

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 Wednesday, March 22, 2017

No. 3 People v Shawn J. Sivertson

Employees of a Buffalo convenience store called 911 to report that a man with a knife had stolen cash from their charity collection jar in November 2012. The store's shift manager told responding police officers that she had followed the robber as he fled behind a building across the street. Two residents told officers that Shawn Sivertson matched the description of the perpetrator and that he lived in the lower rear apartment of the building. Looking through his window, officers saw Sivertson watching television and they saw a pair of gloves like those worn by the robber. They knocked on the window and the door, shouting for him to open the door. When he did not respond, they forced the door open, arrested him, and seized the gloves, a knit cap, and three knives from the kitchen. Sivertson remained largely silent after his arrest.

After a suppression hearing, Supreme Court found the warrantless entry and search were justified by exigent circumstances. At trial, defense counsel did not object when the prosecutor suggested during summation that Sivertson's failure to declare his innocence when the police burst into his apartment was evidence of his guilt. Sivertson was convicted of first-degree robbery and sentenced as a persistent violent felony offender to 20 years to life in prison.

The Appellate Division, Fourth Department affirmed, finding "there was an urgent need that justified the warrantless entry in this case." It said the police "reasonably believed that they had located the perpetrator, who was still armed, as they observed defendant in his apartment unit from the outside" and they "did not know if defendant had access to the remainder of the building," which might provide a means of escape. The court said, "We agree with defendant that certain comments made by the prosecutor during summation were improper, particularly those reflecting upon defendant's silence or demeanor following his arrest.... We conclude, however, that the prosecutor's comments 'were not so pervasive or egregious as to deprive defendant of a fair trial'" and defense counsel did not render ineffective assistance by failing to object.

Sivertson argues there were no exigent circumstances, in part because the officers "had a viable alternative to forcibly entering appellant's apartment: one or more of the many officers involved in this investigation could have been posted outside of appellant's door and windows, ready to arrest him if he sought to leave his home," while others obtained a warrant. And even if they had probable cause, he said, "no officer testified that he saw a knife or any other sort of weapon in the apartment when looking from the outside." He also argues that his attorney's failure to object to the prosecutor's comments about his post-arrest silence was not harmless because "the evidence was not overwhelming" in this case, where the store clerks saw only the eyes of the robber, whose face was covered by a scarf, and only one of them said he had a knife.

For appellant Sivertson: Timothy P. Murphy, Buffalo (716) 853-9555

For respondent: Erie County Assistant District Attorney Ashley R. Lowry (716) 858-7922

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No. 38 People v John Stone

John Stone was charged with stabbing his estranged wife's boyfriend, Lance Smallwood, as the couple was crossing a Bronx street in February 2010. The wife, who was divorced from Stone by the time of trial, refused to testify against him and the only eyewitness identification was made by Smallwood. The prosecutor called to the stand a detective who testified that he "conducted a telephone interview of a witness," Stone's wife, on the morning after the stabbing and then "did several computer checks on the person that had been indicated as a suspect, John Stone." Supreme Court struck the detective's testimony from the record and instructed the jury to disregard it, but denied Stone's motion for a mistrial. Stone was convicted of first-degree assault.

Prior to sentencing, Stone moved to set aside the verdict on the ground of juror misconduct based on an interaction between Smallwood and one of the jurors after the verdict was announced. In support, Stone attached an affidavit of his girlfriend, who said a group of the jurors was standing together outside the courthouse when Smallwood approached and spoke to one of them in a manner that indicated they had a prior personal relationship. The prosecutor responded with an affidavit by Smallwood, who said he approached the jurors and thanked them for "making the right decision." He denied that he knew any of the jurors personally. The court, finding Smallwood's account "is clearly more consistent with reality than defendant's girlfriend's assertions," denied the motion without a hearing. Stone was sentenced to 22 years in prison.

The Appellate Division, First Department affirmed, saying the trial court "properly exercised its discretion in denying defendant's mistrial motion, made after a detective gave testimony that may have implied that a nontestifying declarant had implicated defendant. The court prevented any prejudice by striking the testimony and instructing the jury to disregard it, an instruction that the jury is presumed to have followed...." It ruled Stone was not entitled to a hearing on his CPL 330.30 motion to set aside the verdict due to juror misconduct. "The events described in the affidavit" submitted by Stone, "standing alone, did not constitute any basis for setting aside the verdict," it said. "The affidavit related an ambiguous remark by the victim that allegedly suggested the possibility of an undisclosed prior relationship between the victim and one of the jurors. However, the People supplied an affidavit from the victim denying any relationship, and explaining that he was simply thanking the jurors for reaching what he believed to be a just verdict."

