

***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.

WEEK OF JANUARY 12 - 14, 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, January 12, 2016

No. 12 People v Raymond Leach

Raymond Leach found discarded medical records of several patients in the parking lot of the Greater Hudson Valley Family Health Center in the Town of Cornwall, Orange County, in September 2010. He allegedly told Health Center officials that he planned to prepare lawsuits for the patients unless the Center paid him \$10,000, wrote letters of apology to the patients and paid them money, saying it would be costly if the Center were sued and embarrassing if the records were released to the media. He also directed them to draft a "stipulation of settlement," which provided that he would not "take the matter to court" and that there would be no disclosure of the underlying facts. The Center's chief executive arranged for him to bring back the records the next morning. After he was given a \$10,000 check and a copy of the stipulation stamped with the Health Center's corporate seal, Leach was arrested by waiting police officers. He was initially charged with third-degree grand larceny, but County Court reduced the charge to attempted grand larceny after concluding the check was not negotiable.

Leach pled guilty to third-degree attempted grand larceny and was sentenced to a year in jail. At his plea colloquy, Leach said, "I gave [a Health Center official] copies of the medical records that I found in the parking lot and she gave me a check for \$10,000 as a stipulation of settlement not to take the matter to court." He admitted the records were not his. When the court said, "You should have just given them the records, is that a fair statement?" Leach initially replied, "That is not a fair statement," but after discussion with his attorney, he said it was fair. He also agreed when the court said "you were extorting them" and "were overreaching when you demanded they give you money for the records."

The Appellate Division, Second Department affirmed the judgment, finding his waiver of the right to appeal was voluntary, knowing, and intelligent.

Leach argues his appeal waiver is invalid because the court "only tangentially referred to the appellate waiver in a single sentence" before his plea, and did not place its terms on the record until after he was sentenced. He also argues that "a stipulated payment, as consideration for the return of mislaid medical records, does not constitute attempted grand larceny in the third degree." He says "stealing" is an element of the crime and he "never 'took' or used anything without permission." He "merely 'found' and repatriated medical records," he says, and he did not steal money because the stipulation was not extortion, but "a meeting of the minds, with a reward payable to a finder."

The prosecution argues that Leach's challenge to the validity of his appeal waiver is unpreserved because he "did not object to the trial court's procedure of having him execute the written waiver at the time of sentencing," and in any event, "execution of the waiver at sentence simply confirmed defendant's previously communicated intent to waive his right to appeal." Leach's claim that his plea did not establish the elements of the crime "is both unpreserved and baseless," since he admitted that "he attempted to extort \$10,000" from the Health Center for return of the records, which he admitted were not his, and threatened the center with legal action.

For appellant Leach: Steven A. Feldman, Uniondale (516) 522-2828

For respondent: Orange County Assistant District Attorney Elizabeth L. Schulz (845) 615-3640

State of New York Court of Appeals

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To be argued Tuesday, January 12, 2016

No. 13 People v Gordon Gross

(papers sealed)

Gordon Gross was charged in 2008 with sexually abusing a Wayne County girl, S.W., over a period of years. S.W. testified at trial that Gross repeatedly engaged in anal intercourse with her from 1999, when she was five years old, to 2004, when she was ten. She also testified that she told her mother at age six that Gross had touched her in a sexual manner; that she told her sister in 2008, when she was 14, that Gross had raped her; that she reported the abuse to a detective the following day; and that she described the abuse to a pediatrician who examined her at a prosecutor's request after Gross was indicted. The pediatrician testified that her examination of the girl was normal and she found no scarring, but she also testified that S.W. told her Gross "anally penetrated" her when she was six and seven years old. Gross's attorney did not object to any of the testimony about S.W.'s prior statements to others regarding the abuse. Gross was convicted of first-degree course of sexual conduct against a child and endangering the welfare of a child and was sentenced to 25 years in prison. The judgment was upheld on direct appeal.

In 2011, Gross filed a CPL 440.10 motion to vacate the judgment. He said he was deprived of the effective assistance of counsel by, among other things, his trial attorney's failure to object to testimony about S.W.'s prior consistent statements or to the prosecutor's use of that testimony during summation, which he said improperly bolstered S.W.'s credibility. Wayne County Court denied the motion.

