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 4 - 7, 2016

NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

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 Monday, January 4, 2016

No. 2 People v Anthony Jones

Anthony Jones was charged with possession and sale of crack cocaine based on two encounters with police in Manhattan in 2011. He pled guilty to criminal possession and sale of a controlled substance in the third degree in exchange for concurrent terms of six months in jail. At sentencing, defense counsel asked Supreme Court to defer imposition of the mandatory surcharge. The court refused, saying, "I can't do it, the law doesn't allow it. If you look at the statute and cases, clearly, I can't do it.... If I could, I would." The court imposed the $300 mandatory surcharge in each case.

The Appellate Division, First Department affirmed. "Since defendant was sentenced to a term of incarceration of longer than 60 days (see Penal Law § 60.35[8]), he was required to seek relief from his mandatory surcharge payments by way of a CPL 420.10(5) motion for resentencing. Defendant's claims that he was entitled to a financial hardship hearing pursuant to CPL 420.40, and that the hearing should have been held at the time of his sentencing, are not supported by the applicable statutes. Rather, any application for relief from his surcharges is to be entertained in postsentence proceedings (see People v Bradley, 249 AD2d 103 [1st Dept 1998], lv denied 92 NY2d 923 [1998]...)."

Jones relies on CPL 420.40, which states that it "governs the deferral of the obligation to pay all or part of a mandatory surcharge" imposed under Penal Law § 60.35(1). Although it creates a specific procedure for defendants sentenced to less than 60 days, he says it "does not limit the availability of hardship hearings to those defendants. Indeed, since the collection of fees from defendants sentenced to more than 60 days is governed by [Penal Law] § 60.30, which gives full civil authority to courts charged with collecting those surcharges..., those courts are ... statutorily authorized to conduct hardship hearings at the time of the imposition of the surcharge." He argues that CPL 420.10(5), relied on by the Appellate Division, "applies only where a defendant is unable to pay a fine, restitution or reparation imposed as part of the sentence and does not specify that it applies to surcharges." He says, because the sentencing court "erroneously believed that there was no statutory authority to defer imposition of a mandatory surcharge" in his case, "appellant's right to due process at sentencing was violated."

For appellant Jones: Kristina Schwarz, Manhattan (212) 577-3587
For respondent: Manhattan Assistant District Attorney Sheila L. Bautista (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 Monday, January 4, 2016

No. 3 Sean R. v BMW of North America, LLC

Sean R. was born in 1992 with severe birth defects, including mental retardation, cerebral palsy and a congenital heart defect. His parents attribute his condition to in utero exposure to gasoline vapors his mother inhaled during the first trimester of her pregnancy while driving her BMW 525i sedan. She took the car to Hassel Motors in March 1991 after noticing an odor of gasoline, but no repairs were made. She returned in November 1991, when she was about 14 weeks pregnant, and Hassel found gasoline was leaking into the engine compartment from a split fuel line and replaced the line. In 2008, when Sean was 15, his family brought this action against Hassel, BMW (US) Holding Corp. and a subsidiary, and Martin Motor Sales, the dealer that sold them the car.

Sean served notice of intent to present six expert witnesses, including Dr. Shira Kramer and Dr. Linda Frazier, who said they believed, "to a reasonable degree of scientific certainty," that gasoline vapor and the chemical components of gasoline, particularly toluene and other solvents, are causally related to an elevated risk of birth defects among children exposed during early pregnancy.

Supreme Court granted a defense motion to preclude the testimony of Drs. Kramer and Frazier, finding that their opinions "do not comport with methodologies prevailing in the" scientific community and that they provided insufficient support for their conclusion. The experts "did not cite a single scientific publication that establishes a causal link between exposure to gasoline vapors during pregnancy and the birth defects found in Sean R.," the court said, noting that federal and California agencies that publish scientific analyses of toxic agents had not found gasoline to be a developmental toxin. "Contrary to established scientific practices, Drs. Kramer and Frazier pass over these negative results in silence. Instead, they claim to have found a causal link between gasoline and developmental outcomes that escaped other scientists."

