State of New York
Court of Appeals

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NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

TUESDAY, JANUARY 3, 2017
AND
THURSDAY, JANUARY 5, 2017

State of New York Court of Appeals

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To be argued Tuesday, January 3, 2017

No. 1 People v Gregory Vining

While he was being held at Rikers Island for allegedly assaulting his girlfriend in September 2011, Gregory Vining made a series of phone calls to the complainant. Vining had been informed the calls would be recorded pursuant to New York City Department of Correction policy. In one of those recorded calls, the complainant repeatedly said Vining had broken her ribs. Vining did not expressly deny her statements or directly address them, instead asking if she believed he was a threat to her and if she cared that he might serve a year in jail.

At trial, Supreme Court permitted the prosecutor to introduce part of the recording into evidence against Vining as an adoptive admission by silence. The court cited the hearsay exception for admissions against penal interest. In summation, the prosecutor replayed the recording and argued that Vining's failure to deny the complainant's claims demonstrated his consciousness of guilt and constituted an admission by silence. He was convicted of third-degree assault, fourth-degree criminal mischief and trespass, and was sentenced to an aggregate term of two years.

The Appellate Division, First Department affirmed, saying, "The court properly exercised its discretion in admitting a phone call placed by defendant" while he was incarcerated, "in which the victim repeatedly stated that defendant had broken her ribs. The record supports the court's findings that defendant heard and understood the victim's accusation, and that a person in defendant's position would have been expected to answer.... Although the phone call was recorded by the Department of Correction pursuant to a standard policy made known to all inmates, the rule excluding 'silence in the face of police interrogation' ... was not implicated, since defendant's admissions by silence were made to a civilian." It said the court should have redacted references in the call to a potential one-year sentence, but found the error "harmless in light of the court's thorough instructions."

Vining argues that admission of the recording "was error because (1) using Mr. Vining's silence during a call that he knew to be monitored by the government violated due process and undermined his constitutional right to remain silent, (2) an insufficient foundation was laid for a tacit admission, and (3) the court refused to redact inadmissible information about Mr. Vining's sentencing exposure that was incorrect and misleadingly suggested that Mr. Vining faced a much lower sentencing exposure than he actually did." He says, "At the time of the call, Mr. Vining had been arrested, informed of his Miranda rights, and remained in custody. He also knew that his calls were being monitored by the government and had almost certainly been told by his attorney not to discuss the case over the Rikers Island telephones. Under these circumstances, the use of his post-arrest silence as direct evidence of guilt constituted a clear violation" of his right to remain silent.

For appellant Vining: Margaret E. Knight, Manhattan (212) 402-4100
For respondent: Manhattan Assistant District Attorney Ross Mazer (212) 335-9000

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To be argued Tuesday, January 3, 2017

No. 2 Marin v Constitution Realty, LLC (Menkes v Golomb)

Attorney Sheryl Menkes represented Jose and Ada Marin in a personal injury action beginning in 2006. In February 2009, Menkes entered into an agreement with Jeffrey A. Manheimer to act as her co-counsel, provide advice, and attend certain depositions and the trial in exchange for 20 percent of the attorney's fees. Neither Menkes nor Manheimer informed the plaintiffs of the arrangement. The agreement was amended in June 2009 to provide that Manheimer would serve only as an advisor. Menkes discharged Manheimer in August 2009, saying she preferred "to handle this matter alone."

After the plaintiffs won summary judgment on liability in 2012, Menkes retained David B. Golomb to handle a mediation to set the amount of damages in return for 12 percent of the attorney's fees. The agreement also provided, "If the case does not resolve at the mediation, presently scheduled for May 20, 2013," then Golomb would handle the trial on damages and receive 40 percent of the fees "whenever the case is resolved, whether by settlement, verdict after trial or appeal." At the mediation session, the parties came within about $1 million of agreement on damages. The case was not resolved that day, but the mediator continued to negotiate with Golomb and the defendants' insurers, which resulted in an $8 million settlement on May 31, 2013. Then a dispute arose over division of the counsel fees, which totaled $2.6 million.

Supreme Court ruled Golomb was entitled to 40 percent of the fees under his agreement with Menkes, rejecting her argument that Golomb was only entitled to 12 percent because the mediation resulted in a settlement. The court said the agreement's language -- "If the case does not resolve at the mediation, presently scheduled for May 20, 2013" -- "limits the timeframe of the mediation" to that one day, when the case was not "resolved" and "the parties were $1,000,000 apart." The court also ruled Manheimer was entitled to 20 percent of the fees, rejecting Menkes' claim that his agreement was unenforceable because the clients were not informed of it as required by rule 1.5(g) of the Rules of Professional Conduct.

