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 MARCH 29 - 31, 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, March 29, 2016

No. 59 Matter of Viking Pump, Inc. and Warren Pumps, LLC, Insurance Appeals

This insurance dispute, a consolidated appeal from rulings by the Court of Chancery and the Superior Court in Delaware, arises from efforts by Viking Pump, Inc. and Warren Pumps, LLC to recover under insurance policies issued between 1972 and 1985 to Houdaille Industries, now defunct, which previously owned both pump manufacturers. Viking and Warren face tens of thousands of asbestos-related personal injury suits, most of them alleging exposures to asbestos and progressive injuries that occurred over a period of years. The manufacturers' entitlement to coverage under primary and umbrella policies issued by Liberty Mutual Insurance Company was resolved in prior litigation. Viking and Warren then brought these actions in the Court of Chancery against more than 20 other insurers that issued excess insurance policies, a third layer of coverage, to Houdaille. The policies are governed by New York law.

The parties cross-moved for summary judgment on how losses should be allocated among the policies where the underlying asbestos claims potentially trigger coverage in multiple policy periods. Viking and Warren argued allocation should be made by an "all sums" or "joint and several" rule, which would permit them to recover in full up to the policy limit under a single triggered policy, leaving that insurer to seek contribution from other insurers whose policies were also triggered by the asbestos claims. The excess insurers argued the losses should be allocated among all of the triggered policies on a pro rata basis, requiring each insurer to bear its proportionate share of the cost. The Court of Chancery ruled for Viking and Warren, finding that, in the language of the policies and particularly in their "Non-Cumulation" and "Prior Insurance" provisions, the parties had agreed to all sums allocation.

The case was transferred to the Superior Court to determine, among other things, whether the excess policies were subject to vertical or horizontal exhaustion. Viking and Warren argued for vertical exhaustion, which permits an insured to obtain benefits under an excess policy once the primary and umbrella insurance for the same policy year are exhausted. The excess insurers sought horizontal exhaustion, requiring an insured to exhaust all triggered primary and umbrella policies before obtaining any excess coverage. The court ruled for the insurers, holding as a matter of New York law that Viking and Warren are required to horizontally exhaust all triggered "primary and umbrella insurance layers before tapping" any of Houdaille's excess coverage.

The Delaware Supreme Court, concluding that "a resolution of this appeal depends on significant and unsettled questions of New York law," is asking this Court to decide the key issues in a pair of certified questions: "1. Under New York law, is the proper method of allocation to be used all sums or pro rata when there are non-cumulation and prior insurance provisions? 2. Given the Court's answer to Question #1, under New York law and based on the policy language at issue here, when the underlying primary and umbrella insurance in the same policy period has been exhausted, does vertical or horizontal exhaustion apply to determine when a policyholder may access its excess insurance?"

For appellant Viking Pump: Michael P. Foradas, Chicago, IL (312) 862-2000
For appellant Warren Pumps: Robin Cohen, Manhattan (212) 506-1700
For resp. Underwriters at Lloyd's, London: Kathleen M. Sullivan, Manhattan (212) 849-7000
For respondents Century Indemnity et al: Jonathan D. Hacker, Washington, DC (202) 383-5300

State of New York Court of Appeals

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To be argued Tuesday, March 29, 2016

No. 38 Millennium Holdings LLC v The Glidden Company

Insurance companies are appealing a decision that applied the antisubrogation rule to bar their claims against Akzo Nobel Paints LLC (ANP), formerly known as The Glidden Company, to recover as much as $15 million they paid to their insured, Millennium Holdings LLC, for defense and settlement of lead paint lawsuits under policies issued from 1962 to 1970. The appellants -- Certain Underwriters of Lloyd's, London and Certain London Market Insurance Companies (the London Insurers) and Northern Assurance Company of America -- issued primary and excess policies insuring Glidden until 1967, when Glidden merged with SCM Corp. and the Insurers began issuing policies to the Glidden-Durkee Division of SCM. SCM went into liquidation in 1986 and transferred the former Glidden paints business and pigments business to separate subsidiaries. After further corporate transactions and name changes, ANP became the owner of the paints business and Millennium the owner of the pigment business.