The Appellate Division, First Department affirmed. "[T]he medical and scientific literature submitted by plaintiffs' experts does not support the proffered theory that exposure to gasoline fumes caused plaintiff's birth defects. Rather, the literature shows that some of the constituent chemicals contained in gasoline ... can cause birth defects. However, plaintiff failed to show how exposure to those constituent chemicals, constituted as unleaded gasoline vapors, could have caused his injuries," the court said, citing Parker v Mobil Oil Corp. (7 NY3d 434).

Sean argues the lower courts violated his "right to present qualified and competent proofs to a jury" by precluding his experts, whose "qualifications in epidemiology and occupational medicine went unchallenged." He says the courts improperly credited the "flawed" analyses of defense experts and misapplied Parker and Frye. "[T]he standards in Parker are amply satisfied by the court-approved, generally accepted methods Plaintiff's experts faithfully applied, and the wealth of record evidence and peer-reviewed literature supporting their causal conclusions." At the least, he says, he is entitled to a Frye hearing.

For appellant Sean R.: Steven J. Phillips, Manhattan (212) 388-5100
For respondent Martin Motor Sales: Leslie McHugh, Melville (631) 694-0033
For respondent Hassel Motors: Haydn J. Brill, Manhattan (212) 374-9101
For BMW respondents: Philip C. Semprevivo, Jr., Manhattan (646) 218-7560

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 Monday, January 4, 2016

No. 4 Selective Insurance Company of America v County of Rensselaer

This insurance dispute stems from a federal class action brought against Rensselaer County in 2002 by Nathaniel Bruce and other plaintiffs seeking damages for inmates of the Rensselaer County Jail who were strip searched after being charged with misdemeanors or violations since June 1999. They alleged the County had a policy of strip searching everyone placed in the jail, regardless of the charges, in violation of 42 USC § 1983 and a Second Circuit ruling that persons charged with such minor offenses cannot be strip searched without a particularized suspicion that they possessed weapons or contraband.

During the period covered by the class action, 1999 to 2002, Selective Insurance Company of America and its affiliates insured the County under a series of four identical police professional liability policies. The policies applied a $10,000 deductible to "all damages ... sustained by one person or organization as the result of any one occurrence." They defined "occurrence" as "an event, including continuous or repeated exposure to substantially the same general harmful conditions, which results in ... 'personal injury' ... by any person or organization and arising out of the insured's law enforcement duties. All claims arising out of (a) a riot or insurrection, (b) a civil disturbance resulting in an official proclamation of a state of emergency, (c) a temporary curfew, or (d) martial law are agreed to constitute one 'occurrence.'"

When the class action was settled in 2004, the federal district court approved payments of $5000 to Bruce and $1000 to each of the other 806 class members, a total of $811,000, and awarded the plaintiffs $442,702 in legal fees and costs, all of which Selective paid. The insurer sought reimbursement from the County for all of its payments to the plaintiffs as well as $314,551 of its own legal costs, a total of nearly $1.6 million, contending that a separate deductible applied to each of the 807 class members. The County responded that Selective was entitled to just one $10,000 deductible because the damages were caused by a single strip search policy and, thus, were the result of a single "occurrence" within the meaning of the insurance contracts. Selective then brought this breach of contract action against the County.

Supreme Court granted partial summary judgment to both parties. It held for Selective on the issue of deductibles, ruling the County owed a deductible for damages paid to each plaintiff. It said the policy language was unambiguous in stating that the deductible "applies to all damages ... sustained by one person or organization as the result of any one occurrence." It said plaintiffs "were searched on multiple dates, and each search involved the separate act by an agent of the defendant. They were not related to each other except for a remote or 'common originating' cause of the defendant's strip search policy." It ruled for the County on the allocation of legal fees, saying, "Silence on this issue in the policy creates ambiguity, which should be resolved against the drafting party." Rather than allocate the legal fees pro rata to each claim, it allocated all of them to Bruce's claim and limited Selective's recovery of legal fees to the deductible attributable to his claim. The ruling allows Selective to recover no more than $816,000, consisting of the $10,000 deductible for Bruce's claim and the amount actually paid to the other 806 claimants.

The Appellate Division, Third Department affirmed on the opinion of Supreme Court.