The Appellate Division, Fourth Department affirmed on a 3-2 vote, saying S.W.'s testimony that she reported the abuse to her mother, her sister, and the police was admissible, so defense counsel was not ineffective in failing to object. "Although the dissent correctly notes that the repetition of prior consistent statements may 'give to a jury an exaggerated idea of the probative force of a party's case'..., here, the victim's testimony constituted a narrative of events" explaining how the abuse was disclosed and the investigation began. "Indeed, she did not repeat the specific allegations of her testimony, i.e., that defendant had engaged in anal penetration...." It said "defense counsel lacked any strategic or reasonable basis for her failure to object when the [pediatrician] repeated the specific allegations that defendant had anally penetrated her," but "the single error in an otherwise competent representation" did not deprive Gross of a fair trial.

The dissent said S.W.'s testimony that she reported the abuse to her mother, sister, the police and the pediatrician was inadmissible "and we can discern no strategic reason for defense counsel's failure to object." They said, "We found no cases that recognize a narrative exception to the rule against the admission of prior consistent statements, and such an exception, if created, would swallow the rule altogether." Further, "the testimony at issue here did not complete the narrative; instead, the testimony merely repeated the narrative, which was that defendant sexually molested the victim." In view of defense counsel's failure to object to the pediatrician's inadmissible testimony and the prosecutor's summation as well, they said Gross was deprived of his right to effective assistance of counsel.

For appellant Gross: Brian Shiffrin, Rochester (585) 423-8290

For respondent: Melvin Bressler, for Wayne County District Attorney (585) 586-5993

State of New York Court of Appeals

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To be argued Tuesday, January 12, 2016

No. 14 People v Jin Cheng Lin

Cho Man Ng (known as Sharon) and her brother Sek Man Ng (known as Simon) were murdered in their Queens apartment on May 12, 2005. The next morning, May 13, detectives brought Jin Cheng Lin to their precinct to discuss the case. Lin stayed for more than 12 hours, telling them he had been to the Ngs' home on the day of the murders to give Sharon, his former girlfriend, two seashell figurines. Lin returned to the precinct on May 14 and was given Miranda warnings. After he was told witnesses had seen the figurines in the apartment weeks earlier, Lin said he helped two men get into the apartment to rob the Ngs, but didn't know they would be killed. He was arrested that night, 10 hours after his arrival, and was held at the precinct. He was given Miranda warnings again on May 15 and, after detectives falsely told him Simon had survived and was talking to them, Lin began sobbing, then said in a written statement that he meant to rob the Ngs and used a knife from the kitchen to stab them. Still at the precinct on May 16, Lin began to make a videotaped statement, but invoked his right to counsel when a prosecutor explained his Miranda rights and the interview ended. He was arraigned that night.

Supreme Court denied Lin's motion to suppress his statements, finding that he was not in custody when he made his initial statement about delivering the figurines and that he made the subsequent statements after Miranda warnings, which he knowingly and voluntarily waived. Although Lin "was not totally fluent in English," it said he "was able to fully understand the 'immediate import of the warnings.'" The delay in arraignment was not "designed to deprive him of his right to counsel," it said, but was due to "the police investigation into the circumstances surrounding a double homicide and their need to follow-up on differing versions of the events as provided by the defendant and other witnesses." Lin was convicted of first-degree murder and other crimes and was sentenced to life in prison without parole.

The Appellate Division, Second Department affirmed, finding Lin's statements were voluntary. "Approximately 28 hours elapsed between the time the police arrested the defendant and the time the defendant made the statement sought to be suppressed," the court said, but "a delay in arraignment alone does not warrant suppression.... [T]he delay in arraigning the defendant was attributable to the time it took the police to conduct a thorough investigation and not to a strategically designed plan to permit the defendant to be questioned outside the presence of counsel.... Moreover, the record supports the hearing court's finding that the defendant understood the import of the Miranda warnings...." It said the trial court properly precluded Lin from introducing the videotape of his aborted May 16 statement because its "probative value was outweighed by potential prejudice to the People."

The dissenter said the prosecution failed to show "beyond a reasonable doubt" that the statements were voluntary. Lin was periodically questioned at the precinct for more than 22 hours over two days before his arrest and then was held two more days without access to a lawyer before he was arraigned, she said. "Upon my reading of the record, I find that the delay in the arraignment was strategically designed so that the defendant could be questioned outside the presence of counsel.... The police could have initiated the arraignment process shortly after the defendant's arrest, and should have initiated it, at the latest," the next morning. "Their failure to do so strongly suggests that the defendant's arraignment was delayed for an improper purpose." She said the videotape "was relevant to the issue of whether the defendant's statements were voluntary," and its preclusion deprived Lin of his right to present a defense.