ANP and Millennium inherited from their predecessors an indemnification agreement over which they disagreed, and Millennium brought this action in 2008 to compel ANP to indemnify it for its defense costs in lead paint litigation. While the action was pending, in 2011, Millennium settled a lead paint suit by the City of Santa Clara, California, for $8.5 million. The London Insurers and Northern Assurance contributed $3.2 million to Millennium's satisfaction of the settlement subject to a reservation of rights, contending the Santa Clara settlement was not covered by their policies. Two months later, Millennium and ANP settled their claims in this case, with ANP agreeing to pay Millennium $3 million to terminate any obligations under the indemnification agreement. Supreme Court subsequently granted the London Insurers' motion to intervene in this action and Northern Assurance joined as a plaintiff in 2012, all of them seeking a declaration that they were entitled to subrogate to Millennium's indemnification rights against ANP and thereby recover their payments for lead litigation defense and the Santa Clara settlement. In 2013, in related litigation in Ohio, the Court of Common Pleas ruled the Insurers' contribution to the Santa Clara settlement was not required by their policies and was therefore a "voluntary payment" for which they could not seek reimbursement from Millennium.

Supreme Court granted ANP's motion for summary judgment dismissing the Insurers' subrogation claims. It found ANP was contractually obligated to indemnify Millennium in the lead paint cases, but said the antisubrogation rule, which prohibits an insurer from recovering against its own insured for damages arising from a risk covered by its policy, barred the Insurers' claims. Although it was bound by a 2006 Ohio Supreme Court ruling that ANP's predecessor was not an insured under the policies after it was spun-off from SCM in 1986, the trial court said ANP's "lack of coverage is irrelevant" because "ANP's liability arose between 1962 and 1970, when the lead in SCM's products caused property damage. That liability was expressly covered by the subject policies and is the exact liability that the [Insurers] do not want to pay for." The court also noted that it could have precluded the Insurers from recovering their payments for the Santa Clara settlement under the voluntary payment doctrine, based on the 2013 Ohio trial court ruling. The Appellate Division, First Department affirmed without opinion.

For appellants London Insurers et al: Carl S. Kravitz, Washington, D.C. (202) 778-1800
For respondent ANP (f/k/a Glidden): Maura Monaghan, Manhattan (212) 909-6000

State of New York Court of Appeals

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To be argued Tuesday, March 29, 2016

No. 60 People v Andre Harrison
No. 61 People v Marino Serrano

These appeals, filed by defendants who were deported by federal authorities based on their guilty pleas while their appeals were still pending, address the scope of People v Ventura (17 NY3d 675 [2011], which held the Appellate Division abused its discretion in dismissing direct appeals by two defendants on the ground they had been involuntarily deported and were no longer subject to the court's mandate. This Court said the defendants "had an absolute right to seek appellate review of their convictions" under CPL 450.10. It also observed that disposition of the issues raised "would result in either an affirmance or outright dismissal of the convictions" and "neither outcome would require the continued legal participation of defendants." The current cases concern whether Ventura is limited to direct appeals or to cases that would not result in a remittal for further proceedings.

Andre Harrison, a native of Jamaica, was charged with weapon possession in April 2008 for discarding a loaded pistol as he fled from an officer who was trying to ticket him for riding his bicycle on a sidewalk in Queens. He pled guilty to second-degree attempted criminal possession of a weapon and was sentenced to two years in prison. He filed a CPL 440.10 motion to vacate the conviction due to ineffective assistance of counsel, arguing his attorney, since disbarred, misadvised him that his plea would not result in deportation. Supreme Court denied his motion and the Appellate Division, Second Department granted him leave to appeal.

After Harrison was deported, the Appellate Division dismissed his appeal. Distinguishing Ventura, it said Harrison "is not directly appealing from his judgment of conviction as of right pursuant to CPL 450.10(1) but, rather, is appealing, by permission, from an order denying his motion to vacate his conviction.... Further, if the order were to be reversed ... and his plea of guilty vacated, the defendant's continued participation in the proceedings would be required." Harrison argues that "the logic and fundamental fairness concerns that underlie Ventura apply equally to appeals from 440 denials raising ineffective assistance of counsel claims," since such a claim "impacts the essential validity" of a plea, and appeal of a section 440 motion denial "may be, as a practical matter, the only opportunity a defendant has" for appellate review.

