State of New York Court of Appeals

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WEEK OF FEBRUARY 9 - 11, 2016

NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

State of New York Court of Appeals

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To be argued Tuesday, February 9, 2016

No. 23 Matter of New York State Correctional Officers and Police Benevolent Association, Inc. v Governor's Office of Employee Relations

Thomas Tierney was employed by the State Office of Mental Health (OMH) as a Safety and Security Officer 2 (SSO 2), a salary grade 15 position, at the Hudson River Psychiatric Center in June 2011, when his supervisor, the Chief Safety and Security Officer (CSSO), transferred to another facility. Tierney was assigned to serve as "Acting Chief" and he performed duties of the CSSO for the next seven months, until the Hudson River facility closed in January 2012. Tierney and his union, the New York State Correctional Officers and Police Benevolent Association (NYSCOPBA), filed an out-of-title work grievance seeking additional pay for the work he performed as acting CSSO, a salary grade 20 position. He said the duties included supervising all day shift officers, scheduling assignments, tracking overtime, overseeing vendors, attending committee meetings, and generating reports.

OMH sustained the grievance, saying, "After a thorough review of the record, facts, documentation and discussion with facility management, it is the agency's determination that the grieved duties are most appropriate to that of a [CSSO]." However, the Division of Classification and Compensation (DCC) recommended that the grievance be denied, finding the grieved duties "are consistent with those of a properly classified" SSO 2. The Governor's Office of Employee Relations (GOER) adopted the recommendation and denied the grievance. Tierney and NYSCOPBA brought this proceeding to challenge the determination.

Supreme Court found there was a rational basis for the determination and dismissed the suit. "Many, if not all of petitioner's grieved duties were either listed in or directly derived from the [SSO 2] classification," it said.

The Appellate Division, Third Department affirmed on a 3-2 vote, disagreeing about whether to give greater weight to the findings of OMH or of GOER. The majority said GOER and DCC compared the grieved duties with the classification standards for CSSO and SSO 2. "Some of the listed duties are appropriate for either title, as both are supervisory positions.... Tierney did not assert in his grievance form that he was performing all, or even the most distinctive aspects, of the duties of a CSSO. Based on the limited duties listed on Tierney's grievance form, DCC and GOER rationally found that the work he was performing, in the absence of his supervisor, either fell within the duties of an SSO 2 or were a reasonable and logical outgrowth of those duties.... Rather than deferring to OMH, as the dissent does, we should defer to DCC and GOER, the agencies or offices that are responsible for regularly making this type of determination ... and that are not bound by OMH's decision."

The dissenters argued GOER's denial of the grievance was irrational, saying, "[I]t is important to note that Tierney was not simply filling in for a CSSO who was temporarily absent," but instead replaced a CSSO "who had transferred out ... for a period of seven months until the ... facility closed...." They said, "As the agency providing oversight and supervision for [Tierney's] facility, OMH is ... in a significantly better position than GOER to understand and evaluate the tasks performed by its employees.... [I]t strikes us as irrational for GOER to base its decision to deny Tierney's grievance upon a generic, out-of-context examination of ... Civil Service classification standards rather than the reasoned conclusion reached by OMH" after "thorough review of the particular facts and circumstances and, more importantly, discussions with facility personnel."

For appellants NYSCOPBA and Tierney: Erin N. Parker, Albany (518) 462-0110
For respondents GOER et al: Assistant Attorney General Laura Etlinger (518) 776-2028

State of New York Court of Appeals

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To be argued Tuesday, February 9, 2016

No. 24 People v Assad Cedeno

Assad Cedeno and six co-defendants were arrested during a gang fight between the Latin Kings and the Trinitarios on a crowded subway platform in Queens in June 2008. Ariel Pena Rodriguez, a suspected Trinitario, was stabbed to death during the melee. Cedeno moved to sever his trial from that of co-defendants Jason Villanueva and Alexandra Huacon, arguing that they incriminated him in statements they gave to the police and that admission of those statements at a joint trial would violate his right to confront witnesses under Bruton v United States (391 US 123). In a written statement, Villanueva said "one of the Latin Kings wearing red and white trunks pulled out a knife and rushed the whole crowd.... [T]he male with the red and white trunks ran over to the victim and started punching him with a small knife." Other witnesses established that Cedeno was wearing red and white swim trunks. In an oral statement, Huacon identified Cedeno by his nickname as a Latin King and said he cut his hand during the fight.