For appellant Lin: De Nice Powell, Manhattan (212) 693-0085

For respondent: Queens Assistant District Attorney Anastasia Spanakos (718) 286-5810

State of New York Court of Appeals

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To be argued Wednesday, January 13, 2016 (arguments begin at 9 a.m.)

No. 15 Aetna Health Plans v Hanover Insurance Company

Luz Herrera was injured in an accident on the Hutchinson River Parkway in the Bronx in April 2008 while driving a car insured by Hanover Insurance Company. Hanover provided no-fault benefits, paying medical bills that were submitted to it by Herrera or her doctors. However, some of her medical providers erroneously billed Aetna Health Plans, Herrera's medical insurer, instead of Hanover for treatment of her accident-related injuries. Aetna paid \$19,649.10 for such treatment in 2008. After Hanover stopped providing no-fault benefits in 2009, Aetna paid an additional \$23,525.73 for continuing treatment of Herrera's injuries through 2011. Herrera submitted documentation for some of those costs to Hanover in 2010 and demanded reimbursement for bills paid by Aetna that should have been paid by Hanover.

When Hanover did not respond, Herrera commenced a no-fault arbitration against Hanover. The arbitrator denied her claim, saying the medical records she submitted to Hanover to document the bills paid by Aetna "were not bills" because she had no legal obligation to pay them. "[I]f any person and/or entity [has] a claim against [Hanover] in this matter it is [Aetna], not [Herrera]." Herrera assigned her right to recover no-fault benefits to Aetna, which brought this action against Hanover to recover the \$43,174.83 it had paid for her treatment.

Supreme Court dismissed Aetna's complaint, saying its claim was barred by 11 NYCRR 65-3.11(a), which provides for the payment of no-fault benefits "directly to the applicant ... or, upon assignment by the applicant ... to [the] providers of health care services." The court said Aetna, "a health insurer, is not a 'provider of health care services' contemplated under 11 NYCRR 65-3.11." Aetna's breach of contract claim fails because it "is not in privity of contract" with Hanover, it said, and Aetna "cannot sustain a cause of action under subrogation principles" because there is "no authority permitting a health insurer to bring a subrogation action against a no-fault insurer for sums the health insurer was contractually obligated to pay to its insured."

The Appellate Division, First Department affirmed, saying Aetna "is not a 'health care provider' under [under 11 NYCRR 65-3.11], but rather a health care insurer.... While the No-Fault Law provides a limited window of arbitration between no-fault insurers (see Insurance Law §§ 5105, 5106[d] ...), the statutory language does not pertain to a health insurer such as Aetna. Thus, Aetna cannot maintain a claim against defendant under the principle of subrogation.... Nor may Aetna assert a breach of contract claim..., since it is not in privity of contract with Hanover, and there has been no showing that it was an intended third-party beneficiary of the contract."

Aetna argues it is entitled to recover from Hanover "under the doctrines of subrogation, indemnification, or both" because it paid the medical costs of Herrera, which Hanover was obligated to pay, and it therefore stands in place of Herrera with the same rights she would have to recover from Hanover. Even though it is not a "health care provider," Aetna says 11 NYCRR 65-3.11 does not bar its claim because it is Herrera's subrogee and has the same right to payment from Hanover as she has under the regulation. It argues, "Privity of contract is not required where, as here, the health insurer's claim is made under principles of subrogation or indemnity."

For appellant Aetna: Jonathan A. Dachs, Mineola (516) 747-1100

For respondent Hanover: Barry I. Levy, Uniondale (516) 357-3000

State of New York Court of Appeals

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To be argued Wednesday, January 13, 2016 (arguments begin at 9 a.m.)

No. 16 People v Freddie Thompson

Freddie Thompson, serving 15 years in prison for first-degree robbery, is challenging his sentencing as a second violent felony offender under Penal Law § 70.04, which requires an enhanced sentence for defendants who commit a violent felony within 10 years of their sentencing for a prior violent felony, excluding any time the defendant was incarcerated.