Marino Serrano, a native of Mexico, was charged with driving while intoxicated in July 2009 after he sideswiped a parked vehicle in Brooklyn. He pled guilty and was sentenced to 30 days in jail. On direct appeal, he argued his plea was involuntary because neither his attorney nor the court explained the rights he was waiving, but he was deported before it was decided.

The Appellate Term, Second Department agreed with him on the merits that his plea was invalid because neither the court nor defense counsel discussed "in any manner or form" the rights he was waiving, but it dismissed his appeal because, unlike Ventura, "reversal would be required and ... a penological purpose would be served by remitting the matter to the Criminal Court for all further proceedings.... The crime with which defendant was charged is ... a serious one, which could potentially serve as a predicate for an enhanced charge.... Thus, defendant's continued legal participation would be necessary, which is not possible because he has been deported." Serrano argues that, as in Ventura, his "direct appeal was his first and only opportunity for appellate review of the critical claim in his case." The dismissal "gave the prosecution the windfall of keeping 'on the books' a conviction which the Appellate Term recognized as in violation of due process.... Such treatment of an involuntarily deported person is inconsistent with Ventura and indeed, with due process."

No. 60 For appellant Harrison: Lisa Napoli, Manhattan (212) 693-0085
For respondent: Queens Assistant District Attorney Deborah E. Wassel (718) 286-5860
No. 61 For appellant Serrano: Amy I. Donner, Manhattan (212) 577-3487
For respondent: Brooklyn Assistant District Attorney Joyce Slevin (718) 250-2531

State of New York Court of Appeals

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To be argued Wednesday, March 30, 2016

No. 63 Matter of Kent v Lefkowitz

This case arises from a decision by the chairman of the State Racing and Wagering Board (the Board) to reduce per diem pay rates for seasonal employees at the state's horse tracks by 25 percent in 1996. The seasonal track workers are exempt from civil service classification and their compensation is set each year by the Board's chair, subject to the approval of the state budget director. The Public Employees Federation, AFL-CIO (PEF) filed an improper practice charge with the Public Employment Relations Board (PERB), alleging that the unilateral reduction in wages for track workers violated the Taylor Law, specifically Civil Service Law § 209-a(1)(d), which makes it an improper practice for a public employer to refuse to negotiate the terms and conditions of employment with the collective bargaining representative of its employees. In 2010, PERB's assistant director found the wages of track workers were "a mandatory subject of bargaining" and, therefore, the unilateral pay cut violated the statute.

PERB reversed the decision and dismissed the improper practice charge in 2012, finding the Board satisfied its obligation to negotiate wages in October 1995 when it executed a side letter agreement with PEF regarding their 1995-99 contract. The side letter addressed the track employees' eligibility for lump-sum payments, pay raises and holiday pay, and addressed how their wages would be raised to conform with a potential increase in the federal minimum wage, among other things.

PEF filed this article 78 proceeding against PERB, the Board, and the Governor's Office of Employee Relations (GOER) to annul the determination. Supreme Court dismissed the suit, deferring to "PERB's experience with the subtleties of how parties negotiate" a contract.

The Appellate Division, Third Department reversed and annulled PERB's determination on a 3-2 vote, saying the side letter "covered discrete compensation issues" and "does not evidence the intent of the parties ... to address any and all situations under which the Director of the Budget could unilaterally adjust wage rates for the affected employees. In other words, the side letter agreement is not ... sufficiently broad to demonstrate that the subject matter that formed the basis for the improper practice charge, i.e., the unilateral 25% reduction in wages, was negotiated to completion, and PERB's determination to the contrary was arbitrary and capricious."