Supreme Court denied the motion to sever the trial, saying that "the confrontation problem may be eliminated by redacting the statement so that it no longer connects the defendant to the crimes charged.... [A] redaction of the reference to the red and white clothing [in Villanueva's statement] would eliminate any prejudice to defendant. In reviewing Huacon's statement, redaction of the name 'Fidel' or 'Bambino' and replacing it with the neutral pronoun [or] the word 'person' would eliminate the right to confrontation problem."

The redacted statements were admitted at the joint trial. The court also permitted Enerfry Hierro, an alleged Trinitario, to testify that he recognized Cedeno and Villanueva from an assault four months earlier, in which Cedeno struck him with a cane and Villanueva slashed his face, although they were not charged. Hierro testified that Cedeno and Villanueva were approaching him on the train platform when Rodriguez intervened and both men stabbed Rodriguez. Cedeno was acquitted of murder, but convicted of first-degree gang assault and weapon possession. He was sentenced to 16 years in prison.

The Appellate Division, Second Department affirmed. Admission of Villanueva's redacted statement did not violate the Bruton rule because the redaction "would not have caused the jurors to 'realize that the confession refers specifically to the defendant,'" it said, citing Gray v Maryland (523 US 185). It said Huacon's statement was inadmissible hearsay, but found the error harmless. The uncharged crime evidence in Hierro's testimony was properly admitted because it "established the witness's ability to identify the defendant..., was probative of the defendant's motive and intent, and it provided necessary background information about the nature of the relationship between the witness and the defendant, placing the charged conduct in context."

Cedeno argues, "The manner in which the People redacted Villanueva's statement was rejected as insufficient in Gray," which held, "Redactions that simply replace a name with an obvious blank space or a word such as 'deleted' or a symbol or other similarly obvious indications of alteration ... leave statements that, considered as a class, so closely resemble Bruton's unredacted statements that ... the law must require the same result." He also argues that he was denied due process and a fair trial when the court "permitted the People to elicit unreliable uncharged crime evidence" in Hierro's testimony "without making a threshold determination of whether it was even minimally reliable."

For appellant Cedeno: De Nice Powell, Manhattan (212) 693-0085
For respondent: Queens Assistant District Attorney Nancy Fitzpatrick Talcott (718) 286-6696

State of New York Court of Appeals

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To be argued Tuesday, February 9, 2016

No. 25 People v Keith Johnson

Keith Johnson and Joe Rushing were charged with using a toy pistol to steal $30 from an undercover officer during a buy-and-bust operation in the Bronx in 2009. The undercover officer testified that, when he approached Johnson and asked to buy crack, Johnson led him to a car and climbed in. Johnson demanded the money and the officer replied, "No, give me the stuff." The officer said Rushing, in the driver's seat, asked to count the cash and the officer reached over Johnson to hand Rushing $30 in pre-recorded buy money. He said Johnson pulled out what appeared to be a gun and pointed it at him as Rushing drove away. The officer fired once at the vehicle, striking Johnson in the shoulder. When they were arrested a few blocks away, officers found the buy money in Rushing's pocket and a plastic toy pistol next to the passenger's seat.

At their joint trial, the prosecutor sought to introduce Rushing's grand jury testimony, in which he said he had been driving around with Johnson and stopped to let him get something to eat. When Johnson returned, "someone came to the vehicle talking about where is the stuff and reaching money out." Rushing said he "knew it was time for me to leave" and, as he drove off, "the money dropped in the car." He admitted putting the money in his pocket, but denied having seen a firearm or toy gun during the incident. Johnson's attorney moved to sever the trials, arguing that the grand jury testimony incriminated his client and its admission at a joint trial would violate his right to confrontation under Bruton v United States (391 US 123).

Supreme Court denied the motion, saying Rushing's statements to the grand jury "were not facially incriminating as to Mr. Johnson.... [T]here is nothing in Mr. Rushing's statement that suggests that Mr. Johnson was involved in any illegal conduct." Johnson was convicted of second-degree robbery and related crimes and sentenced to five years in prison.

The Appellate Division, First Department reversed in a 4-1 decision, saying, "Although [Rushing's] grand jury testimony was intended as an innocent explanation of the events surrounding the alleged robbery, and admitted no wrongdoing, nevertheless it was 'facially incriminating' as to [Johnson] within the meaning of Bruton. [Rushing's] narrative placed [Johnson] with [him] throughout the relevant events and, specifically referring to [Johnson] approximately 40 times, described [Johnson's] conduct," including his return to the car when the officer appeared asking for "the stuff" and dropped the money in the car. "This narrative suffices to create an inference that [Johnson] ... had purported to set up a deal for a sale of contraband that was to culminate in the vehicle, but did not fulfill the deal...." It said the testimony "was the only nonpolice evidence that [Rushing] possessed the buy money when the car was stopped."