Stone argues the detective's testimony, which gave the "clear implication" that his ex-wife identified him as the perpetrator, violated his right to confront witnesses and to a fair trial. He says the detective's statements constituted testimonial hearsay, and the court's curative instruction could not "rectify the error of admitting such devastatingly prejudicial evidence." He also argues that he was entitled to a hearing on his mistrial motion under CPL 330.40(2) because he asserted a legal basis, juror misconduct, supported by a witness's sworn allegations. "No more is required to make out a showing for a hearing, and yet the trial court summarily denied the motion in the apparent belief that it could simply credit the prosecution's account over the defense's...."

For appellant Stone: Lisa A. Packard, Manhattan (212) 577-2523 ext. 528

For respondent: Special District Attorney Robert A. Spolzino, White Plains (914) 323-7000

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No. 39 Nomura Home Equity Loan, Inc., Series 2006-FM2, by HSBC Bank USA, National Association v Nomura Credit & Capital, Inc. (and three other actions)

These cases stem from four residential mortgage-backed securities transactions sponsored by Nomura Credit & Capital, Inc. in 2006 and 2007. Nomura sold the loans through mortgage loan purchase agreements (MLPA) to an affiliate, which transferred them to four trusts pursuant to pooling and servicing agreements (PSA) and sold interests in the pooled loans to investors. In section 7 of each MLPA, Nomura warranted that the statements and reports it furnished in connection with the transactions "do not contain any untrue statement of material fact or omit to state a material fact necessary to make the statements contained therein not misleading." In section 8, Nomura made specific representations regarding the quality of the mortgage loans. Section 9(a) of the MLPAs provides that, upon discovery "of a breach of any of the representations ... contained in Section 8," Nomura must cure the breach or repurchase the affected loan at the purchase price; and section 9(c) states that Nomura's obligation to cure or repurchase defective loans "constitute the sole remedies of the Purchaser against the Seller respecting ... a breach of the representations ... contained in Section 8." The PSA's contain similar "sole remedies" language regarding breaches of representations "set forth in ... Section 8" of the MLPA. In 2012, with investors claiming breaches of Nomura's warranties affected thousands of the pooled loans, HSBC Bank USA, as trustee of the four trusts, brought these actions seeking repurchase of the loans by Nomura or damages for its breach of that obligation, and damages for its alleged violation of the No Untrue Statement provision.

Supreme Court denied Nomura's motion to dismiss claims based on its repurchase obligation, but dismissed claims for damages under the No Untrue Statement provision, saying "the relief available to plaintiff is limited by the sole remedy provision ... to specific performance of the repurchase protocol, or if loans cannot be repurchased, to damages consistent with its terms." The court relied on its prior ruling in a related action against Nomura, which said, "The complaint does not allege any breach of the No Untrue Statement provision that was not also a breach of the Mortgage Representations to which the sole remedy provisions apply.... [T]he sole remedy provision establishing the repurchase protocol for breaches of Mortgage Representations would be rendered meaningless if the duplicative representations in the Mortgage Loan Schedule were not subject to that protocol, and could support an independent breach of the No Untrue Statement provision."

The Appellate Division, First Department modified by reinstating the claims for breach of the No Untrue Statement provision in section 7 of the MLPA. It said, "By its plain language, section 9(c) says that "[t]he obligations of the Seller [Nomura] ... to cure or repurchase a defective Mortgage Loan ... constitute the sole remedies of the Purchaser against the Seller *respecting a missing document or a breach of the representations and warranties contained in Section 8*" (emphasis added)." It said, "Had these 'very sophisticated parties' desired to have the sole remedy provisions apply to both section 8 and section 7 breaches, 'they certainly could have included such language in the contracts. They did not do so....' In any event, section 13 of the MLPA provides that remedies are cumulative."

For appellant Nomura Credit & Capital: Joseph J. Frank, Manhattan (212) 848-4000

For respondent Trustee for NHELI 2006-FM2 and NHELI 2007-3:

Christopher P. Johnson, Manhattan (212) 506-1700

For respondent Trustee for NHELI 2007-2 and NAAC 2006-AF2:

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