The dissenters said the side letter "was comprehensive and covered a broad range of issues regarding the compensation to be paid to seasonal personnel.... Notably, aside from the negotiated raises for 1997-1998 and 1998-1999, the agreement neither sets forth any limitation on the chair's discretion to set the seasonal employees' per diem compensation rates nor indicates that it was intended to be anything less than a comprehensive agreement as to such employees. Thus..., it was reasonable for PERB to determine that the side letter agreement constituted the full agreement between the Board and PEF as to any limitations on the Board's wage-setting discretion."

For appellants GOER et al: Assistant Solicitor General Julie M. Sheridan (518) 776-2029
For appellants PERB et al: David P. Quinn, Albany (518) 457-2678
For respondent PEF and Kent: Lisa M. King, Albany (518) 785-1900 ext. 241

State of New York Court of Appeals

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To be argued Wednesday, March 30, 2016

No. 64 Jiannaras v Alfant

On2 Technologies, Inc., a Delaware Corporation that developed video compression technology at its headquarters in New York, announced an agreement to merge with Google, Inc. in August 2009. Google agreed to exchange 60 cents worth of its Class A common stock for each share of On2 common stock, a transaction valued at $106.5 million. Three days later, Michael Jiannaras brought this putative class action in New York on behalf of On2 shareholders against On2, its board of directors and Google, alleging the On2 directors breached their fiduciary duty by failing to ensure that shareholders received the best price. Other shareholders commenced similar actions in Delaware.

The New York and Delaware plaintiffs reached a settlement with On2 in February 2010, and the parties to the New York action sought certification of a settlement class of all who held shares since the merger was announced. The proposed settlement, which did not permit shareholders to opt out, provided for dismissal of the New York and Delaware actions, with prejudice, and release of "any and all" claims related to the merger. Objections were filed by 226 shareholders, who claimed the settlement was inadequate and contained "an astonishingly broad" release that would "unlawfully restrict" their rights to pursue individual damages. They argued out-of-state residents must be allowed to opt out of the settlement under Matter of Colt Industries Shareholder Litigation (77 NY2d 185 [1991]).

Supreme Court refused to approve the non-opt-out settlement after a fairness hearing, although it found the settlement class "is properly defined" and the proposed settlement "is fair, adequate, reasonable and in the best interests of the proposed Settlement Class." It said a non-opt-out settlement "is not appropriate because those proposed class members who are non-residents of New York State must be afforded the opportunity to opt out ... so that they can preserve their right to assert claims for damages, if any such claims exist." It said New York residents need not be afforded an opportunity to opt out.

The Appellate Division, Second Department affirmed in a 3-1 decision. The court said it was bound by Matter of Colt, in which "the Court of Appeals held that the Supreme Court erred in approving a settlement that purported to extinguish the rights of out-of-state class members to litigate damages claims, without giving them a chance to opt out of the class. The Court of Appeals emphasized that the mere fact that the relief initially demanded was largely equitable should not permit a court to bind litigants to a settlement that eliminated constitutionally protected property interests without due process.... [I]f there is to be any shift in that precedent, the change in the law is for the Court of Appeals to pronounce."

The dissenter said, "Since I conclude that the damages at issue here are merely incidental to the equitable relief sought, I conclude that the court was not required to afford any class members the opportunity to opt out.... Moreover, I disagree with the practice of affording only out-of-state class members the opportunity to opt out, while denying that opportunity to in-state class members." He said, "[A] distinction that has arisen in the years since Colt was decided leads me to conclude that..., where any claim for money damages is incidental to the equitable relief sought, and requires no individualized adjudications, class members, whether in-state or out-of-state, do not have a due process right to exclusion from the class."

For appellants Alfant, On2 Technologies et al: Frederick Liu, Washington, DC (202) 637-5600
For respondents Ackerman et al: Martin E. Karlinsky, Manhattan (646) 437-1430

State of New York Court of Appeals

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To be argued Wednesday, March 30, 2016

No. 65 People v Quanaparker Howard *(papers sealed)*

Quanaparker Howard and his girlfriend were arrested in August 1998 for severely abusing the girlfriend's eight-year-old son in Buffalo. Police found the boy in an upstairs bedroom, where he had been tied in a standing position for five days and repeatedly beaten with a plastic bat, belt, and extension cord. The boy's injuries included a collapsed lung, lacerated liver, bruised intestines, and there was pooled blood in his abdomen. There were no allegations of sexual abuse. Howard was convicted of first-degree assault and first-degree unlawful imprisonment, among other charges, and was sentenced to 12½ to 25 years in prison.