The dissenter said the testimony was not facially incriminating under Bruton because "Rushing made no mention of any interaction" between Johnson and the officer before the officer approached the car and "Rushing did not testify that [Johnson] demanded or took possession of the buy money. Moreover, he asserted that he never saw a toy pistol. In sum, the bizarre encounter Rushing recounted ... did not attribute any criminality to [Johnson]." He said "the identity of the [buy] money as the proceeds of the robbery could not have been established by Rushing's grand jury testimony alone," but required "the testimony of the police witnesses."

For appellant: Bronx Assistant District Attorney Noah J. Chamoy (718) 838-7142
For respondent Johnson: David J. Klem, Manhattan (212) 577-2523 ext. 527

State of New York Court of Appeals

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To be argued Tuesday, February 9, 2016

No. 26 People v Oliver Berry

Josiah Salley was shot to death in July 2002, while driving near a Queens intersection where he had been involved in a traffic dispute an hour earlier. His passenger, Korin Bush, was uninjured. Police chased two men who ran from the scene and caught one, Kevin Kirven, whom Bush said was not the shooter. During an interview at the police station, Kirven allegedly gave a statement implicating Oliver Berry in the shooting and provided contact information for Berry from his address book. When Berry was arrested nearly two years later, Bush identified him in a lineup as the shooter.

The prosecutor did not call Kirven as a witness at Berry's first trial, but elicited testimony from a detective that he had copied a page from Kirven's address book during the police station interview and then issued a "wanted card" for Berry. The Appellate Division, Second Department reversed Berry's conviction, saying the "plain implication" of the detective's "testimonial hearsay" was that Kirven had accused Berry of the crime and admission of the testimony violated Berry's right to confrontation. It also said, "The evidence in this single eyewitness identification case was not overwhelming...."

The prosecutor called Kirven as a witness at Berry's retrial. Kirven's attorney had told prosecutors that his client denied giving any statement to police, denied that he had even seen the shooting, and would invoke his Fifth Amendment right to remain silent. The prosecutor elicited testimony that Kirven and Berry were friends and then, when she questioned him about the shooting, Kirven repeatedly invoked his Fifth Amendment rights. The prosecutor impeached him with his contradictory accounts of the shooting, including a redacted version of his police statement. Berry was convicted of second-degree murder, attempted murder and related crimes, and was sentenced to 25 years to life in prison.

The Appellate Division, Second Department affirmed, saying, "Under the circumstances presented here, invocation of the Fifth Amendment privilege against self-incrimination by a prosecution witness did not add critical weight to the prosecution's case, and the defendant was not deprived of his right to a fair trial by that testimony.... Furthermore, the Supreme Court properly permitted the People to impeach that witness with a prior inconsistent statement...."

Berry argues, "[T]he People called Kirven even though his attorney had informed them that he would invoke the Fifth Amendment, deny having made the statement, and refuse to implicate [Berry].... [T]he prosecutor elicited Kirven's repeated invocations of the Fifth Amendment in front of the jury, questioned him in an accusatory manner, repeatedly impeached him on bias and other grounds, and introduced the written statement Kirven had disavowed.... This massive, multi-faceted impeachment of the People's own witness ... denied [Berry] his due process right to a fair trial." He also argues the trial court improperly precluded his identification expert from testifying about the effect of "high stress" on the accuracy of an identification.

For appellant Berry: Erica Horwitz, Manhattan (212) 693-0085
For respondent: Queens Assistant District Attorney Rona I. Kugler (718) 286-5933

State of New York Court of Appeals

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To be argued Wednesday, February 10, 2016

No. 27 Government Employees Insurance Co. v Avanguard Medical Group, PLLC

This appeal stems from a dispute over no-fault insurance benefits between Government Employees Insurance Co. and affiliated companies (collectively, GEICO) and Avanguard Medical Group, PLLC, a professional corporation owned by Dr. Mark Gladstein, who performs office-based surgery at Avanguard's offices in Brooklyn. Gladstein billed GEICO for surgeries he performed for accident victims the company insured, and Avanguard billed GEICO separately for facility fees to cover the cost of technicians, nurses, equipment and supplies it provided for the surgeries. GEICO paid for Gladstein's own medical services, but refused to pay about $1.3 million in facility fees charged by Avanguard. GEICO brought this action for a judgment declaring it was not obligated to pay facility fees to Avanguard, and it moved for a preliminary injunction and stay of lawsuits and arbitrations commenced by Avanguard.