The Appellate Division, First Department affirmed, ruling unanimously that Manheimer was entitled to 20 percent, but splitting 3-2 on Golomb's share. The majority said Golomb's agreement "uses the term 'the mediation' and further defines it as 'presently scheduled for May 20, 2013,'" which limits the mediation session to that day. "There is nothing in this agreement or in the record that indicates that the parties contemplated additional mediation sessions or that the May 20 session was 'adjourned'.... That the mediator offered to reach out to the excess carriers to see if they would increase their offer does not change the fact that the mediation had ended" on May 20, when "the parties were not even close to a settlement." It said there is nothing in the agreement "that conditions Golomb's entitlement to the higher fee upon his commencing or taking any steps to prepare for trial."

The dissenters argued Golomb was entitled to just 12 percent under the agreement "because the action was settled as a direct result of 'the mediation' commenced on May 20, 2013." They said, "The term 'presently scheduled for May 20, 2013,' separated by commas, is a descriptive term, not one of limitation.... Although the phrase identifies the start date of the mediation, it does not limit Mr. Golomb's responsibilities with respect to 'the mediation' to that single date. Thus..., the agreement unambiguously provides for a 12% fee if the case resolves through the mediation and a 40% fee if the mediation was unsuccessful and the case has to proceed towards trial."

For appellant Menkes: Scott T. Horn, Manhattan (212) 425-5191
For respondent Golomb: Brian J. Shoot, Manhattan (212) 732-9000
For respondent Manheimer: Jay L.T. Breakstone, Port Washington (516) 466-6500

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To be argued Tuesday, January 3, 2017

No. 3 People v Shawn J. Sivertson

Employees of a Buffalo convenience store called 911 to report that a man with a knife had stolen cash from their charity collection jar in November 2012. The store's shift manager told responding police officers that she had followed the robber as he fled behind a building across the street. Two residents told officers that Shawn Sivertson matched the description of the perpetrator and that he lived in the lower rear apartment of the building. Looking through his window, officers saw Sivertson watching television and they saw a pair of gloves like those worn by the robber. They knocked on the window and the door, shouting for him to open the door. When he did not respond, they forced the door open, arrested him, and seized the gloves, a knit cap, and three knives from the kitchen. Sivertson remained largely silent after his arrest.

After a suppression hearing, Supreme Court found the warrantless entry and search were justified by exigent circumstances. At trial, defense counsel did not object when the prosecutor suggested during summation that Sivertson's failure to declare his innocence when the police burst into his apartment was evidence of his guilt. Sivertson was convicted of first-degree robbery and sentenced as a persistent violent felony offender to 20 years to life in prison.

The Appellate Division, Fourth Department affirmed, finding "there was an urgent need that justified the warrantless entry in this case." It said the police "reasonably believed that they had located the perpetrator, who was still armed, as they observed defendant in his apartment unit from the outside" and they "did not know if defendant had access to the remainder of the building," which might provide a means of escape. The court said, "We agree with defendant that certain comments made by the prosecutor during summation were improper, particularly those reflecting upon defendant's silence or demeanor following his arrest.... We conclude, however, that the prosecutor's comments 'were not so pervasive or egregious as to deprive defendant of a fair trial'" and defense counsel did not render ineffective assistance by failing to object.

Sivertson argues there were no exigent circumstances, in part because the officers "had a viable alternative to forcibly entering appellant's apartment: one or more of the many officers involved in this investigation could have been posted outside of appellant's door and windows, ready to arrest him if he sought to leave his home," while others obtained a warrant. And even if they had probable cause, he said, "no officer testified that he saw a knife or any other sort of weapon in the apartment when looking from the outside." He also argues that his attorney's failure to object to the prosecutor's comments about his post-arrest silence was not harmless because "the evidence was not overwhelming" in this case, where the store clerks saw only the eyes of the robber, whose face was covered by a scarf, and only one of them said he had a knife.

For appellant Sivertson: Barbara J. Davies, Buffalo (716) 853-9555
For respondent: Erie County Assistant District Attorney Ashley R. Lowry (716) 858-7922

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To be argued Thursday, January 5, 2017 (arguments begin at noon)

No. 5 Artibee v Home Place Corporation

Carol Artibee was injured as she was driving on State Route 9N in the Town of Bolton in August 2011 when a tree branch overhanging the highway fell on her vehicle. Artibee and her husband sued Home Place Corp., the owner of the property where the tree was located, for negligence in Warren County Supreme Court. They also sued the State of New York in the Court of Claims, alleging the State was negligent in failing to address the hazard the diseased tree posed to users of its highway. Home Place moved for admission of evidence of the State's liability in the Supreme Court action and for the jury to apportion liability between itself and the State under CPLR 1601. The statute modified the traditional rule of joint and several liability in personal injury cases by providing that defendants who are no more than 50 percent culpable may be held liable for only their equitable share of the damages.

