

# 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, October 24, 2019

## No. 91 Matter of Krug v City of Buffalo

This case arose from an encounter between Buffalo Police Officer Corey Krug and a civilian, Devin Ford, in a downtown parking lot near Chippewa Street in November 2014. A video of a portion of the incident shows Krug attempting to pin Ford to the hood of a car, then shoving him to the ground and kneeling him in the side. As Ford lay on his back, and two other officers approached, Krug repeatedly struck Ford on the legs with his baton. Krug did not arrest Ford or charge him with any offense. A year later Ford brought a civil suit against Krug and the City of Buffalo, alleging use of excessive force by Krug in violation of his constitutional rights.

Krug requested that the City defend and indemnify him in the civil action pursuant to General Municipal Law § 50-j, which requires a municipality to “provide for the defense of any civil action” against its police officers and to “indemnify and save harmless” an officer from civil liability “arising out of a negligent act or other tort ... committed while in the proper discharge of his duties and within the scope of his employment.” When the City declined, Krug brought this article 78 proceeding to compel it to defend and indemnify him. The City moved to dismiss the suit, arguing that he had not been acting in the proper discharge of his duties. It noted that Krug had been indicted in federal court for his conduct toward Ford and had disciplinary charges pending against him.

Supreme Court granted the petition only to the extent of ordering the City to defend Krug against Ford’s claims. “[R]elying on an indictment to deny defense to a police officer or any other public employee ... is arbitrary and capricious. They are presumed to be not guilty.... If there is a conviction in this matter, [Krug] would have to reimburse the City. But until there is one, I cannot rule that General Municipal Law does not apply.” As for indemnification, the court said Krug’s request was “premature” because there was no civil verdict in Ford’s action and, thus, “right now there’s nothing to indemnify.”

The Appellate Division, Fourth Department affirmed on a 3-2 vote, saying, “Here, it is undisputed that [Krug] was on duty and working as a police officer when the alleged conduct occurred.... We respectfully disagree with the view of our dissenting colleagues that a 30-second long video recording of a portion of the incident, considered in conjunction with the indictment, provides a factual basis for [the City’s] implicit determination that [Krug] was not acting within the scope of his employment and duties as a police officer. First..., ‘[a]n indictment is a mere accusation and raises no presumption of guilt’.... Second, the video recording captured only part of the encounter between [Krug and Ford], and did not capture the beginning or the end of the encounter. As a result, the recorded images of [Krug] striking [Ford] in the area of his legs and feet with a baton are unaccompanied by contextual factual information that would be essential to support a determination that [Krug’s] actions fell outside the scope of his employment....”

The dissenters said the video “shows enough of the encounter to demonstrate, persuasively to our mind, that [Krug] was not acting out of any immediate fear for his life or safety or out of any need to subdue [Ford], who was lying prone on his back.... But ultimately, our conflicting interpretations of the videotape are beside the point, for they demonstrate – at most – that reasonable people could disagree about what is depicted thereon. And that is simply an insufficient predicate for striking down an administrative determination as arbitrary and capricious; quite the opposite, it is well established that administrative action ‘may not be characterized as arbitrary and capricious’ so long as ‘[r]easonable [people] might differ as to the wisdom of such a determination’ ....”

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## No. 92 Rivera v State of New York

Jose Rivera was an inmate at the Mid-State Correctional Facility in January 2010, when he was seriously injured in an unprovoked assault by Correction Officer Michael Wehby. Rivera was going through the mess hall line for breakfast when Wehby taunted him about a protective helmet he wore for a seizure disorder, then ordered him out of line and began punching him in the head. Rivera fell to the floor and another officer handcuffed him while Wehby removed his helmet and continued to punch, stomp and kick him in the head. Two other officers who were present were fired for lying about the incident. Wehby was indicted in Oneida County on felony assault charges, but his trial ended in a jury deadlock. He later pled guilty to official misconduct, a misdemeanor, and was required to retire.

Rivera filed this suit against the State in the Court of Claims in 2011, alleging that it was liable for the assault and battery committed by its employee. In 2015, the court granted the State's motion to amend its answer to raise an affirmative defense that the correction officers involved were acting outside the scope of their official duties. The court rejected Rivera's argument that he would be prejudiced by the late amendment.

