# *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 Thursday, February 9, 2017 (arguments begin at noon)

**No. 23 People v Charles Smith**

Charles Smith walked into a Queens check cashing store in November 2011 and demanded money from the teller, who was alone and locked behind a counter with a bulletproof plexiglass partition. The teller testified that Smith told her he had a gun and that one of his hands was under his sweatshirt at his waist. When she did not comply, she said, Smith threatened to shoot her. After 10 or 15 minutes, he left the store empty-handed. Police arrested Smith minutes later, at which time he was unarmed. He was convicted of attempted robbery in the first degree and sentenced to 16 years to life in prison.

On appeal, Smith argued there was insufficient evidence to support his conviction under Penal Law § 160.15(4), which provides that a defendant is guilty of first-degree robbery when, during the commission of the crime or his immediate flight, he "displays what appears to be a ... firearm." Smith relied on People v Lopez (73 NY2d 214), which said the prosecution "must show that the defendant consciously displayed something that could reasonably be perceived as a firearm ... and that the victim actually perceived the display." Although "a mere threat without some display is insufficient," the Court said that "even a hand consciously concealed in clothing may suffice..., if under all the circumstances the defendant's conduct could reasonably lead the victim to believe that a gun is being used during the robbery."

The Appellate Division, Second Department affirmed Smith's conviction, finding there was sufficient evidence under Lopez that he "displayed what appeared to be a firearm."

Smith argues that his conviction should be reduced to attempted robbery in the third degree under Lopez. "This Court has never interpreted the display element of [section] 160.15(4) so broadly as to encompass a robbery in which a defendant did not make any volitional movement or gesture suggesting the presence of a firearm," he says, and there is no evidence that he "engaged in any affirmative, volitional act intended to convey the impression that he possessed a firearm. Instead, the sum total of the People's proof consisted of a single witness's testimony that Mr. Smith demanded money and stated that he had a gun and would shoot her, and that one of his hands happened to be obscured by his clothes during their interaction.... [T]he record reflects that Mr. Smith's hand remained passively out of view throughout the encounter with [the teller], even after she ignored his demands for money."

The prosecution argues the evidence satisfied Lopez. Smith's "actions and his threats demonstrated his conscious intent to create the impression that he had a handgun under his jacket. Moreover, the victim, having heard these threats and seen defendant's hand placed under his shirt at his waist, perceived the display and subjectively believed that, while she could not be certain, defendant had a gun.... [D]efendant did not simply keep his hand out of view; he held it under his shirt, at his waist -- where guns are often carried -- while telling the cashier that he had a gun and threatening to shoot her. Based on this evidence, the jury could reasonably infer that the gesture was not a random passive act fortuitously coinciding with the threat to shoot but that it was meant to convey what it in fact did convey, that defendant had a gun."

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For respondent: Queens Assistant District Attorney William H. Branigan (718) 286-6652

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To be argued Thursday, February 9, 2017 (arguments begin at noon)

**No. 24 Rivera v Department of Housing Preservation and Development**
**No. 25 Matter of Enriquez v Department of Housing Preservation and Development**

When a New York City agency orders tenants to vacate their apartment due to hazardous conditions or code violations, the city's Administrative Code authorizes the Department of Housing Preservation and Development (HPD) to provide relocation assistance including "temporary shelter benefits" to the displaced tenants and to recover the cost of "moving expenses or other reasonable allowances" from responsible landlords by filing a lien against their property. In these cases, brought by landlords seeking summary discharge of such liens, the question is whether courts may determine that claimed expenses are unreasonable and render the lien facially invalid without an evidentiary hearing. The Appellate Division has split on the issue.

In Case No. 24, the Fire Department issued a vacate order in 1995 that displaced two tenants from a Brooklyn building owned by David Rivera. In 2000, HPD filed a lien for $76,103.78 in relocation costs, including $75,228 for hotel expenses incurred over a period of four and a half years and $875.78 for administration costs. Rivera argued the lien was facially defective because the cost and length of the hotel stay were unreasonable. Supreme Court denied his motion for summary judgment and dismissed the complaint, saying "the lien is not invalid on its face, given that hotel expenses for tenants are allowable" under the Administrative Code, and thus the lien "was not subject to summary discharge" without a foreclosure trial.