For appellant-respondent Rensselaer County: Melissa J. Smallacombe, Albany (518) 862-1386
For respondent-appellant Selective Insurance: Richard A. Galbo, Buffalo (716) 332-0151

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 Tuesday, January 5, 2016

No. 22 People v Oscar Sanders

In August 2010, Oscar Sanders arrived at Jamaica Hospital in Queens with two bullet wounds in his upper right leg. A nurse reported the gunshot wounds to the police and officers were sent to investigate. Sanders, lying on a gurney, told one of them he had been shot in nearby Liberty Park. Sanders was wearing a hospital gown and his own clothes were in a clear plastic bag on the floor of a trauma room about 15 feet away. Without asking permission, the officer retrieved the bag and searched through the clothes. When the officer found two singed holes in the right leg of Sanders' boxer shorts and no holes in his jeans, he concluded the wounds were self-inflicted and arrested Sanders for weapon possession. A bullet was found in one of Sanders' sneakers, but no gun was ever recovered.

Prior to trial, Sanders moved to suppress the clothing as the fruit of an illegal search conducted without a warrant or his consent. Supreme Court denied the motion, saying that Sanders had no reasonable expectation of privacy with regard to his clothes left in a clear bag and that the clothing "potentially was evidence of a crime." After an unrecorded Sandoval hearing, the court ruled that, if Sanders took the stand, the prosecutor could ask if he had any prior convictions. Sanders was found guilty of criminal possession of a weapon in the second and third degrees and sentenced to eight years in prison.

The Appellate Division, Second Department affirmed, finding the search was valid. "Since the defendant's clothing was lying on the floor of a hospital room in a clear plastic bag, the clothing was openly visible...," it said. "Moreover, the police had probable cause to seize the defendant's clothing as evidence of a crime of which they believed the defendant had been a victim...." It also rejected Sanders' claim that he was not present for the Sandoval hearing, saying he "failed to rebut the presumption of regularity that attaches to official court proceedings by coming forward with substantial evidence demonstrating that the Sandoval hearing was conducted in his absence...."

Sanders argues the search was illegal because the officer had neither a warrant nor consent, "had no reason to believe that appellant had committed a crime" before his clothing was searched, "and no exception to the warrant requirement existed" because "there are no 'crime victim' or 'evidence of a crime' exceptions" to the Fourth Amendment. "[T]here can ... be no argument that an apparent crime victim waives his Fourth Amendment rights. Since a crime victim has not chosen his status, he cannot be understood to have affirmatively waived this essential right of privacy." Under the lower court rulings, he says, victims of violent crimes "could be searched by the police without a warrant, without consent, and without probable cause," and could be subject to arrest if officers find illegal drugs or other evidence of unrelated crimes. He also contends the conduct of the Sandoval hearing violated his right to be present at all material stages of his trial.

For appellant Sanders: Rahshanda Sibley, Manhattan (212) 693-0085
For respondent: Queens Assistant District Attorney William H. Branigan (718) 286-6652

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 Tuesday, January 5, 2016

No. 6 People v Scott Barden

In February 2010, Scott Barden stayed five nights at the Thompson LES Hotel in Manhattan at the expense of a business associate, Anthony Catalfamo, who authorized the hotel in a third-party billing agreement to charge up to $2,300 to his American Express card. He did not give his credit card information to Barden. Although Catalfamo made clear to the hotel that he would not agree to additional charges and wrote on the agreement that he was authorizing "one swipe one charge ONLY!," the hotel did not delete his card information when Barden checked out and the card remained linked to Barden's account on the hotel's computer system. After their business relationship soured a month later, Barden stayed at the hotel for three days in March 2010 and told the staff to charge it to the American Express card on file, which was Catalfamo's. He returned to the hotel at the end of that month, beginning a stay of nearly six weeks, and he continued to tell the staff to bill the charges to the American Express card. Catalfamo discovered the unauthorized charges in mid-April 2010 and American Express notified the hotel it was declining more than $10,000 in charges. The hotel then mistakenly linked Barden's account to the Visa card of another guest, who had the same last name, and Barden told the staff to bill that card. The other guest discovered the charges and Visa notified the hotel it was declining them in mid-May 2010, when the unpaid charges totaled about $50,000 for both cards. The hotel then called the police.