GEICO argued the No-Fault Law requires it to pay facility fees only for services performed at hospitals and ambulatory surgery centers licensed under Public Health Law article 28, not for office-based surgery performed at offices such as Avanguard's, which are licensed under Public Health Law § 230-d. The Department of Financial Services (DFS) has adopted fee schedules establishing the allowable facility fees for hospitals and ambulatory surgery centers licensed under article 28, but not for office-based surgery providers licensed under section 230-d. Insurance Law § 5102(a)(1) requires automobile insurers to cover "basic economic loss" up to $50,000, including "[a]ll necessary expenses incurred for ... medical ... services," subject to the limitations of Insurance Law § 5108, which prohibits providers from charging insurers more than the amounts set in the fee schedules. Avanguard argued it was entitled to facility fees under a "catch-all" provision adopted by DFS, 11 NYCRR 68.5, which addresses reimbursable medical services that are "not set forth in the fee schedules." The regulation states that, "if [DFS] has not adopted or established a fee schedule applicable to the provider, then the permissible charge for such service shall be the prevailing fee in the geographic location of the provider...."

Supreme Court rejected GEICO's claims. While the fee schedules establish facility fees only for entities licensed under article 28, it said, "they do not provide that only article 28 facilities are entitled to bill for facility fees ... or that an [office-based surgery] entity ... is precluded from recovering facility fees." Therefore, it said, "the facility rate issue effectively defaulted to the [catch-all] provisions of § 68.5(b) -- under which fees would then be payable based on prevailing rates" in Avanguard's geographic area.

The Appellate Division, Second Department reversed, saying, "There is ... no provision for recovery of a facility fee for the performance of an 'office-based surgery' performed in a practice and setting accredited under [section] 230-d," which "imposes a substantially more modest level of oversight and regulation than article 28." The absence of a facility fee schedule for office-based surgery "supports GEICO's argument that a facility fee is not a necessary expense" for such services. It said the catch-all provision in section 68.5 does not apply because "there is indeed a fee schedule for facility fees" charged by article 28 facilities, though it "is not applicable to Avanguard. Thus, a prerequisite to application of the default provision is absent."

For appellant Avanguard: Charles Michael, Manhattan (212) 668-1900
For respondents GEICO: Barry I. Levy, Uniondale (516) 357-3000

State of New York Court of Appeals

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To be argued Wednesday, February 10, 2016

No. 28 Matter of Aoki v Aoki

Rocky Aoki, founder of the Benihana restaurant chain, created the Benihana Protective Trust (BPT) in 1998 to hold his stock and other assets of the business. The trust agreement gave him the power to appoint beneficiaries of the BPT through his will. He selected as trustees two of his six children, Kevin and Kana Aoki, and his attorney Darwin C. Dornbush. After Rocky married his third wife, Keiko Ono Aoki, in July 2002, Kevin and Kana sought advice from Dornbush about how to protect their interest in the trust from claims by Keiko. Dornbush's partner Norman Shaw, a trusts and estates specialist, drafted a partial release of Rocky's power of appointment that restricted distribution of BPT assets to only his children and grandchildren. In September 2002, Rocky signed the one-page release, which states, "I hereby irrevocably partially release [my] power of appointment so that, from now on, I shall have only ... a testamentary power to appoint any of the principal and accumulated net income remaining at my death to ... any one or more of my descendants." In December 2002, Rocky signed another partial release prohibiting him from making bequests from the BPT to any "non-resident alien."

In August 2003, Rocky executed a codicil to his will, drafted by his wife's attorney Joseph Manson, exercising his power of appointment to give 25 percent of the BPT assets and the income from the remaining 75 percent to Keiko. Manson asked Dornbush for an opinion letter addressing the validity of the codicil. In September 2003, Shaw told Manson that the bequests to Keiko were invalid because they were barred by the partial releases, which were irrevocable. Two weeks later, Rocky said in an affidavit that he did not understand the releases were irrevocable and he did not intend to limit his ability to bequeath BPT assets as he chose, but he never took any steps to challenge the validity of the releases. He removed Dornbush as a trustee in 2004. Rocky executed a new will in 2007, making the same dispositions to Keiko as in the codicil; but he added that if, "contrary to my desires, the [partial releases] are found to be valid," the trust assets should be divided equally between sons Devon and Steven Aoki. Rocky died in 2008. The BPT trustees brought this action against Devon, Steven and Keiko to determine validity of the releases. Keiko sought a declaration they were invalid "as they are the product of fraud." Devon and Steven moved for summary judgment declaring the releases valid.