Although Howard was not convicted of a sex crime, he was required to register as a sex offender under Correction Law § 168-a(2), which includes unlawful imprisonment (Penal Law § 135.10) in the definition of "sex offense" when the victim is less than 17 years old and is not the child of the defendant. As Howard approached his release date in 2013, the Board of Examiners of Sex Offenders prepared a risk assessment instrument (RAI) which, including points assigned for inflicting physical injury, would have made him a Level I (low risk) offender. However, it recommended that he be designated a Level III (highest risk) offender based on its Risk Assessment Guidelines, which include a presumptive override to Level III for offenders who inflict serious physical injury. The Board noted that his "offense was not sexually driven."

Erie County Court designated Howard a Level III offender based on the override, rejecting defense counsel's argument that Level I was more appropriate because Howard had no history of sex crimes and posed little risk of committing a future sex offense. The court said, "[B]ecause of the extensive serious injury inflicted upon the victim here, essentially the torture inflicted, I agree ... that he poses a serious risk to public safety that is not captured by the scoring instrument and, therefore, I will employ the Presumptive Level 3 with no special designation." The Appellate Division, Fourth Department affirmed "for reasons stated" by County Court.

Howard says he was not convicted of a sex crime in this case and has no history of convictions or arrests for sex offenses, and he argues County Court erred in failing to weigh those mitigating factors against the aggravating factor of serious physical injury when it designated him a Level III offender. He says, "Forcing him to register [as Level III] in no way is rationally related to the governmental purpose of protecting the public from sexual crimes."

For appellant Howard: Kathryn Friedman, Buffalo (716) 912-3699
For respondent: Erie County Assistant District Attorney Nicholas T. Texido (716) 858-2424

State of New York Court of Appeals

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To be argued Wednesday, March 30, 2016

No. 99 People v Elliot Parrilla

Elliot Parrilla was driving in upper Manhattan in February 2011, when police pulled him over for traffic and equipment violations. They frisked him and found a "Husky" brand utility knife, which an officer opened with a flick of his wrist, locking the blade in place. They arrested Parrilla for possession of a gravity knife. He was indicted on a charge of third-degree criminal possession of a weapon under Penal Law § 265.02(1).

At trial, Supreme Court instructed the jurors, over defense objection, that they could convict Parrilla if they found he was aware that he possessed a knife, not necessarily a gravity knife. "A person does not have to know that the knife is specifically a gravity knife or that it fits the legal description of a gravity knife in order to knowingly possess it," the court said. "The People are only required to prove that the defendant ... knowingly possessed a knife." During deliberations, a juror sent out a note expressing concern that one of the locations mentioned in testimony "may affect my judgment" because she lived nearby. The court questioned her twice, telling her "you can't let it influence the verdict you reach in the case.... Can you do that?" The juror replied, "I want to say yes, it is just in my mind." The court said, "In terms of evaluating the evidence, the fact that you have ever lived in the area or know the area cannot be one of the factors.... Can you follow that?" The juror said, "I can follow that, yeah." The court declined to discharge the juror. Parrilla was convicted as charged and sentenced to 2½ to 5 years in prison.

The Appellate Division, First Department affirmed, saying, "The court properly instructed the jury that the knowledge element would be satisfied by proof establishing defendant's knowledge that he possessed a knife in general, and did not require proof of defendant's knowledge that the knife met the statutory definition of a gravity knife...." It said the trial court made "sufficient inquiry" of the concerned juror and, when "the juror unequivocally confirmed that she would follow the court's instructions," there was no basis to disqualify her.