Barden was convicted of first-degree identity theft and fourth-degree criminal possession of stolen property, both based on the charges made to Catalfamo's American Express account, and two misdemeanor counts of theft of services. He was sentenced to concurrent terms of 2⅓ to 7 years for identity theft and 1⅓ to 4 years for possession of stolen property.

The Appellate Division, First Department vacated the identity theft conviction, for lack of proof that Barden ever assumed Catalfamo's identity, and otherwise affirmed. It rejected the argument that the stolen property statute (Penal Law § 165.45[2]) applies only to possession of a tangible credit card, not to an intangible credit card number. "[T]he mention of 'tangible property' in [Penal Law §] 10.00(8) cannot strictly apply to criminal possession of stolen property, because to do so would thwart the legislative intent to criminalize the knowing possession of certain types of intangible stolen property," including "any ... computer data, computer program" or "thing of value" under Penal Law § 155.00, it said. "It is irrelevant whether defendant had physical or constructive possession of a tangible credit card, because he had access to the full value of Catalfamo's account as if he had possessed the credit card itself."

Barden argues that, "for purposes of the stolen property statute, 'credit card' is defined as an actual, physical card, and not merely its number. Moreover, the law requires possession of 'tangible' property; the unlawful possession of personal identifying information, such as a credit card number, is a separate chargeable offense, but it is not criminal possession of stolen property." Even if possession of the card number could suffice, he says, he "never even knew the credit card number, and certainly did not possess it."

For appellant Barden: Richard M. Greenberg, Manhattan (212) 402-4100
For respondent: Manhattan Assistant District Attorney David M. Cohn (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 Tuesday, January 5, 2016

No. 7 Sangaray v West River Associates, LLC

In August 2009, Yousufu Sangaray was walking on a sidewalk along Amsterdam Avenue in Manhattan when he tripped and fell over an uneven joint between flagstones, fracturing his right leg. The accident occurred in front of 1785 Amsterdam Avenue, owned by Sandy and Rhina Mercado, and 1787 Amsterdam, owned by West River Associates, LLC. The flagstone on one side of the uneven joint was entirely abutted by the Mercados' property and was flush and level. The flagstone on the other side, more than 90 percent of which was abutted by West River's property, was sunken and sloped down toward the joint due to settling of the soil beneath it, leaving a height differential between the stones that posed a tripping hazard. Two to four inches of the defective flagstone -- and the joint between the stones -- were on the Mercados' side of the property line, according to a survey.

Sangaray brought this personal injury action against West River and the Mercados under New York City Administrative Code § 7-210, which provides that "the owner of real property abutting any sidewalk ... shall be liable for any ... personal injury ... proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition." West River moved to dismiss the complaint against it, arguing it was not liable under section 7-210 because the uneven joint where Sangaray tripped and fell was on the Mercados' side of the property line.

Supreme Court dismissed the complaint against West River based on Montalbano v 136 W. 80 St. CP (84 AD3d 600 [1st Dept 2011]), which held in a similar case that a defendant, whose property abutted the largest portion of a defective flagstone, was not liable for a trip and fall injury because the plaintiff actually fell in front of a neighboring property. Supreme Court said it was "constrained to follow Montalbano..., notwithstanding that it would appear to be difficult or impossible for the 10% owner of a flagstone to fix such an alleged defect...."

The Appellate Division, First Department affirmed. Three justices, citing Montalbano, said West River was not liable because it "did not own the property that abutted the sidewalk where plaintiff tripped and fell." Two justices "reluctantly" concurred. Section 7-210 was enacted in 2003 to shift liability for sidewalk injuries from the City to abutting property owners and, secondly, to encourage abutting owners to keep sidewalks in good repair "in order to avoid liability," they said, but it "fails to achieve" the second purpose "in circumstances such as these.... West River is being allowed to avoid liability for the consequences of its failure to maintain its own sidewalk. Nevertheless, the law as it now stands permits the imposition of liability ... only on the Mercados."