Thompson previously pled guilty in Brooklyn to first-degree assault, a violent felony, and was sentenced in June 1994 to five years of probation. His probation was revoked 18 months later when he pled guilty to a drug possession charge and in December 1995 he was re-sentenced on the assault conviction to two to six years in prison. In February 2010, Thompson stole prescription drugs at gunpoint from two pharmacies on Staten Island and he was convicted by a jury of two counts of first-degree robbery, a violent felony offense. Excluding the time he spent in prison for the Brooklyn assault conviction, the current robbery offenses were committed within 10 years of his 1995 re-sentencing to prison in the assault case, but more than 10 years after his 1994 sentencing to probation.

Supreme Court initially sentenced Thompson to 20 years as a second felony offender for the robbery convictions, but after his transfer to prison, the state Department of Corrections and Community Supervision advised the court and the parties that he should be adjudicated a second violent felony offender. The prosecution filed an affirmation in support of treating Thompson as a second violent felony offender, arguing that his 1995 re-sentencing in the assault case was the operative date for the 10 year look-back period in Penal Law § 70.04 because his 1994 sentence of probation "was in fact revoked" and the 1995 "re-sentencing replaced the earlier sentence."

Supreme Court granted the prosecution's application and re-sentenced Thompson as a second violent felony offender to the same 20-year term. Adopting the 1995 re-sentencing as the controlling date, it found that Thompson's robbery offenses "fall within the ten-year period as extended by the incarceration time." The Appellate Division, Second Department reduced Thompson's sentence to 15 years "in the interest of justice" and otherwise affirmed.

Thompson argues he was improperly sentenced as a second violent felony offender because the date of his original 1994 sentence of probation in the prior assault case, "rather than the re-sentencing, determines whether the [robbery] conviction falls within the 10-year look-back period" in the statute. He says Penal Law § 70.04(1)(b)(iii) "specifically states that, '[f]or the purpose of determining whether a prior conviction is a predicate violent felony conviction ... a sentence of probation ... shall be deemed a sentence.'"

For appellant Thompson: A. Alexander Donn, Manhattan (212) 693-0085

For respondent: Staten Island Assistant District Attorney Anne Grady (718) 876-6300

State of New York Court of Appeals

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To be argued Wednesday, January 13, 2016 (arguments begin at 9 a.m.)

No. 17 People v Christopher A. Nicholson

(papers sealed)

Christopher Nicholson was charged in 2008 with sexually abusing a girl at his home in Rochester from October 1998 to November 2000, when the girl was five to seven years old. The girl first disclosed the abuse to a high school counselor in November 2008. At trial, Supreme Court allowed the girl to testify that Nicholson repeatedly beat and threatened her and her brother, saying such Molineux evidence was admissible to explain the girl's eight-year delay in reporting the sexual assaults. The court also permitted the prosecutor to present expert testimony about child sexual abuse accommodation syndrome (CSAAS) to explain the delayed disclosure. Defense counsel presented testimony of Jill Marincic, who said she was Nicholson's girlfriend from 1995 to about 2003 and lived with him during the time of the alleged sexual abuse. She testified that she never saw Nicholson use violence or threats with the victim or her brother. On cross-examination, Marincic said she did not maintain a romantic relationship with Nicholson after they broke up, but she remained friends with him even after he married Donna Nicholson in 2005. In rebuttal, the prosecutor called Donna Nicholson to testify that, to her knowledge, the defendant had no contact with Marincic from 2003 until her marriage ended in 2008. The defendant was convicted of first-degree course of sexual conduct against a child and sentenced to 16 years in prison.

The Appellate Division, Fourth Department affirmed in a 3-2 decision, ruling the trial court properly allowed the prosecutor to call Donna Nicholson as a rebuttal witness "to give testimony that was relevant to [Marincic's] bias or motive to fabricate, which is not collateral.... Reading the prosecutor's colloquy with the court on this issue, together with her cross-examination of [Marincic], we conclude that the purpose of calling the rebuttal witness was to show that defendant and [Marincic] were romantically involved at the time of the trial, which the prosecutor believed could be inferred if [Marincic] and defendant had not been friends when he was married to the rebuttal witness." The court said its ruling did not violate People v Concepcion (17 NY3d 192) because "we are not affirming on a ground that is different from that determined by the [trial] court," but instead holding the court properly allowed rebuttal testimony "for the 'limited purpose' of whether [Marincic] and defendant were friends.... Whereas the dissent infers nothing from that testimony other than that defendant and [Marincic] were not friends after 2003, we conclude that a permissible inference ... was that ... [Marincic] never lost her romantic feelings for defendant, even at the time of trial." The court rejected defense claims that the Molineux evidence and expert testimony on CSAAS were improperly admitted.