Surrogate's Court denied the summary judgment motion, finding that Dornbush and Shaw were Rocky's fiduciaries, due to their attorney-client relationship, and that Keiko raised a triable question of whether the attorneys informed him the releases were irrevocable. After a bench trial, the court invalidated the releases, finding Devon and Steven failed to prove the attorneys did not induce Rocky to sign them by failing to explain the releases were irrevocable.

The Appellate Division, First Department reversed and declared the releases valid, relying on Cowee v Cornell (75 NY 91 [1878]). For the doctrine of constructive fraud to apply, it said, "the fiduciary must be a party to or have an interest in the subject transaction," but "neither Dornbush nor Shaw were parties to the releases and thus could not benefit from them. The Surrogate therefore erroneously shifted the burden of proof to Devon and Steven to prove that the releases were not procured by fraud." It said there was no evidence the attorneys misled Rocky about the nature of the releases, Rocky testified in prior litigation "that Shaw did explain the effect of these waivers" and, "[m]ost significantly," Rocky made no attempt to challenge their validity, "thereby calling into question his later allegations that the waivers did not represent his wishes."

For appellant Keiko Ono Aoki: Seth P. Waxman, Washington, D.C. (202) 663-6000
For respondents Devon and Steven Aoki: David C. Rose, Manhattan (212) 421-4100

State of New York Court of Appeals

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To be argued Wednesday, February 10, 2016

No. 29 People v Sean John *(papers sealed)*

Police officers responded to a report of a man with a gun at a Brooklyn address in January 2010 and met a couple in front of the building, a three-story brownstone. The man told them Sean John, who lived in the building, had just confronted him with a handgun, pointing it at his chest, and the woman said John had assaulted her several hours earlier. The officers entered the building, frisked John, and searched his apartment without a warrant, but found no gun. They arrested John for assault, handcuffed him, and placed him in their patrol car. One of the officers then spoke with a ground-floor tenant, who said she had seen John "go down into the basement with something in his hand." She directed the officer to the basement door and he went into the basement to search, finding a blue box labeled Smith and Wesson on the floor. The box was latched, but was not locked. The officer opened the box and found a handgun and ammunition, which belonged to John.

Supreme Court denied John's motion to suppress the gun, ruling that he had no reasonable expectation of privacy in the basement of the apartment building. The court also found the officer had consent for the basement search from the ground-floor tenant, when she told the officer John had carried something to the basement. "[T]he only fair, logical and reasonable inference that you can get from that is that [the tenant] certainly gave [the officer] permission to go search the basement." John was convicted of second-degree weapon possession and menacing and was sentenced to 4½ years in prison.

The Appellate Division, Second Department affirmed. A three-justice majority found the search and seizure were justified under the plain view doctrine. The officer "was lawfully present in the apartment building" and found the gun "in a gun box located in a common storage area accessible to anyone in the building. The box was not locked" and "was clearly marked 'Smith and Wesson.' Under these circumstances, the distinctive label on the outside of the box 'proclaim[ed] its contents' and ... made it immediately apparent to the officer that the box contained a firearm..., thus authorizing the officer to seize the box without a warrant," they said, citing People v Velasquez (110 AD3d 835). "Furthermore, since the gun box, 'by its very nature, could not support any reasonable expectation of privacy because its content could be inferred from its outward appearance'..., the officer lawfully opened the box, and discovered the handgun and ammunition inside."

A fourth justice concurred in result, "but only on constraint of this court's precedent in People v Velasquez...." She said, "While I recognize the several exceptions to the warrant requirement..., I fear that the exceptions ... have swallowed the rule. In my view, the police should have obtained a warrant prior to seizing and opening the gun box in the common area of the subject building.... There was no emergency or exigent circumstances to justify the search and seizure of the gun box without first obtaining a warrant. The defendant was already under arrest at the time the gun box was searched, and no clear threat to public safety was present."

John argues a warrant was required to search the contents of the "closed container" in the basement. He also argues that the admission of DNA evidence at his trial, without the testimony of those who performed the testing, violated his constitutional right to confront the witnesses against him.

For appellant John: Dina Zloczower, Manhattan (212) 693-0085
For respondent: Brooklyn Assistant District Attorney Sholom J. Twersky (718) 250-2537

State of New York Court of Appeals

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To be argued Wednesday, February 10, 2016

No. 46 Matter of NYC C.L.A.S.H., Inc. v New York State Office of Parks, Recreation and Historic Preservation

In February 2013, the State Office of Parks, Recreation and Historic Preservation adopted a regulation, 9 NYCRR 386.1, which establishes outdoor no-smoking areas in parks, historic sites and recreational facilities under its jurisdiction and, for the seven state parks in New York City, prohibits virtually all outdoor smoking. The Office said the rule was necessary to allow "patrons to enjoy the outdoors, breathe fresh air, walk, swim, exercise and experience State Parks' amenities and programs without being exposed to secondhand tobacco smoke and tobacco litter." New York City Citizens Lobbying Against Smoker Harassment (CLASH), a non-profit organization formed to advance and protect smokers' rights, filed this proceeding two months later to strike down the regulation, arguing the Office of Parks violated the separation of powers doctrine by usurping the authority of the Legislature.