Sangaray argues the Appellate Division ruling "is irreconcilable with the plain wording of the statute, which does not restrict a landowner's liability to accidents occurring entirely in front of its property, and incorporates only a conventional, flexible proximate cause requirement." He says, "By its plain terms, the statute imposes a duty upon landowners to maintain their sidewalks in a reasonably safe condition, and makes them liable for 'any injury' that is 'proximately caused' by a breach of that duty.... The Appellate Division's location rule was not intended by the legislature, and should not be grafted onto the statute."

For appellant Sangaray: Joshua D. Kelner, Manhattan (212) 425-0700
For respondent West River: Timothy J. Dunn III, Farmingdale (631) 249-6600

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, January 7, 2016

No. 8 Matter of Monarch Consulting, Inc. v National Union Fire Insurance Company of Pittsburgh, PA (and two other proceedings)

National Union Fire Insurance Company of Pittsburgh, PA, sold workers' compensation insurance in California to Monarch Consulting, Inc., Priority Business Services, Inc., Source One Staffing, LLC, and other California companies beginning in 2003. National Union filed the policies with the Workers' Compensation Insurance Rating Bureau (WCIRB), as required by California Insurance Code § 11658, and the WCIRB sent them on to the California Department of Insurance (CDI) for approval. National Union later sent the insureds a series of "payment agreements" that governed their payment obligations and procedures for default and dispute resolution, among other things, which were never filed with the WCIRB. The payment agreements contained broad arbitration clauses requiring that all disputes be submitted to arbitration governed by the Federal Arbitration Act (FAA). They provided that arbitrators "will have exclusive jurisdiction over the entire matter in dispute, including the question as to its arbitrability," and required that any court action concerning arbitrability be brought in Manhattan. There were no arbitration provisions in the insurance policies submitted to the WCIRB.

Claiming the insureds were in default, National Union filed petitions to compel arbitration in Manhattan Supreme Court in 2010 and 2011. Monarch, Priority and Source One opposed the petitions, arguing the arbitration provisions were unenforceable because the payment agreements that contained them were never filed with the WCIRB as required by California law.

In separate proceedings, two Supreme Court justices granted National Union's petitions to compel arbitration of its claims against Monarch and Priority. A third justice ruled in favor of Source One, finding the arbitration clause unenforceable.

In a consolidated decision, the Appellate Division, First Department held 3-2 that the payment agreements and the arbitration clauses they contained were unenforceable because National Union did not file them with California regulators as required by California law. It said application of the FAA to compel arbitration here was barred by the federal McCarran-Ferguson Act, which states, "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance ... unless such Act specifically relates to the business of insurance." Since the arbitration and payment agreements are unenforceable under California law, the court said, "we find that applying the FAA to mandate arbitration in this case would, in fact, invalidate, impair, or supersede the California Insurance Code."

The dissenters argued that "the arbitrators, and not the court, should decide the gateway issue of whether the payment agreements containing the arbitration clauses are enforceable.... Although the insureds seek only to invalidate the arbitration provisions..., this necessarily and inextricably implicates the validity of the payment agreements as a whole. Consequently, pursuant to the parties' respective payment agreements and the [FAA], the underlying legal issue regarding the validity of the payment agreements should be decided by the arbitrators in the first instance." Arguing the McCarran-Ferguson Act does not preempt the FAA, they said "arbitration does not impair the California legal requirement" that workers' compensation policies be filed "because California law does not restrict the power of an arbitrator to address whether the payment agreements ... were required to be filed, and if so, what the consequences" for failure to file them would be.

For appellant National Union: Peter D. Keisler, Washington, DC (202) 736-8000
For respondent Priority: Jeffrey E. Glen, Manhattan (212) 278-1000
For respondent Monarch et al: Clifford G. Tsan, Syracuse (315) 218-8000
For respondent Source One: Alexander D. Hardiman, Manhattan (212) 858-1000