The dissenters argued the rebuttal witness's testimony "related solely to collateral matters" and should not have been admitted. "The rebuttal witness's testimony -- that [Marincic] did not have contact with defendant after 2003 -- served only to show that [Marincic] was not being truthful when she testified that she and defendant remained friends. In our view, that constitutes impermissible impeachment testimony on a collateral matter." They argued the majority's affirmance violated Concepcion because "the prosecutor did not say anything about seeking to show that [Marincic] was romantically involved with defendant" and the trial court's ruling was not based on that ground.

For appellant Nicholson: Mary P. Davison, Canandaigua (585) 394-5222

For respondent: Monroe County Assistant District Attorney Geoffrey Kaeuper (585) 753-4674

State of New York Court of Appeals

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To be argued Wednesday, January 13, 2016 (arguments begin at 9 a.m.)

No. 18 People v Marcus D. Hogan

Marcus Hogan was arrested on drug possession charges in May 2005, when police executed a search warrant at his girlfriend's apartment in Rochester. After breaking down the door officers found six "dime" bags of crack cocaine and about 50 unused ziplock bags on a counter in the kitchen, where the girlfriend was standing, along with some loose cocaine and a razor blade on the floor. The seized cocaine weighed 2.54 grams. The officers found a small bag of marijuana in the bedroom. Hogan was arrested in a hallway near the bathroom. He moved to dismiss the indictment on the ground the prosecution provided insufficient notice of the grand jury proceeding. Supreme Court denied the motion as untimely.

At Hogan's non-jury trial, the prosecutor pursued theories based on constructive possession and on the "drug factory" presumption in Penal Law § 220.25(2), which provides, "The presence of a narcotic drug ... [or] marijuana ... in open view in a room ... under circumstances evincing an intent to unlawfully mix, compound, package or otherwise prepare for sale such controlled substance is presumptive evidence of knowing possession thereof by each and every person in close proximity to such controlled substance...." Hogan argued the drug factory presumption did not apply because there was insufficient proof the cocaine was being packaged for sale, that it was in open view, or that he was in close proximity to it. Defense counsel said, "[T]he court needs to find there was a drug factory going on in this premises, six bags, personally using, not a drug factory. Loose rock. Razor blades. Okay. Baggies. But are we talking about a drug factory here sufficient to invoke the ... presumption? I don't believe so." The court said there was insufficient proof of constructive possession, but it applied the drug factory presumption and found Hogan guilty of criminal possession of a controlled substance in the third and fifth degrees. It sentenced him to nine years in prison.

The Appellate Division, Fourth Department affirmed., saying, "We reject defendant's contention that the presumption ... in Penal Law § 220.25(2) was inapplicable because he was not in proximity to the packaged and unpackaged drugs and drug trafficking paraphernalia that were found in open view in the kitchen/living room area of the small apartment in question.... [T]he police observed defendant running from the kitchen/living room area not more than 15 feet from where the drugs and drug trafficking paraphernalia were found. Although defendant was apprehended in a hallway bathroom of the apartment, 'proximity is not limited to the same room'...." It also rejected his ineffective assistance of counsel claims.

Hogan argues the drug factory presumption does not apply because mere possession with intent to sell is insufficient to trigger it, and officers found no cutting agents like baking soda, additives like benadryl, pill grinders or screens that "could indicate an intent to mix or compound" the drugs and found no scale to show an intent to package them for sale. There was no "factory" operation, he says, because the "drugs appeared to be ready for sale or for an individual's personal use." He also argues he was deprived of effective assistance of counsel because his attorney did not discuss with him his right to testify before the grand jury or make a timely motion to dismiss the indictment for insufficient notice of the grand jury proceeding.

For appellant Hogan: Shirley A. Gorman, Brockport (585) 637-5645

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

State of New York Court of Appeals

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To be argued Thursday, January 14, 2016

No. 19 People v Lawrence Watson

When police officers tried to stop Lawrence Watson and Toi Stephens in a midtown Manhattan park in October 2009, both men fled -- Watson in his wheelchair, allegedly discarding a .38 caliber handgun before he was apprehended. Watson was charged with weapon possession and resisting arrest, and attorney Robert Fisher of New York County Defender Services (NYCDS) was assigned to represent him. Stephens, charged with drug possession, pled guilty to a misdemeanor drug count two months later.