Supreme Court held the regulation was adopted in violation of the separation of powers doctrine and declared it invalid, enjoined Parks officials from enforcing it, and ordered them to remove any "No Smoking" signs they installed in connection with it. Applying the factors outlined in Boreali v Axelrod (71 NY2d 1), it said the Office of Parks adopted the smoking restrictions, an area "fraught with 'difficult social problems,'" in "the absence of a legislatively established outdoor tobacco use policy.... Nor does the broad language of the Parks, Recreation and Historic Preservation Law empower respondents to promulgate rules regulating conduct bearing any tenuous relationship to park patrons' health or welfare.... Accordingly, the court finds that respondents extended their reach beyond interstitial rulemaking and into the realm of legislating." The Legislature had tried, and failed, to act on the issue, it said. "Between the 2001-2002 and 2013-2014 sessions, both the Senate and Assembly have attempted, albeit unsuccessfully, to target smoking in public parks.... [T]his is a strong indication that the Legislature is uncertain of how to address the issue." Finally, it said, "special expertise or technical competence is no longer required to understand that secondhand tobacco smoke is deleterious to the health of nonsmokers...."

The Appellate Division, Third Department reversed, ruling the Office of Parks did not intrude on legislative powers under Boreali. "First, we find no indication that [Parks] improperly balanced economic and social concerns against its stated goal in order to act on its own ideas of sound public policy...," it said. "Rather, all aspects of the regulation are grounded in [Parks'] stated purpose -- to allow all patrons to enjoy the fresh air and natural beauty of its outdoor facilities.... Next, we do not find that [Parks] 'wrote on a clean slate, creating its own comprehensive set of rules'.... The Legislature has instructed [Parks] to '[o]perate and maintain' its sites while '[p]rovid[ing] for the health, safety and welfare of the public using [those sites]' (PRHPL 3.09 [2], [5])." Parks officials did not improperly intrude "upon an area that is a matter of legislative debate," despite the Legislature's failed attempts to restrict outdoor smoking, it said. "We are not persuaded that these failed bills are enough to warrant the conclusion that [Parks] has exceeded its authority.... Finally, we find that there was sufficient agency expertise required to enact this rule such that it did not intrude upon legislative authority."

For appellant CLASH: Edward A. Paltzik, Manhattan (646) 820-6701
For respondent Office of Parks: Assistant Solicitor General Victor Paladino (518) 776-2012

State of New York Court of Appeals

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To be argued Thursday, February 11, 2016

No. 71 People v Anthony Badalamenti *(papers sealed)*

In October 2008, Anthony Badalamenti was living with his girlfriend and her six-year-old son, J.T., in the second-floor apartment of a house in Merrick. Their downstairs neighbors heard Badalamenti angrily shouting at J.T.; the boy crying and calling out, "Please, Anthony, stop, stop. You're hurting me;" and what sounded like a strap striking the boy. The neighbors called the police, who said the boy's mother told them she and Badalamenti had been spanking him with belts as punishment for bad behavior at school. The officers arrested Badalamenti and the mother and seized two belts, one black and the other white, from the apartment.

About five months earlier, in May 2008, J.T.'s biological father had called the mother, who pressed the answer button on her cell phone without speaking to him, then left the line open. The father heard Badalamenti and the mother berating and threatening J.T., who was crying. Without speaking to anyone on the phone or obtaining their consent, the father recorded the goings-on for about 20 minutes and later gave the recording to the police.

Badalamenti moved to preclude use of the father's recording at his trial under CPLR 4506. The statute bars the use of eavesdropping evidence obtained in violation of Penal Law § 250.05, which provides, "A person is guilty of eavesdropping when he unlawfully engages in ... mechanical overhearing of a conversation," which is defined as "the intentional overhearing or recording of a conversation or discussion, without the consent of at least one party thereto, by a person not present thereat, by means of any instrument, device or equipment." Supreme Court admitted the recording into evidence. Badalamenti was convicted of three counts of second-degree assault, two counts of fourth-degree criminal possession of a weapon (one for each belt), and endangering the welfare of a child. He was sentenced to seven years in prison.