Parrilla argues the jury instruction requiring only proof he knew he possessed "a knife" misinterpreted the statute and deprived him of due process. He was convicted "simply because the jury found he possessed a common workman's utility knife that he bought legally and openly at Home Depot in 2009...," he says. "[T]he utility knife here had none of the outward thug-and-brute qualities that would justify equating it with firearms, blackjacks, or 'Kung Fu Stars'.... Nothing in its outward appearance would put the possessor on notice of potential regulation, nor was Home Depot required to provide notice to the tens of thousands of customers to whom it had sold the knives that the District Attorney's office began to criminalize in June 2010." He also argues the concerned juror "gave no unequivocal assertion of impartiality" and should have been disqualified.

For appellant Parrilla: Robert S. Dean, Manhattan (212) 577-2523
For respondent: Manhattan Assistant District Attorney Andrew E. Seewald (212) 335-9000

State of New York Court of Appeals

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To be argued Thursday, March 31, 2016

No. 67 People v Joel Joseph

Based on information from a confidential informant that Siffreido Gonzalez was trafficking narcotics from his apartment in lower Manhattan, the New York Drug Enforcement Task Force began an investigation in 2009, staking out his apartment and monitoring a video camera hidden in the hallway outside his door. About five months later, in February 2010, detectives saw Gonzalez leave his apartment with a white plastic Duane Reade bag, walk to a nearby parking garage, and drive out in his black BMW. The detectives followed him up to Harlem, where he double parked and turned on his hazard lights. Joel Joseph approached the car within minutes, Gonzalez lowered a window and spoke with him briefly, then opened the hatchback. Joseph went to the rear of the car and took out the shopping bag, put it in a jacket pocket, and walked away. A detective in plainclothes followed Joseph into the St. Nicholas Houses, then tried to stop him by grabbing his hair. Joseph ran away, with the detective shouting "Police, stop." The detective tackled Joseph and the men struggled until two more detectives arrived to handcuff Joseph. They found 350 grams of cocaine in the white plastic bag.

Supreme Court denied Joseph's motion to suppress the cocaine, rejecting his claim that the search was invalid because the police lacked probable cause to arrest him. The detectives had "reasonable cause" to believe Gonzalez was dealing drugs based on the informant and their own surveillance, it said, and his interaction with Joseph entitled them "to conclude that they had witnessed a drug transaction," providing probable cause for the arrest. Even if they did not have probable cause when Joseph took the shopping bag, "they certainly had reasonable suspicion that a crime had occurred, thus warranting the pursuit and forcible stop of the defendant.... That reasonable suspicion ripened into probable cause after the defendant's flight and subsequent struggle with the officers." Joseph later pled guilty to third-degree criminal possession of a controlled substance and was sentenced to six years in prison.

The Appellate Division, First Department affirmed, saying the informant provided reliable information about Gonzalez and the officers' surveillance "established, circumstantially, that the drug activity ... continued up to the time of [Joseph's] arrest.. Accordingly, there was sufficient evidence that the informant's information had not become stale...." Finding there was probable cause for the arrest, it said, "Although, if viewed in isolation, the generic bag could have been innocuous, it clearly indicated the presence of a drug transaction when viewed in context." Even if the officers lacked probable cause, they had reasonable suspicion justifying the forcible stop, it said. Joseph's "flight from the officers, after they had identified themselves, and his struggle when they tried to stop him, elevated the officers' suspicions and provided probable cause regardless of whether it already existed...."

Joseph argues the officers had no authority to arrest or forcibly stop him because they had "at most a 'founded suspicion' of criminality" when he took the Duane Reade bag, "the sort of bag law-abiding New Yorkers carry every day." There is no evidence the police "had recovered any drugs" while investigating Gonzalez, "seen any drugs, or intercepted any communications about drugs," so they could not "establish that the informant's tips ... were not stale," he says. There is no evidence they had seen or heard of Joseph prior to his arrest, and they did not hear his conversation or see him give Gonzalez money before he took the bag. He says any founded suspicion or even reasonable suspicion officers might have had "was not elevated to probable cause to arrest when [he] ran after being followed at night by a plainclothes detective who grabbed his hair" because his flight "was precipitated by [the detective's] use of force" and was not "evidence of consciousness of guilt," but of fear that he might be robbed.