In 2017, the Court of Claims granted summary judgment to the State and dismissed Rivera's claim. It ruled that, under Riviello v Waldron (47 NY2d 297), Wehby was not acting within the scope of his official duties when he committed his "unprovoked assault" on Rivera. Noting that regulations of the Department of Corrections and Community Supervision (DOCCS) provide that use of physical force by prison staff "shall be reasonable under the circumstances," the court said, "Wehby's abhorrent actions are not within the normal and customary duties regularly performed by correction officers, and [DOCCS] could not reasonably anticipate that he would act in such a heinous way.... Wehby's actions were personal, unrelated to [the State's] interests, and a complete departure from performing the requisite duties of a correction officer in a reasonable manner. Consequently, although a harsh result, there is no viable basis upon which the State ... may be held liable as Wehby's actions fall outside the scope of his employment." The Appellate Division, Fourth Department affirmed without opinion.

Rivera argues that Wehby and his two fellow officers were acting within the scope of their employment, in part because they "were on duty, in uniform, on post, supervising other inmates, and exercising control over [Rivera]." He says the State "admits that it is within the scope of a correction officer's duties to use force against prisoners. Regulations allow for the individual officer to use his own discretion as to when and how much force is to be used against a prisoner," making incidents of excessive force foreseeable. "These officers were discharging their duties even though they were discharging their duties irregularly and in disregard of appropriate rules and regulations.... These officers intended to show all the inmates that they were supervising that if you do not immediately respond to an officer when spoken to you will be subjected to discipline ... that is immediate, physical and violent." Under the lower courts' view that an unprovoked assault is necessarily outside the scope of an officer's duties, he said, "Only inmates who instigate violence with an officer would be entitled to compensation. This cannot be the intent of the governing laws which waive sovereign immunity."

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For respondent State: Assistant Solicitor General Patrick A. Woods (518) 776-2020

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To be argued Thursday, October 24, 2019

## No. 93 People v Clarence Rouse

In August 2013, a civilian sitting on his porch in the Bronx called 911 to report that he had just seen a bald man in his “early to mid twenties” holding a handgun on the street. At about the same time, Officer Steven Lopez and his partner arrived at the scene and saw a bald man fire one shot toward a group of fleeing teenagers. They ordered him to drop the gun, which he did and then fled. The officers recovered the gun and gave chase, but lost sight of the shooter in the Webster Houses residential complex. After about five to eight minutes of searching, they spotted Clarence Rouse, who they identified as the shooter, walking along 168<sup>th</sup> Street. Rouse was bald and 39 years old. The officers said he ran away as soon as he made eye contact with one of them. They chased him down and arrested him, injuring his head and shoulder in the process.

At trial, the civilian who made the 911 call was unable to identify Rouse as the gunman he had seen, and the prosecutor produced no physical evidence linking Rouse to the gun. Both officers identified Rouse as the shooter. Rouse sought to impeach the officers’ credibility by cross-examining Lopez about his participation in a 2010 ticket fixing scandal. He also sought to question Lopez about findings by two federal judges in unrelated criminal cases in 2011 that his testimony was not credible, one of whom also rejected his partner’s testimony as not credible, and about Lopez’s false statements to a federal prosecutor in which he denied his involvement in ticket fixing. Supreme Court allowed cross-examination of Lopez about his ticket fixing, but precluded questioning about his false statements to the federal prosecutor and the adverse findings by federal courts regarding the officers’ credibility. The court also precluded Rouse from introducing two anonymous 911 calls in which he said the callers gave details that contradicted the officers’ account. Rouse moved for a mistrial based on the trial judge’s criticisms of defense counsel, including a comment the judge made to the jury – during cross-examination of one of the officers – that “attorneys are never satisfied with just asking questions, sometimes they want to give them the answer too, that’s all I can say.”

Rouse was convicted of second-degree attempted murder, criminal use of a firearm and weapon possession. He was sentenced to 18 years in prison.

The Appellate Division, First Department affirmed, saying, “The evidentiary rulings challenged by defendant were provident exercises of discretion that did not deprive defendant of a fair trial.... Defendant received a full opportunity to cross-examine a police witness about his involvement in a ticket-fixing scandal, and the additional areas that counsel wished to explore were remote from the officer’s credibility. Anonymous 911 calls proffered by defendant had minimal relevance or probative value on the issue of whether an officer correctly identified defendant as the person who fired the shot.” It said the trial court’s comments about defense counsel did not prevent the jury from reaching an impartial judgment on the merits.

Rouse argues that, under People v Smith (27 NY3d 652 [2016]), he was entitled to cross-examine Lopez about his false statements to a federal prosecutor and, under United States v White (692 F3d 235 [2d Cir 2012]), he was entitled to cross-examine the officers about prior federal court findings that their testimony was not credible. He says the trial court’s refusal violated his right to confrontation. He contends that preclusion of the two anonymous 911 calls violated his rights to due process and to present a defense, and that the court’s comments to the jury about defense counsel deprived him of a fair trial.

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