

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, May 3, 2017

No. 65 People v Lawrence P. Frumusa

Lawrence Frumusa was charged with stealing nearly \$250,000 by diverting credit card receipts from Webster Hospitality Development LLC (WHD), of which he was the majority owner, to other companies wholly owned by him between December 1, 2008 and June 15, 2009, while WHD was in receivership. Frumusa allegedly used a Pennsylvania bank account he had opened in WHD's name to convey the money to his other businesses. WHD's minority owner sued him in 2008, after a falling out over Frumusa's business practices, and in February 2009 Supreme Court appointed a receiver to manage WHD. In July 2009, the court ordered Frumusa's businesses to turn over to WHD all of the funds they had received from the Pennsylvania account. In October 2009, the court issued an order holding Frumusa's businesses in civil contempt for "willfully and deliberately" failing to comply with the order. It found "they have converted \$249,196.28 of WHD's monies" and said their conduct "was calculated to and actually did defeat, impair, impede and prejudice the rights and remedies of WHD."

At Frumusa's criminal trial for theft of the diverted funds, the prosecutor sought to introduce the civil contempt order as Molineux evidence of his intent to steal. Monroe County Court admitted the contempt order into evidence. Frumusa was convicted of second-degree grand larceny and sentenced to 4 to 12 years in prison.

The Appellate Division, Fourth Department affirmed on a 3-2 vote, finding the evidence of civil contempt was properly admitted. "[T]he contempt order does not constitute a finding that defendant stole the money; rather, it demonstrates that defendant's businesses failed to abide by the earlier order to return money to WHD..." it said. "We thus conclude that the contempt order was properly admitted as relevant evidence of defendant's intent to deprive WHD of the money by 'withhold[ing] it or caus[ing] it to be withheld from [WHD] permanently'...." It also found the "significant probative value" of the contempt order outweighed its prejudicial effect because "it showed that defendant's conduct did not merely constitute poor financial management but, rather, that defendant, through his businesses, intended to deprive WHD of the diverted money permanently."

The dissenters argued the contempt order was not Molineux evidence, in part because "it was evidence involving conduct of defendant, through his businesses, that was related to the same crime with which defendant was charged. Indeed, the contempt order arose from an order directing defendant's businesses to turn over the very funds that the People accused defendant of stealing." They also argued the probative value of the evidence did not outweigh its prejudicial effect. "Inasmuch as the contempt order stated that defendant, through his businesses, 'converted' the funds at issue to the detriment of the rights and remedies of WHD, the jury had before it a document that essentially constituted ... a judicial finding of defendant's larcenous intent. The prejudicial effect ... was nothing other than obvious and extreme."

For appellant Frumusa: Drew R. DuBrin, Rochester (585) 753-4947

For respondent: Monroe County Assistant District Attorney Robert J. Shoemaker (585) 753-4810

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To be argued Wednesday, May 3, 2017

No. 66 People v Nirun Honghirun

(papers sealed)

Nirun Honghirun was arrested in 2011 on charges that he sexually abused a young girl years earlier, from 1999 to 2004, while he was babysitting her at his home in Queens. The abuse allegedly began when the girl was five years old and ended when she was ten. She did not tell any adults about the abuse for seven years. She first disclosed it to her high school guidance counselor and then to a police detective in February 2011, when she was 17. The counselor and the detective were permitted to testify at trial about their discussions with the girl under the prompt outcry exception to the hearsay rule. Under the same exception, the girl was allowed to testify that she had told a couple of close friends about the molestation while playing a game of "confessions" when she was 13, three years after the abuse ended. Honghirun was convicted of first-degree course of sexual conduct against a child and sentenced to 15 years in prison.

The Appellate Division, Second Department affirmed, saying Honghirun's claim that the testimony did not qualify as prompt outcries was unpreserved because his attorney did not object to its admission at trial. "Moreover, this argument was waived in light of the fact that the defense elicited the same testimony on cross-examination...," it said. "The defendant was not deprived of the effective assistance of counsel, as the record reveals that defense counsel provided meaningful representation..."

Honghirun argues he was denied effective assistance of counsel. "Here, defense counsel's obvious lack of familiarity with the law of prompt outcry resulted in the repeated admission at trial of detailed accounts of the complainant's disclosures that were made three and seven years after the purported sexual abuse ended. Counsel failed to seek preclusion of the delayed disclosure testimony and allowed the prosecutor to repeatedly use the disclosures to bolster the complainant's testimony. Counsel stayed silent as the prosecutor elicited highly prejudicial details of abuse from an outcry witness and a detective, only to later elicit similar damaging details from the same detective, thus further corroborating the complainant's otherwise inconsistent claims.... Because the entire case rested on the believability of the complainant, there was no possible strategic reason for counsel's repeated failures to object to the improper elicitation and use of the unquestionably harmful testimony."

The prosecution argues that "using the delayed outcry [testimony] was part of counsel's defense strategy, and not ... the result of ignorance of the law. Indeed, in a case where the victim's testimony constituted the only direct evidence against defendant, the victim's credibility -- and the substance of and circumstances surrounding the outcry -- was of the utmost importance. Thus, counsel reasonably sought to use the delayed outcry and the circumstances prompting it -- including the victim's falling grades and evidence that she may have been suffering from hallucinations -- as the main thrust of his defense. Counsel's strategy should not be questioned in hindsight because it was ultimately unsuccessful.... This was not only a legitimate choice of defense; it was the best defense available."

For appellant Honghirun: Patricia Pazner, Manhattan (212) 693-0085

For respondent: Queens Assistant District Attorney Deborah E. Wassel (718) 286-5860