

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 or gspencer@nycourts.gov.

To be argued Tuesday, February 14, 2017

No. 27 O'Brien v The Port Authority of New York and New Jersey

Thomas J. O'Brien, Jr. was injured in July 2010 while working for DCM Erectors as a crane operator and mechanic at the construction site of the World Trade Center Freedom Tower. He slipped and fell down a temporary steel staircase that gave workers access to floors under construction. The staircase, or tower scaffold, was outdoors and was wet with rain when he fell. O'Brien sued The Port Authority of New York and New Jersey, the project owner, and Tishman Construction Corporation, the general contractor, alleging violations of the Labor Law.

Supreme Court denied summary judgment to both sides on O'Brien's claim under Labor Law § 240(1), the "scaffold law," which requires owners and contractors to provide scaffolding, ladders "and other devices which shall be so constructed, placed and operated as to give proper protection" to construction workers against elevation-related risks. It said conflicting affidavits from the parties' experts raised a question of fact about whether the staircase provided proper protection. The court granted summary judgment to O'Brien under Labor Law § 241(6), saying the evidence showed the defendants violated Industrial Code (12 NYCRR § 23-1.7[d]), which prohibits employers from allowing workers "to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition."

The Appellate Division, First Department reversed. On a 4-1 vote, it granted summary judgment to O'Brien on liability under section 240(1), saying, "A fall down a temporary staircase is the type of elevation-related risk to which section 240(1) applies, and the staircase ... is a safety device within the meaning of the statute.... The fact that the [parties'] experts conflict as to the adequacy and safety of the temporary stairs does not preclude summary judgment in plaintiff's favor..., where, as here, stairs prove inadequate to shield him against harm resulting from the force of gravity.... Plaintiff's expert opined, *inter alia*, that the stairs showed obvious signs of longstanding use, wear and tear; therefore, a decrease in anti-slip properties was to be expected. Given that it is undisputed that the staircase, a safety device, malfunctioned or was inadequate to protect plaintiff against the risk of falling, plaintiff is entitled to summary judgment, whatever the weather conditions might have been." The court unanimously reversed the grant of summary judgment under section 241(6), saying, "Issues of fact exist concerning whether someone within the chain of the construction project had notice of the hazardous condition."

The dissenter said, "The parties' conflicting expert affidavits raise a triable issue as to whether a staircase offering superior protection from slipping hazards could have been provided. If a factfinder determines that no better staircase could have been provided, there was no violation of Labor Law § 240(1).... In my view, the motion court correctly determined that neither side was entitled to summary judgment.... While the staircase in question was a safety device within the purview of section 240(1), the record, including the conflicting expert affidavits concerning the adequacy of the staircase under prevailing safety standards, gives rise to a question of fact as to whether the accident arose from a violation of the statute...."

For appellants Port Authority and Tishman: Christopher Simone, Lake Success (516) 488-3300
For respondent O'Brien: David H. Perceman, Manhattan (212) 977-7033

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No. 28 People v Leonard Williams

In December 2009, a group of men broke through the door of Lynville Scott's apartment in Crown Heights. They beat him and cut him with a knife, shot him in the legs, and poured bleach in his eyes while demanding money. They left with about \$300. Scott testified at trial that Leonard Williams was among the men who broke in, but he could not remember who assaulted him. Scott's brother, Kurt Clarke, testified that he drove by the apartment in his truck just before the break-in and "thought" he recognized Williams among a group of men on the street. Surveillance video recorded at that time showed a group of men in hoodies walking on the street in a snowstorm along with a passing truck. None of the men could be identified from the video and, when Clarke was asked if the truck was his, he replied, "I can't say."

