

# *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](mailto:gspencer@nycourts.gov).

To be argued Thursday, January 12, 2017

## **No. 13 People v William Flanagan**

*(papers sealed)*

William Flanagan was convicted of three misdemeanor charges -- two counts of official misconduct, one alleging malfeasance and the other nonfeasance, and sixth-degree conspiracy -- for allegedly joining with other supervising officers of the Nassau County Police Department to prevent the arrest of a 17-year-old high school student in 2009, when Flanagan was a deputy police commissioner. The student's school, John F. Kennedy High School in Bellmore, accused him of stealing electronic equipment worth more than \$10,000 and it sought his arrest. The student's father, who was a friend of Flanagan and a benefactor of the police department, sought the officers' assistance in returning the stolen property in hopes it would induce the school to drop the charges. The student was not arrested until 2011, after The Long Island Press published an article about the matter. Flanagan was convicted at trial and two other police officials entered guilty pleas. The Appellate Division, Second Department affirmed Flanagan's conviction.

Flanagan's official misconduct conviction for malfeasance, under Penal Law § 195.00(1), requires proof he committed "an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act is unauthorized." Flanagan argues that his actions were not criminal because he was authorized to return the stolen equipment to the school at the school's request. The prosecution argues his actions were unauthorized because he arranged to return the stolen property "for a corrupt purpose: to avert [the student's] arrest and thus benefit [his] influential father -- not for the legitimate purpose of assisting JFK high school." Flanagan responds that the statute "does not permit conviction for an 'authorized' act committed for an illegitimate purpose" and, "in any event, the People failed to prove the existence of any nexus between the return of the property and the police's ability to arrest" the student.

The nonfeasance charge under Penal Law § 195.00(2) requires proof that Flanagan "knowingly refrain[ed] from performing a duty which is imposed upon him by law or is clearly inherent in the nature of his office." The prosecution argues that his failure to arrest the student despite having probable cause and a victim willing to press charges "was an abuse of discretion that rose to the level of corruption." The Police Department Manual leaves decisions on whether or not to make an arrest to the "reasonable discretion and sound judgment" of officers, according to Flanagan, and he argues, "The failure to perform a discretionary duty cannot form the basis for criminal liability" for nonfeasance under the statute.

Flanagan also argues the trial court improperly admitted hearsay statements made by his alleged co-conspirators before and after his own involvement. The "agency-based co-conspirator exception to the hearsay rule logically precludes the admissibility of such statements; for under the rules of agency, one cannot speak as the agent of, and bind, another before the agency relationship begins or after it is terminated." The prosecution argues the statements are admissible based on "the notion that upon entry into a conspiracy, a conspirator adopts his coconspirators' pre-existing verbal acts that 'enhance the enterprise of which he is taking advantage.'"

For appellant Flanagan: Donna Aldea, Garden City (516) 745-1500

For respondent: Nassau County Assistant District Attorney Yael V. Levy (516) 571-3800

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To be argued Thursday, January 12, 2017

## **No. 14 People v Michael Pena**

*(papers sealed)*

Michael Pena was a New York City police officer in August 2011, when he sexually assaulted a 25-year-old school teacher at gunpoint in upper Manhattan. Pena approached the woman, whom he had never met, on a street corner as she was going to her first day of work at an elementary school at about 6 a.m. He showed her his service weapon and dragged her into a courtyard, where he committed three criminal sexual acts while holding the gun to her head.

Pena was convicted at trial of three counts of predatory sexual assault and three counts of criminal sexual act in the first degree. A defendant is guilty of predatory sexual assault under Penal Law § 130.95(1) when he commits the crime of first-degree criminal sexual act and, during the commission of that crime, "[u]ses or threatens the immediate use of a dangerous instrument." Supreme Court sentenced him to the maximum term of 25 years to life on each count of predatory sexual assault and ordered the sentences to run consecutively, resulting in an aggregate prison term of 75 years to life.

The Appellate Division, First Department affirmed, saying Pena failed to preserve his claim that the aggregate sentence was unconstitutionally excessive. It also held that consecutive sentences were lawfully imposed. "Although defendant's convictions on three counts of predatory sexual assault involved a single transaction and shared the dangerous instrument element, consecutive sentences were permissible because the three criminal sexual acts were separate and distinct....," it said.

