or competitors where they can take their classes."

The Unemployment Insurance Appeal Board reversed the ALJ and reinstated the Commissioner's determination, finding Yoga Vida had "an employment relationship" with its non-staff instructors and must pay for unemployment insurance. "[T]he company established the fees charged, established the master schedule that was published on its website, set the class duration and provided the space and some equipment...," it said. "Moreover, the instructors were required to notify the company of substitutes.... In addition, the company evaluated the services of the instructors to determine whether their services would be continued."

The Appellate Division, Third Department affirmed, saying, "Overall, despite the existence of evidence that could result in a contrary result, the record contains substantial evidence to support the Board's decision that Yoga Vida had sufficient control over the instructors' work, thereby allowing for a finding of an employer-employee relationship...."

Yoga Vida argues the Appellate Division "failed to consider factors that have repeatedly been considered significant under New York law in the context of determining whether a person is an employee or an independent contractor," including "whether the person: (1) worked at his or her own convenience; (2) was free to engage in other employment; (3) received fringe benefits; (4) was on the employer's payroll; and (5) was on a fixed schedule."

For appellant Yoga Vida: Elizabeth A. Harlan, Baltimore, MD (410) 783-3526
For respondent Commissioner: Assistant Solicitor General Valerie Figueredo (212) 416-8019

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No. 131 Three Amigos SJL Rest., Inc., d/b/a The Cheetah Club v CBS News Inc.

This libel action arose in November 2011 from CBS news coverage of a federal crackdown on an illegal immigration ring, allegedly controlled by organized crime, that recruited women from Russia and eastern Europe and forced them to work as strippers in New York. Federal agencies called the crackdown "Operation Dancing Brides" because the women were placed in sham marriages for citizenship purposes. The operation included a search of The Cheetah Club, a strip club in midtown Manhattan. CBS covered the raid on Cheetah's and reported that "federal authorities say it is run by the mafia."

Claiming the statement defamed them, three employees of companies that provided services to Cheetah's sued CBS Broadcasting Inc., its local station and reporters for libel. Dominica O'Neill is president of Times Square Restaurant No. 1, which provides management and promotional services, and Sean Callahan is a manager for the company, responsible for supplying food and beverages to Cheetah's. The third individual plaintiff, Philip Stein, is a manager for Times Square Restaurant Group, which books dancers for the club. CBS moved to dismiss the complaint, arguing the plaintiffs could not show the statement was "of and concerning" them since the news reports made no mention of the plaintiffs or their employers. The plaintiffs argued the statement would be seen as referring to them because they were at the club on a daily basis, overseeing all aspects of its operation and interacting with customers.

Supreme Court granted the motion to dismiss, finding the statement was not "of and concerning" the plaintiffs. "The challenged reports do not state that all or even any employees of Cheetah's are members of organized crime, much less that employees of unnamed affiliated companies are members of organized crime...," it said.

The Appellate Division, First Department affirmed in a 3-2 decision, saying "[P]laintiffs' relationship to Cheetah's is peripheral, and the public at large would have no reason to think that they were implicated in the federal investigation.... While the individual plaintiffs involved" in providing supplies or booking dancers "may be present at the club 'on a daily basis ... and are highly visible to ... customers'..., they are nevertheless mere employees. Significantly, they are not employees of Cheetah's itself, but rather, present at the club to perform the services provided to it by their own employers. They can hardly be understood to be 'those who "run" the Cheetah Club,' which implies persons in a position of ownership or control...." It said, "[E]xposing news organizations to defamation claims by any business supplying goods or services to an entity reported to be engaged in illegal conduct would have a chilling effect on free speech...."

The dissenters said, "[T]here are sufficient facts pleaded at this early stage in the litigation to reasonably connect the individual plaintiffs" with the statement that Cheetah's is run by the Mafia. "O'Neill provided an affidavit in which she alleged extrinsic facts that she, Callahan, and Stein were part of a 'small and exclusive group of individuals' who ran and managed Cheetah's, with constant visible contact with customers, officials, dancers, and vendors. Taking these allegations as true..., the individual plaintiffs are members of a small, identifiable group that allegedly 'ran' Cheetah's and are thus implicated in the allegedly defamatory statement."

For appellants O'Neill et al: Nichelle A. Johnson, New Rochelle (914) 633-4102
For respondent CBS: Jay Ward Brown, Manhattan (212) 850-6100