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, January 7, 2016

No. 9 Matter of Cisse v Graham *(papers sealed)*
Matter of Graham v Cisse

Rokhaya Cisse (mother) and Christopher Graham (father) are the unmarried parents of a girl, who was born in Queens in March 2001, and each is seeking custody of their daughter. The parties became estranged before the girl was born. Queens Family Court awarded the mother sole custody in a June 2004 order, when the girl was three years old, and granted the father visitation on alternate weekends, two evenings a week, and certain school holidays and vacations. The father, a public school teacher, married his current wife in 2004 and moved from Queens to West Babylon, Suffolk County, about two years later. The mother, who lives in Queens and is single, left a job with flexible hours, which allowed her time off to be with her daughter as needed, for a more demanding job in financial services with inflexible hours in 2007. She filed a petition to reduce the father's visitation so she would have more time with the girl on week nights and weekends. She argued that her new job and the father's move to Suffolk County constituted a change in circumstances warranting a modification to protect the best interests of the child. The father, who has three children with his wife, then petitioned to transfer custody to himself, arguing that the mother interfered with his visitation and that the girl wished to reside with him.

Family Court, while finding both parties to be fit and loving parents, granted the father's petition for custody and awarded visitation to the mother. "Significant changes have occurred since ... 2004," it said. "The father has moved a greater distance away from ... the child's residence. The mother has obtained different employment that places much greater demands on her time. The child has matured and made clearer her needs, her desires, and bases for those desires. Thus, a change of circumstances has been shown...." Noting the girl's preference to live with her father, it said, "The court does not fault the mother for her employment obligations, and applauds her for her success, but the reality is that given each parent's career choices, the father is more available during the week to parent [her]."

The Appellate Division, Second Department affirmed on a 3-1 vote, saying there was "a sound and substantial basis" for findings that a change of circumstances warranted the transfer of custody. The father's move to Suffolk County "was not the genesis of the difficulties the child has encountered in developing the relationship with her mother that she desires.... [T]he mother acknowledged that her new work schedule and the child's school schedule leave little time for them to spend quality time together during the school/work week."

The dissenter said the father failed to show there was a sufficient change of circumstances to support the transfer of custody. She said, "[T]he mother is a financially stable, upwardly mobile professional who has ... provided her daughter with a private school education," where she "is thriving academically.... The father's relocation, which focused on improving the circumstances for his wife and their three young children, was not in any way made to address the needs or best interests of the child."

The mother says she "was improperly penalized for being a working mother with a successful career." She argues the lower courts gave too much weight to the girl's preference to live with her father and too little to the disruption that would be caused by removing her from her school and her life-long home.

For appellant Cisse (mother): Barry J. Fisher, Garden City (516) 280-5065
For respondent Graham (father): Larry S. Bachner, Queens (917) 378-0176
For the child: Marc E. Strauss, Queens (718) 725-0022

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, January 7, 2016

No. 10 People v Urselina King *(papers sealed)*

Urselina King was accused of attacking the girlfriend of her ex-husband in the woman's Brooklyn apartment in March 2008. The complainant testified that King, armed with a knife, and a masked man with a gun ambushed her outside her apartment, dragged her inside and beat her, cut her with the knife, then ransacked her belongings and stole about $300. The complainant, who said King was jealous of her and had harassed her in the past, sustained fractures of her cheek and nose and cuts on her forehead and the back of her head.

King raised an alibi defense, presenting testimony of her two daughters and a niece that she was sleeping at her home in New Jersey at the time of the attack. King also sought to call a witness to testify that, days before the crime, two men told her the complainant's boyfriend had stolen their drugs, they believed the complainant had set up the theft, and they planned to "get her." Supreme Court precluded the testimony as speculative hearsay. During summations, the prosecutor said, "Only a woman would inflict th[e] kind of beating" that injured the complainant's face, a woman "who is trying as hard as she can to maim and disfigure her rival and to have an avenue for her rage and her jealousy." The prosecutor said the complainant's apartment was "a good location for a woman trying to take out her shame and her rage and her jealousy on the face of her rival." King was convicted of first-degree burglary and second-degree assault and was sentenced to nine years in prison.

The Appellate Division, Second Department affirmed in a 3-1 decision, saying King's claim of prosecutorial misconduct during summation was unpreserved. "In any event, although some of the prosecutor's remarks ... improperly included gender stereotyping, the improper comments were not so flagrant or pervasive in the context of the entire summation as to deprive the defendant of a fair trial.... Other comments ... were within the proper bounds of response to the defense summation in that they presented arguments based upon the evidence and the inferences to be drawn therefrom that the crime was a targeted attack motivated by the defendant's jealousy toward the victim ... rather than a random attack by an unapprehended perpetrator during the course of a robbery...." It said the trial court "properly precluded evidence of third-party culpability as speculative, lacking in probative value, and ... inadmissible hearsay."