For appellant Joseph: Arthur H. Hopkirk, Manhattan (212) 577-3669
For respondent: Manhattan Assistant District Attorney Lindsey Richards (212) 335-9000

State of New York Court of Appeals

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To be argued Thursday, March 31, 2016

No. 68 People v Jonathan J. Connolly *(papers sealed)*

Jonathan Connolly was arrested for breaking into his girlfriend's apartment in the Village of LeRoy, Genesee County, in 2008. He set small fires on the kitchen stove, a couch, living room curtains, various cushions and a box spring. He swung a knife at a police officer who was trying to enter the apartment, and also broke windows and damaged other property. A fire company quickly extinguished the fires. Connolly pled guilty to first-degree attempted assault and third-degree attempted arson and was sentenced to eight years in prison.

The issue of restitution was assigned to a judicial hearing officer (JHO) for a hearing in 2009. The prosecutor presented testimony by an adjuster for the Erie Insurance Company, which had settled the building owner's claims for property damage and lost rental income, along with documentary evidence. Based on the JHO's report, County Court ordered Connelly to pay $31,403.49 in restitution. The Appellate Division, Fourth Department ruled County Court "erred in delegating its responsibility to conduct the restitution hearing to a judicial hearing officer," vacated the order, and remitted the matter to County Court "for a new hearing to determine the amount of restitution."

At the County Court hearing on remittal in 2013, the prosecutor presented the transcript and exhibits from the JHO's hearing in 2009, then rested. The court overruled defense objections and said, "This court is not restricted at a restitution hearing by the traditional rules of evidence, and may consider reliable hearsay...." It cited Penal Law § 60.27(2), which states a court must conduct a hearing if "the record does not contain sufficient evidence" to determine the amount of restitution "or upon request by the defendant;" and CPL 400.30(4), which states, "Any relevant evidence, not legally privileged, may be received regardless of its admissibility under the exclusionary rules of evidence." The court ordered Connolly to pay $31,796.69 in restitution.

The Appellate Division affirmed, rejecting Connolly's claim that the 2013 hearing was inadequate because no witnesses were called. The exhibits and "the transcript of the sworn testimony" taken at the JHO's hearing in 2009, "which was subject to cross-examination..., constitutes 'relevant evidence' ... [that] may be received 'regardless of its admissibility under the exclusionary rules of evidence'...," the court said, citing CPL 400.30(4).

Connolly argues, "County Court did not fulfill its obligation to conduct a hearing.... When a sentencing court impermissibly delegates its responsibility to conduct a hearing, and then holds a later proceeding at which the transcript of the unlawfully delegated hearing is received in evidence in lieu of testimony from the witnesses who appeared before the JHO, the court makes a mockery of the rule that it must conduct the hearing." He says, "The court circumvented the remittal and the statutory duty to conduct a hearing." He also argues, "The unjustified delay in conducting a proper reparation hearing violated appellant's right to be sentenced without unreasonable delay."

For appellant Connolly: Alan Williams, Buffalo (716) 853-9555
For respondent: Genesee County Asst. District Atty. William G. Zickl (585) 344-2550 ext 2495

State of New York Court of Appeals

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To be argued Thursday, March 31, 2016

No. 69 People v Ronald D. Rossborough

Ronald Rossborough was charged in 2010 with engaging in a criminal scheme in several Western New York and Southern Tier counties, using stolen checks to buy jewelry, stereo equipment and other expensive merchandise at stores, then returning the items for cash refunds. In Wyoming County, he pled guilty to a felony count of third-degree grand larceny in exchange for a sentence of three to six years in prison, to run concurrently with sentences imposed in other jurisdictions, and an order to pay $2,500 in restitution.

At his plea proceeding in Wyoming County Court, Rossborough orally agreed to waive his right to be present at his sentencing after the court told him he had "an absolute right to be here for the sentencing." He also executed a written waiver of his right to appeal, a waiver the judge explained would include "anything surrounding your arrest, your conviction here today or the sentence that I impose as long as I stay within the agreed time." The court later imposed the promised sentence in his absence.