The Appellate Division, Second Department affirmed. It relied on Pollock v Pollock (154 F3d 601 [6th Cir 1998]), which adopted a "vicarious consent" exemption to the federal wiretap statute allowing a parent to consent to the recording of a conversation on his child's behalf when there is a "good faith" reason to believe it is "necessary for the welfare of the child." The Appellate Division said, "While ... Penal Law § 250.05 serves the strong public policy goal of protecting citizens from eavesdropping, we are not persuaded that the New York Legislature intended to subject parents to criminal penalties when, 'out of concern for the best interests of their minor child, they record that child's conversations'.... Given the similarity between the federal wiretap statute and New York's eavesdropping statute, and recognizing that the 'vicarious consent' exemption is rooted on a parent's need to act in the best interests of his or her child..., we deem it appropriate to adopt it as an exemption to Penal Law § 250.05."

Badalamenti argues Penal Law § 250.05 clearly prohibits the recording of a conversation without the consent of a party to it, and nothing in the "language or legislative history makes any provision for a parent consenting to a recording on behalf of a child." Neither "the existence of a vicarious consent exemption" nor the factual basis to invoke it were litigated at the trial, so "the Appellate Division was not empowered to rule as it did," he says. The exemption should not apply here, where the father's testimony showed "he did not make the recording under circumstances where he was concerned about his son's safety, and where ... he did nothing with the tape except give it to the prosecution months later to use in its litigation against appellant." Among other claims Badalamenti, who was charged with acting with intent to injure the boy, says the trial court's "erroneous" instructions allowed the jury to convict him for failing to act to protect the child.

For appellant Badalamenti: Marianne Karas, Thornwood (914) 434-5935
For respondent: Nassau County Assistant District Attorney Jason R. Richards (516) 571-3800

State of New York Court of Appeals

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To be argued Thursday, February 11, 2016

No. 31 People v Rashid Bilal

Shortly after receiving a report of shots fired in December 2008, plainclothes officers in upper Manhattan saw two men come out of the Dunbar apartment complex. One matched the description of the gunman, "a black male wearing a black bubble jacket," and the other wore a gray jacket. Without identifying themselves as police, the officers called them over and the man in the black jacket stopped. The other man, Rashid Bilal, began to run. The officers gave chase and saw him throw a loaded revolver over a fence before he was caught.

Bilal was charged with second-degree weapon possession. His trial attorney never moved to suppress the gun, later explaining to appellate counsel that he mistakenly believed Bilal would not have standing to challenge the seizure unless he admitted possessing the gun. Bilal was convicted of the charge at trial and sentenced to five years in prison. He then filed a CPL 440.10 motion to vacate his conviction for ineffective assistance of counsel based on his trial attorney's failure to move for suppression.

Supreme Court denied the motion. "[C]ounsel's failure to move for a suppression hearing was error, particularly in a case where suppression of the gun would in all likelihood have meant the end of the case," it said, but it found the error did not adversely affect Bilal because it was not "reasonably probable" he would have prevailed. It said the officers had a level two common-law right to question Bilal under People v DeBour (40 NY2d 210) when they first approached him. Because he fled, "a court would likely find that defendant's flight, added to the police's right to make a common-law inquiry, increased the level of suspicion to reasonable suspicion, justifying pursuit, and the recovery of the gun abandoned in flight was therefore not the product of any unlawful police activity."

The Appellate Division, First Department affirmed. "Although counsel's failure to move to suppress the weapon had no strategic justification but was based on a misunderstanding of the law, that error did not cause defendant any prejudice" because he "would not have prevailed on a suppression motion," it said. "Unlike the situation in People v Clermont (22 NY3d 931 [2013]), this was not a 'close' suppression issue ... where a properly litigated motion might have been successful, or where a suppression hearing is now warranted in the interest of fairness. Instead, the undisputed facts establish that, when added to the information already known to the police, defendant's flight created reasonable suspicion warranting pursuit (see People v Moore, 6 NY3d 496 ...), and that the seizure was lawful, in any event, under the doctrine of abandonment...."

Bilal argues he was prejudiced by trial counsel's error, and thus deprived of effective assistance, because he has "at least a colorable -- if not 'close' -- argument that the police did not have reasonable suspicion to pursue him when they first encountered him, and his flight did not escalate the encounter because there was no evidence he knew he was fleeing from police," who wore plainclothes and did not identify themselves. He says his conviction should be set aside for a new trial or, "at the very least, held in abeyance pending the outcome of a suppression hearing."

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For respondent: Manhattan Assistant District Attorney Philip Morrow (212) 335-9000

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.