The dissenter said "the prosecutor's comments in summation were so inflammatory and prejudicial that they deprived the defendant of a fair trial.... The prosecutor's comments that this crime could only be committed by a woman, although made without objection, appealed to gender bias and injected an issue of gender stereotyping into the trial..., warranting the reversal of the defendant's conviction in the interest of justice.... The inflammatory comments referring to the fact that the defendant was a woman were not isolated comments...."

King argues that the prosecutor's summation deprived her of a fair trial and her attorney's failure to object to the comments deprived her of the effective assistance of counsel. She says the preclusion of evidence that others had a motive and intent to harm the complainant deprived her of due process and her right to present a defense.

For appellant King: Kendra L. Hutchinson, Manhattan (212) 693-0085
For respondent: Brooklyn Assistant District Attorney Solomon Neubort (718) 250-2000

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, January 7, 2016

No. 11 People v Anthony DiPippo *(papers sealed)*

Anthony DiPippo and a co-defendant were charged with the rape and murder of a 12-year-old girl, J.W., who disappeared from her home in Carmel in 1994. A hunter discovered her remains in a wooded area of Putnam County 13 months later. DiPippo was convicted of second-degree murder and first-degree rape at his first trial in 1997, but the Appellate Division granted his CPL 440.10 motion to vacate the judgment in 2011 (82 AD3d 786) based on his trial attorney's conflict of interest. His attorney had previously represented Howard Gombert, who was identified as a possible suspect during the initial police investigation of J.W.'s murder, and failed to investigate Gombert in preparing DiPippo's defense.

Prior to his retrial in 2012, new defense counsel moved to admit a sworn statement by Joseph Santoro, a fellow inmate of Gombert's at a Connecticut prison where Gombert was serving a sentence for sexually abusing a young girl. Santoro said Gombert told him in 2011 "that Putnam County was trying to get him for the killing of two girls.... He said, 'They are trying to get me for killing this girl [J.W.] but that they already convicted some other suckers.... [T]hey got no evidence against me. It's been a long time since then'.... He said he 'ended up fucking her in his red car'.... I asked him if that happened around the time she died. He said yeah -- 'the time she disappeared.'" Gombert brought up J.W. again the next time they spoke, Santoro said. "He said 'she didn't want to do it at first but I had to persuade her.' By force -- he had a smirk on his face.... It was clear to me that the guy was bragging about killing the two girls."

After a hearing, Supreme Court denied the motion to admit evidence of Gombert's possible culpability, saying "the defendant has not established a train of facts or circumstances as to tend clearly to point out Gombert as the guilty party, People v Schultz, 4 NY3d 521 (2005).... [T]here are no facts that show Howard Gombert was ever seen in the vicinity of J.W. on or about the date she was last seen alive." It refused to admit Santoro's hearsay statements about Gombert's alleged confidences as declarations against penal interest. "They wholly lack ... supporting circumstances, independent of the statements themselves, to attest to their trustworthiness and reliability," it said, citing People v Settles (46 NY2d 154 [1978]). The court excluded evidence of Gombert's prior sexual assaults on girls and young women as irrelevant. DiPippo was again convicted of second-degree murder and first-degree rape and sentenced to 25 years to life in prison. The Appellate Division, Second Department affirmed.

DiPippo argues, "The trial court abused its discretion by failing to apply a relaxed standard of admissibility to defendant's reverse Molineux proffer [of Gombert's prior sex crimes] and his remaining evidentiary offering, all of which established the trustworthiness of Howard Gombert's declarations against penal interest," thus violating his right to due process and to present a defense. He says the lower courts should have applied the more lenient standard of Settles, which said, "Supportive evidence is sufficient if it establishes a reasonable possibility that the statement might be true. Whether a court believes the statement to be true is irrelevant."

For appellant DiPippo: Mark M. Baker, Manhattan (212) 750-7800
For respondent: Putnam County Assistant District Attorney David M. Bishop (845) 808-1050