On the eve of Watson's trial in June 2010 Fisher, who had been trying unsuccessfully to locate Stephens as a potential witness, informed Supreme Court that he had just discovered while reviewing Rosario material that another NYCDS attorney represented Stephens on the drug charge. Fisher said his supervisors concluded this created a conflict of interest and they told him he could not examine Stephens' file and must cease his efforts to locate him, but they also believed Watson could waive the conflict if he chose. The court told Watson that, if Fisher remained his defense counsel, he could not call Stephens as a witness and, if the prosecutor called Stephens, he could not cross-examine him. When Watson said he did not want to relieve Fisher and indicated he was willing to waive any conflict, the court said, "[W]e are in a difficult position now where I see [Fisher] being placed in a position where he just would not be able to effectively represent you." The court disqualified Fisher and appointed new defense counsel. Watson was convicted of two counts of criminal possession of a weapon in the second degree and resisting arrest, and was sentenced to 20 years to life in prison.

The Appellate Division, First Department reversed and remanded for a new trial on a 4-1 vote, finding there was "no conflict or potential conflict of interest" on which to base Fisher's disqualification. "Here, there was no indication or allegation that Fisher ever used or was privy to any confidential information regarding Stephens.... It is undisputed that Fisher never personally represented Stephens and was not involved in the adjudication of his case.... [H]e would thus not have been placed in the 'awkward position' ... of having to balance a duty of confidentiality while conducting either a cross-examination or direct examination. There was no risk that Fisher could disclose Stephens' confidences since he did not have any knowledge of them, and, therefore, no potential conflict of interest could have arisen as a result of Fisher representing Watson."

The dissenter said, "The Sixth Amendment affords a criminal defendant the right to representation by counsel; it does not guarantee the absolute right to representation by a particular attorney.... Where, as here, the chosen attorney is prohibited by a conflict of interest from conducting a thorough investigation, including interviewing a potential favorable witness, and would be prohibited from cross-examining that witness if called by the People, the attorney is unable to ensure that he will provide his client with an effective defense. Under these circumstances, even though the defendant expresses a willingness to waive any conflict, the exercise of the trial court's broad discretion to disqualify the attorney, to preserve the defendant's right to effective representation, will not be disturbed...."

For appellant: Manhattan Assistant District Attorney Dana Poole (212) 335-9000

For respondent Watson: Renee M. Zaytsev, Manhattan (212) 402-4100

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To be argued Thursday, January 14, 2016

No. 20 Matter of Exeter Building Corp. v Town of Newburgh

In 2002, Exeter Building Corp. sought site plan approval from the Town of Newburgh for a 136-unit town house development on 28.9 acres of land it bought two years earlier. Located in an R-3 zoning district, Exeter's "Madison Green" development would have been a permitted use. In 2005, it obtained Planning Board approval for a "lot-line change" to exchange 1.4 acres of its parcel with a neighboring subdivision. In 2006, the Town enacted a new zoning ordinance (Local Law No. 3) that re-zoned Exeter's property to R-1, which does not allow high-density developments like Madison Green. Exeter sued to invalidate the new ordinance, litigation that ultimately led to a ruling that Exeter could proceed with the approval process for its project under an exemption from the re-zoning until January 2009. In 2007, the Planning Board passed a resolution giving Exeter site plan approval subject to numerous conditions. By that time, Exeter had incurred \$359,000 in engineering and review costs. In 2008, Exeter obtained a series of specific permits to, among other things, demolish a house and two water tanks; erect signs; perform clearing and grading of the site; begin road construction and install pad sites for some residences; and complete stormwater management work. Exeter spent \$182,000 on this work and satisfied some of the conditions for site plan approval, but many conditions remained unmet when the exemption period ended in January 2009. When the Planning Board and Zoning Board of Appeals (ZBA) determined that the Madison Green parcel had become subject to the new R-1 zoning restrictions and Exeter was not entitled to a building permit, Exeter brought this action against the Town, the boards and individual officials to annul the determination.

Supreme Court annulled the ZBA determination and declared that Exeter had a common law vested right to develop its property under the R-3 zoning regulations. It said Exeter "demonstrated a commitment to the purpose for which it was granted subdivision approval and [has] effected substantial changes to the real property, incurring substantial expenditures, which would be rendered essentially valueless if the municipal action of the zoning change were to be applied."