Pena acknowledges that his crime was "extremely serious," but he argues his aggregate sentence "is grossly disproportionate" and violates the prohibitions against cruel and unusual punishments in the federal and New York State constitutions. His sentence of 75 years to life is "the equivalent of 3 murder terms for a first-time offense that ... did not result in any physical impairment to the victim.... [H]e did not beat or even strike his victim, who thankfully did not even require inpatient hospitalization....," he says. "Even-handed justice has clearly not been accomplished when both the most-recent Federal and New York State statistical studies ... show without question ... that the average sentence for rape crimes -- including those committed in a brutal manner, those committed by serial rapists, and those committed on child victims -- is 12-years imprisonment...." He says his 75-year minimum term "is a full 50 years longer than the average minimum sentence imposed for murder in our state."

The prosecution says Pena's constitutional claims are unpreserved and, in any event, his "aggregate sentence is plainly constitutional." The consecutive terms imposed "fit within the statutory range proscribed by the Legislature. Thus, as this Court has consistently held, those sentences are afforded a strong presumption of constitutionality." It says Pena "repeatedly lumps together his separate and distinct acts of sexual assault to suggest that he should be punished as if he committed a 'single offense' or 'crime.' However, the logical result of defendant's assertion ... is that a sexual predator commits only one crime no matter how many times and ways he violates his victim," which "clearly violates common sense and New York law."

For appellant Pena: Ephraim Savitt, Manhattan (917) 885-5753

For respondent: Manhattan Assistant District Attorney Joshua L. Haber (212) 335-9000

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To be argued Thursday, January 12, 2017

## **No. 15 People v Kevin Fisher**

Kevin Fisher and Clovis Roche were jointly indicted after a fatal altercation with four other men in Roche's Manhattan apartment in January 2009. The other men, led by Rodney Lewis, had come to reclaim a television set and Roche resisted. During the ensuing struggle, Roche fatally shot Lewis. Fisher then took the gun from Roche and they fled the apartment. The gun was never recovered. Roche was charged with second-degree murder, a class A felony. Fisher was charged with hindering prosecution in the first degree under Penal Law § 205.65, which provides that a defendant is guilty "when he renders criminal assistance to a person who has committed a class A felony, knowing or believing that such person has engaged in conduct constituting a class A felony."

On the eve of their joint trial, Fisher pled guilty to hindering prosecution in the second degree in return for a promised sentence of one and a half to three years in prison. Roche proceeded to trial and the jury acquitted him of all felony charges, convicting him only of a misdemeanor weapon possession charge. Prior to Fisher's sentencing for hindering prosecution, he moved to withdraw his guilty plea on the ground that Roche's acquittal rendered him innocent.

Supreme Court denied the motion, rejecting Fisher's claim that the People should be collaterally estopped from prosecuting him by the acquittal of Roche. "If [Fisher] had not pleaded guilty already, the People would not be barred by collateral estoppel from trying him for hindering prosecution of Roche's murder even though Roche was acquitted of that same murder...", it said. "[A] defendant whose own interests were not put directly in issue at a prior trial ... 'may not utilize the doctrine of "collateral estoppel" as a bar to his own prosecution.'"

The Appellate Division, First Department affirmed saying "a person may validly plead guilty to hindering prosecution in the first degree without knowing whether or not the assisted person will be convicted of the underlying felony at the subsequent trial. Indeed, as the Court of Appeals has noted, the hindering prosecution statute does not require proof that the assisted person was ever arrested or convicted of the underlying felony (see People v Chico, 90 NY2d 585, 588 [1997])."

Fisher argues he should have been allowed to withdraw his guilty plea after Roche, "whose guilt was an element of [his own] offense, was acquitted at trial," rendering Fisher "actually innocent of hindering prosecution." While the Court of Appeals said in Chico "that proving a defendant's guilt of hindering prosecution 'does not require proof that the assisted person was ever arrested or convicted'...", it has never suggested that an individual may be convicted of hindering prosecution notwithstanding the *trial and acquittal* of the assisted person. Such an unfair result was neither addressed in, nor dictated by, Chico." He says collateral estoppel barred further prosecution of him once Roche was acquitted. "Roche's trial afforded the prosecution 'a full and fair opportunity to litigate the precise issue involved' in the prosecution of Fisher for hindering prosecution -- whether Roche committed a felony, specifically second-degree murder -- when he shot Lewis.... [T]he jury's verdict of acquittal ... meant that the jurors made a factual determination that Roche did not commit a crime when he shot Lewis."

For appellant Fisher: Matthew A. Wasserman, Manhattan (212) 402-4146

For respondent: Manhattan Assistant District Attorney Luis Morales (212) 335-9000