To be argued Thursday, February 11, 2016

No. 32 People v Roy Gray *(papers sealed)*

A New York police detective, believing Roy Gray was involved in the November 2004 murder of Levi Bernard in the Bronx, asked North Carolina police to arrest him on an outstanding drug warrant in May 2005, then went to North Carolina to question him. The detective testified at a suppression hearing that he orally advised Gray of his Miranda rights shortly before Gray told him that he would "take the blame for this murder" because his brother "had served enough time in his life." The detective said he then read Gray his Miranda rights from a form used by the local police and waited another 45 minutes to receive a faxed form with Miranda warnings from the New York Police Department before taking a written statement from Gray, in which he gave a detailed account of shooting Bernard and discarding the gun.

Supreme Court suppressed the written statement. It found Gray made his oral statement after he was given incomplete Miranda warnings, and it ruled his written statement was not attenuated from his tainted oral statement.

The Appellate Division, First Department reversed the suppression order, finding the written statement was sufficiently attenuated from the oral statement. It said the written statement was when Gray "for the first time admitted being personally involved in the murder of Mr. Bernard." The written statement "was procured some 45 minutes after he initially offered to take the blame for the crime," which it called a "pronounced break in the interrogation.... It must also be noted that defendant's initial statement to the police -- that he would take the blame for the shooting to absolve his brother -- was on its face ambiguous, and is not necessarily an admission by defendant of any wrongdoing."

The detective testified at trial that Gray had given a second and more substantive oral confession, admitting that he shot Bernard, before he received the written Miranda warnings. Despite this change in the evidence for suppression, Gray's trial counsel did not move to re-open the suppression hearing. Gray was convicted of second-degree murder and sentenced to 25 years to life. Gray filed a CPL 440.10 motion to vacate his conviction for ineffective assistance of counsel based, in part, on counsel's failure to seek re-opening of the suppression hearing.

The Appellate Division affirmed the motion ruling and conviction, finding Gray was not prejudiced by his trial attorney's decision. "Defendant has not established a reasonable probability that the new evidence elicited at trial would have resulted in suppression of his written confession on the ground of lack of attenuation from an inadmissible oral confession...," it said. "[A]lthough the information that emerged at trial gave defendant a stronger argument that his written statement was not attenuated, it did not give him a winning one."

Gray argues the Appellate Division applied the wrong standard. "Where ... counsel's lapse is failure to present a suppression claim, this Court does not look to whether the claim would, ultimately, have been successful. Instead, counsel is ineffective where there are 'substantial arguments' overlooked by counsel and, had the motion been successful, the impact on the outcome would have been significant," he says, citing People v Clermont (22 NY3d 931 [2013]).

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State of New York Court of Appeals

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To be argued Thursday, February 11, 2016

No. 33 People v Nelson Miranda

Police officers arrested Nelson Miranda in Greenwich Village in October 2010 after watching him try, unsuccessfully, to saw through the locks on three bicycles with a hacksaw concealed in his sleeve. The officers arrested and handcuffed Miranda and found the hacksaw on the ground nearby. In patting him down, the officers felt a satchel under his jacket. They removed the satchel and searched it, recovering two screwdrivers, two pairs of pliers, and rubber gloves. Miranda moved to suppress the tools from the satchel, arguing the warrantless search was unjustified.

Criminal Court denied the motion. "This search incident to a lawful arrest was conducted for any number of reasons," the court said. "Most significantly, it was plain that it was appropriate for the officer to make this search given the fact that the defendant ... had secreted a very dangerous tool on his person, which he dropped at the time of his stop, but it was also quite appropriate for any number of other reasons which are abundantly clear given the types of tools that were recovered and the type of activity that the defendant was involved in...." Miranda was convicted of six misdemeanor counts of attempted possession of burglar's tools and three counts of attempted petit larceny. He was sentenced to 45 days in jail.

The Appellate Term, First Department affirmed, saying, "The police lawfully searched defendant's backpack as incident to what defendant concedes was a lawful arrest.... The arrest and search were contemporaneous, the backpack was large enough to contain a weapon and was within defendant's grabbable area at the time of his arrest soon after police saw him discarding a hacksaw, and the surrounding circumstance supported the reasonableness of the testifying officer's stated fear for his safety."

Miranda argues the exception to the warrant requirement for a search incident to arrest did not apply because the prosecution failed to demonstrate that exigent circumstances -- a need to search for a weapon to ensure the safety of the police or public, or to preserve evidence from destruction or concealment -- existed at the time the search was conducted. "Since at the time of the search, appellant was handcuffed and the satchel was in the hands of the police, the satchel was inaccessible to appellant, and neither exigency could exist," he says.

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