The Appellate Division, Second Department reversed the judgment and confirmed the ZBA determination, finding Exeter had no vested rights to develop Madison Green under the prior zoning regulations. The Planning Board "never granted unconditional approval of the ... site plan," it said. "Indeed, since [Exeter] did not fulfill the conditions precedent that were delineated in the Resolution, the chairperson was not authorized to sign the site plan. Accordingly, [Exeter] could not establish that [it] had vested rights to develop Madison Green under the Resolution." It said Exeter "may not ground a claim of common-law vesting upon reliance on the limited permits that were issued" for site work. "None of those permits ... either singly or together amounted to the Town's approval of Madison Green. Thus, [Exeter's] expenditures and construction in reliance on those limited permits could not satisfy the prerequisite for common-law vesting of the right to construct the entire project."

Exeter argues it has vested rights to build Madison Green. "The common law vesting doctrine is not, and never was, limited to whatever specific permits were authorized at any particular time. It has always been a test focused on whether, by dint of legally valid permits, there were substantial changes made and substantial expenses incurred to further the development which it was legally permitted to pursue."

For appellants Exeter et al: Richard B. Golden, Goshen (845) 294-4080

For respondents Town of Newburgh et al: Michael H. Donnelly, Goshen (845) 294-9447

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To be argued Thursday, January 14, 2016

No. 21 Torres v Jones (and another action)

Maria De Lourdes Torres was indicted for the murder of Einstein Romeo Acuna, who was stabbed 20 times in his Queens apartment in September 2002. She was held in jail awaiting trial for four years, until the district attorney moved to dismiss the charges in 2007 and she was released. Torres then brought these actions for malicious prosecution, false arrest and federal civil rights violations against New York City and the detectives who handled her case.

Detectives questioned Torres at her apartment after finding records of several calls between her and Acuna near the time of his death, then she went voluntarily to the precinct for further questioning. After initially denying she knew Acuna, Torres admitted she had been romantically involved with him for about a year, he regularly paid her for sex, and she had sex with him at his apartment on the day he was killed. She returned to the precinct two weeks later and submitted to a one-hour polygraph test in the morning, which the examiner described as inconclusive. She was advised of her Miranda rights that night. Detective Irma Santiago said in her examination before trial (EBT) that Torres confessed after about two hours of questioning and Santiago wrote a summary of the confession, which Torres signed. Torres said that, after 11 hours of questioning, Santiago wrote a statement without her input and promised to let her go if she signed it. The police searched her room, but none of the evidence recovered tied her to the crime. The lead detective conceded that Torres's confession was not consistent with evidence at the crime scene and that the police were unable to corroborate it. Forensic testing, completed several months later, indicated Acuna was stabbed during an altercation with one or two males. Torres's DNA was not found at the crime scene. Several officers and the lead detective agreed in EBTs that the forensic evidence and inconsistencies in the confession merited further investigation, which they did not conduct.

The defendants moved for summary judgment dismissing the complaints, arguing Torres's confession provided probable cause for her arrest and the grand jury indictment created a presumption of probable cause. In response, Torres submitted an affidavit of her expert witness, a former NYPD homicide detective, who said the "defendants deviated from good and accepted police standards ... by failing to make further inquiry when a reasonable investigating homicide detective would have done so ... and by demonstrating an intentional or reckless disregard for proper procedures or otherwise acting in bad faith." He said the detectives coerced the confession with the promise to let Torres go "because of a strong policy that was pervasive throughout the police department to quickly ... close out investigations so that statistically it would appear that the police department was quickly solving crimes, particularly homicides."

Supreme Court dismissed the civil rights claims under 42 USC § 1983 against the City and detectives based on their "clear showing of probable cause" to arrest and detain Torres. It dismissed her malicious prosecution and false arrest claims, finding Torres failed to rebut the presumption of probable cause created by the grand jury indictment. The Appellate Division, Second Department affirmed for similar reasons.

Torres argues the evidence raised issues of material fact regarding the voluntariness of her "false confession" and the "bad faith conduct" of the detectives, thus rebutting the presumption of probable cause created by the confession and grand jury indictment.

For appellant Torres: David H. Peregman, Manhattan (212) 977-7033

For respondent City et al: Assistant Corporation Counsel Richard Dearing (212) 356-1000