The Appellate Division, Second Department affirmed. "A court has no inherent power to vacate or discharge a notice of lien except as authorized by Lien Law § 19(6).... Where, as here, the notice of lien was not invalid on its face, any dispute regarding the validity of the lien must await trial thereof by foreclosure...," the court said.

In Case No. 25, the Department of Buildings issued a vacate order in 2010 that displaced one tenant from a Bronx building owned by Leonardo Enriquez. In 2011, HPD filed a lien for $16,862.89 in relocation expenses, including $16,425 for hotel expenses incurred over one full year and $437.89 for administration costs. Supreme Court dismissed Enriquez's suit, saying the lien "is facially valid" and "any dispute ... regarding the underlying validity of the lien" must be resolved after a foreclosure hearing.

The Appellate Division, First Department reversed and discharged the lien. Although hotel expenses are recoverable, it said, "HPD's financing of the tenant's residence in a hotel for an entire year was not reasonable.... Nor does HPD's payment of a year's worth of hotel charges qualify as 'temporary shelter benefits'.... Accordingly, because the notice of lien states that it is based on one year's worth of hotel charges, it is facially invalid and should be summarily discharged."

For appellant Rivera: Jason Chang, Manhattan (212) 929-4200
For respondent Enriquez: Ian Manas, Bronx (718) 328-0422
For respondent/appellant HPD: Asst. Corporation Counsel Jeremy W. Shweder (212) 356-2611

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To be argued Thursday, February 9, 2017 (arguments begin at noon)

**No. 26 People v Ryan Brahney**

Ryan Brahney killed his former girlfriend, Bridget Bell, with a butcher knife after breaking into her home in the City of Auburn, Cayuga County, in November 2011. The medical examiner said Bell suffered 38 stab and slash wounds, but did not specify which of them were fatal. The police found signs of a struggle in her upstairs bedroom and smears and drops of blood in the upstairs hallway and on the stairs leading down to the living room, where her body was found. Brahney, who admitted killing the victim, presented a defense of extreme emotional disturbance. He was convicted at a bench trial of seven charges, including intentional murder in the first degree and two counts of burglary in the first degree, one based on his causing physical injury to the victim and the other on his use of a dangerous instrument.

County Court sentenced him to concurrent terms of 25 years on each of the burglary counts and directed that they run consecutively to a sentence of 25 years to life on the intentional murder count. Brahney argued on appeal that the consecutive sentencing violated Penal Law § 70.25(2), which requires concurrent sentences "for two or more offenses committed through a single act or omission, or through an act or omission which in itself constituted one of the offenses and also was a material element of the other."

The Appellate Division, Fourth Department upheld the consecutive sentences on a 3-2 vote, finding the burglary and the murder were committed through separate acts. "The evidence established that, after defendant entered the apartment through a window that he smashed with a cinder block, he dragged the victim from her bed and down the stairs to the living room, where he killed her," it said. The blood found in the upstairs hall and on the stairs showed that Bell was injured while she was still upstairs, but it said the amount of blood there was relatively small, while "there was a tremendous amount of blood evidence in the downstairs of the dwelling where the victim died.... [T]he People established that there were separate offenses, i.e., that the burglary was completed while the victim was still upstairs and that the murder occurred downstairs.... Thus, we conclude that the burglary and the murder offenses were 'committed through separate acts, though they are part of a single transaction.'"

The dissenters argued the consecutive sentences were illegal because "the People failed to meet their burden of establishing that the burglary and murder offenses were committed by separate and distinct acts.... Considering the fact that the victim's blood was found upstairs and on the staircase, it is apparent that defendant stabbed the victim at least once while they were upstairs, which would complete the burglary offenses. Unlike the majority, however, we conclude that the murder offense may also have occurred through that same act. In other words, the wound or wounds that the victim sustained while upstairs may have ultimately caused her death."

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