On appeal, Rossborough contended the court violated CPL 380.40 by sentencing him in absentia. The statute states, "The defendant must be personally present at the time sentence is pronounced," but contains an exception allowing a defendant's written waiver of the right to be present "[w]here sentence is to be pronounced for a misdemeanor or for a petty offense."

The Appellate Division, Fourth Department affirmed, saying, "Defendant's valid waiver of the right to appeal encompasses his contention that County Court erred in sentencing him in absentia.... In any event, defendant's contention lacks merit. The record establishes that defendant waived his right to be present at sentencing, having specifically requested at the plea proceeding that he be permitted to waive his personal appearance at sentencing...."

Rossborough argues that "a plain reading of the statute prohibits courts from allowing a defendant to waive his presence for sentencing on a felony." The terms of CPL 380.40 "are plain, clear, and unambiguous, and nothing is left for interpretation: the statute requires the presence of a defendant for sentencing proceedings, and the only exception to this rule applies to misdemeanors and petty offenses -- not felonies."

For appellant Rossborough: Christine Seppeler, Rochester (315) 573-4077
For respondent: Wyoming County Assistant District Attorney Eric R. Schiener (585) 786-8822

State of New York Court of Appeals

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To be argued Thursday, March 31, 2016

No. 62 People v Tyrone D. Manor

Tyrone Manor was charged with intentional murder in the second degree for killing Desiree Curry during a dispute in Rochester in October 2008. He told the police the incident was "a mistake" and said Curry threw garden shears at him, hitting him in the leg, and he threw them back at her, piercing her back. He told officers "I'm no killer" and "I wasn't thinking." On the eve of his bench trial Manor was offered two alternative plea bargains: plead guilty to intentional murder in exchange for a maximum term of 20 years to life, or plead to first-degree manslaughter for a maximum sentence of 25 years in prison.

After meeting with his lawyers and relatives, but not his wife or children, Manor pled guilty to intentional murder. He told County Court, "We got into a discussion. She shot some shears at me. I wasn't thinking. I shot them back and they went in her back." The court asked, "Did you intend to cause her death?" He said, "No." The court explained it could not accept the plea unless it was satisfied that he intended to kill Curry, then said, "Well, Mr. Manor, I'm not putting words in your mouth. You either intended to cause her death or you didn't." Manor replied, "I intended." The court asked, "You intended to cause her death?" He replied, "Yes." He said no one forced him to plead guilty and he was not impaired by medication or alcohol.

Manor's two attorneys moved to vacate his plea and filed affidavits detailing their views of his impaired mental and physical condition at the time of the plea, saying they were surprised by his decision and describing him as "stammering" and "robotic, uncommunicative and weird." They also filed an affidavit from a psychiatrist who examined Manor and concluded that his decision to plead was affected by "extraordinary pressure from family members" and that he was likely impaired by Cognac and marijuana he consumed shortly before arriving at the court house.

County Court denied the motion without asking Manor any questions. "I really don't see an issue for a factual hearing and I'm satisfied that the plea ... was a knowing, voluntary and intelligent waiver of his rights to a trial on the day of trial," it said. It sentenced him to 18 years to life.

The Appellate Division, Fourth Department affirmed, saying Manor's "claims that he was coerced by family members into pleading guilty, that he was intoxicated during the plea proceeding, and that he did not understand the nature of the plea or its consequences are belied by the record of the plea proceeding.... [T]he court did not abuse its discretion in denying his motion without a hearing" because it gave him a "reasonable opportunity to present his contentions." It found his attorneys provided "meaningful representation."

Manor argues the trial court erred in summarily denying his motion to withdraw his plea. "The uncontested factual information contained in [the] motion ... was sufficient alone to establish that [his] plea was not a knowing and voluntary choice." Alternatively, he argues "it was an abuse of discretion for the trial court to deny [the] motion ... absent any inquiry to determine what impact any undue pressure or mental impairment had on [his] decision to plead guilty to intentional murder, and the matter should be remitted to the trial court to conduct a hearing." He also argues he was denied effective assistance of counsel.

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