During his summation, the prosecutor made a PowerPoint presentation with slides of trial evidence, including still images taken from the surveillance video. One slide was a photo of Scott's street and was labeled, "Kurt Clark sees Defendant." Three stills from the video were labeled "Kurt Clark's Truck." Supreme Court instructed the jury to disregard the labels and "to look at the exhibit as you saw it." After a defense objection, the court said the labels "are amendments for the exhibits" and ordered the prosecutor to stop showing them. "I am not allowing any more ... superimposed words. None of that has been presented to the jury. You can say it, but you can't show it," the court said. Williams was convicted of first-degree burglary and second-degree weapon possession and assault. He was sentenced to 17 years in prison.

The Appellate Division, Second Department rejected Williams' claim that the prosecutor's slide show deprived him of a fair trial. "To the extent that the defendant contends that the prosecution mischaracterized the trial evidence with slides indicating that a truck belonged to one of the People's witnesses and that this witness saw the defendant on the street just prior to the assault, the defendant's challenges are preserved for appellate review. The defendant's remaining challenges regarding the slide show are unpreserved.... In any event, the slide show was not improper.... To the extent that there was any prejudice to the defendant, it was mitigated by the court's curative instruction to the jury..., which the jury is presumed to have followed."

Williams argues the prosecutor's slides deprived him of a fair trial because they "contained trial exhibits that he had modified by adding captions expressing his own personal conclusions regarding important factual questions. By adding his own captions..., the prosecutor improperly exposed the jury to altered exhibits that had never been admitted into evidence.... Making matters worse, the content of the slides misrepresented the evidence and transformed the prosecutor into an unsworn witness.... For example, contrary to the unequivocal assertion in a ... slide that an eyewitness "saw" appellant, the witness had testified only that he 'thought' he saw appellant, explaining that his view 'wasn't clear.' That witness also testified that he did not know if a truck depicted in a PowerPoint slide was his...."

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For respondent: Brooklyn Assistant District Attorney Jean M. Joyce (718) 250-3383

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No. 29 People v Trevor Anderson

Trevor Anderson was charged with attempted murder and related crimes for allegedly shooting a man, who was dating Anderson's ex-girlfriend, at least twice with a .45 caliber handgun after confronting him on the street in front of his Brooklyn home in March 2010. Anderson's first trial ended with a hung jury.

Prior to his second trial, Supreme Court said at a Sandoval hearing that, if Anderson took the stand to testify, the prosecutor could question him about a witness's statement that she had seen him in possession of two guns some time before the shooting. Anderson chose not to testify. During summations, the prosecutor made a PowerPoint presentation that included slides of trial exhibits with superimposed labels, a timeline, and a photograph of Anderson surrounded by text boxes that said: "Lay in wait for [the victim] with .45 cal handgun;" "Fired .45 handgun twice from less than 8 feet away...;" "Fired .45 handgun twice more as [the victim] ran from deft;" "His bullets hit [the victim] twice in front and twice in back;" among other things. Anderson was convicted of second-degree murder and weapon possession. He was sentenced to 20 years in prison.

The Appellate Division, Second Department affirmed. While the trial court "improvidently exercised its discretion in determining, after a Sandoval hearing..., that the People could inquire about the defendant's prior conduct of possessing guns...", it said, "the fact that the defendant had possessed guns on a prior occasion had little bearing on his credibility..." It found the error harmless. As in No. 28, People v Leonard Williams (also to be argued today), the Second Department rejected Anderson's claim that the labeled slides in the prosecutor's PowerPoint presentation deprived him of a fair trial. It said his claim was unpreserved and, in any event, "the challenged remarks did not deprive the defendant of a fair trial.

Anderson argues the Sandoval error "was not harmless because there was plausible testimony that appellant could have provided" to negate the element of intent on the attempted murder charge, including that he only meant to "frighten," the victim, the gun discharged accidentally, or he feared the victim "was about to use deadly force against him." He says his attorney provided ineffective assistance during the prosecutor's summation when he failed to object to "an 80-slide PowerPoint presentation that contained numerous altered trial exhibits, including a version of appellant's arrest photo onto which prejudicial text had been inserted; a misleading timeline of events; and slides conveying the prosecutor's own assessments of the demeanor and credibility of the People's witnesses."

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