Supreme Court said evidence of the State's liability was admissible, but ruled apportionment was not available due to a jurisdictional limitation in CPLR 1601, which provides that "the culpable conduct of any person not a party to the action shall not be considered in determining any equitable share herein if the claimant proves that with due diligence he or she was unable to obtain jurisdiction over such person in said action (or in a claim against the state...). The court said, because the State may only be sued in the Court of Claims and sovereign immunity prevents it from being joined in the Supreme Court action, Home Place "essentially seeks ... to have the jury apportion liability amongst itself and a constitutionally mandated empty chair." The statute does not authorize apportionment against the State, it said, and apportionment could jeopardize any recovery by Artibee. The Supreme Court jury "could conceivably apportion fault entirely against the State, but Artibee could only recover from the State in the Court of Claims; and that court, not bound by the Supreme Court outcome, could apportion no liability against the State, leaving Artibee with no recovery "despite potentially proving liability twice." It said denial of apportionment was "the most equitable result" because Home Place could still seek indemnification from the State in the Court of Claims as an additional claimant.

The Appellate Division, Third Department modified on a 3-1 vote by granting the motion for apportionment. Although CPLR 1601 is silent about apportionment in this situation, the court said, "the prevailing view is that apportionment against the State is an appropriate consideration in determining the fault of a joint tortfeasor in Supreme Court.... Legislative history supports this view," given the statutory purpose of limiting the liability of defendants to their proportionate share. "Moreover, as a policy matter, prohibiting a jury from apportioning fault would seem to penalize a defendant for failing to implead a party that, as a matter of law, it cannot implead...." It said the risk of inconsistent verdicts "arises regardless of whether or not the jury is entitled to apportion liability between defendant and the State...."

The dissenter, saying this case "is fodder for those who advocate for a single, Supreme Court level trial court," argued that "Supreme Court fashioned a reasonable solution to a difficult problem" and voted to affirm.

For appellant Artibee: Robert H. Coughlin, Jr., Albany (518) 452-1800
For amicus curiae State: Assistant Solicitor General Frederick A. Brodie (518) 776-2317
For respondent Home Place: Thomas J. Johnson, Albany (518) 456-0082

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To be argued Thursday, January 5, 2017 (arguments begin at noon)

No. 6 People v Rafael Then

Rafael Then was charged with stealing a 2003 Lexus from a car dealership in Queens in October 2006. When his case went to trial nearly six years later, Then, who was in a wheelchair, appeared for the first day of jury selection in orange prison-issued pants. He complained to Supreme Court that he had been held in the "bullpen" at Rikers Island and so was not able to sleep in a bed, take a shower, or call his family to bring his own clothing. "I am in orange pants," he said. "I look crazy. I mean, I am not even being given an opportunity to be presentable for the people that can be prospective jurors" The court said it would arrange for him to get access to his own clothes at Rikers "so you can come to court looking appropriate," but it denied his request for an adjournment. Then remained in the orange prison pants through the first day of voir dire, when half of the jury was chosen. He wore civilian clothing for the rest of the trial. He was convicted of robbery in the first and second degree and sentenced to 23 years in prison.

The Appellate Division, Second Department affirmed, saying, "Before any prospective jurors entered, the court directed that the defendant's wheelchair be moved closer to the defense table, and noted that the defendant was situated at the furthest distance possible from the prospective jurors in the courtroom. The court also noted that, unless the jurors strained, it was unlikely that they would be able to see the pants that the defendant was wearing.... Under these circumstances, the fact that the defendant wore prison pants for half a day of jury selection was not an error so egregious as to deprive the defendant of his right to a fair trial. Further, any other error regarding the clothing worn by the defendant was harmless since the evidence of the defendant's guilt was overwhelming and there is no reasonable possibility that this error affected the outcome of the trial (see People v Best, 19 NY3d 739 ...)."

Then argues that he "was denied his due process right to a fair trial and equal protection when, over his objection, he was forced to wear distinctive prison attire and appear disheveled during the first day of voir dire, when the entire jury pool was present and half the jury was selected." Requiring a defendant to wear prison clothes is per se reversible error under People v Roman (35 NY2d 978), he says, and the Appellate Division erred in relying on Best, "which applied harmless error analysis to the fundamentally different error of improperly shackling the defendant.... [C]ompelling a defendant to wear prison garb because he is too poor to post bail is significantly different than shackling a defendant based on his own courtroom misbehavior."

For appellant Then: Patricia Pazner, Manhattan (212) 693-0085
For respondent: Queens Assistant District Attorney Joseph N. Ferdenzi (718) 286-5867

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To be argued Thursday, January 5, 2017 (arguments begin at noon)

No. 4 Matter of Corrigan v State Office of Children and Family Services *(papers sealed)*

The Statewide Central Register of Child Abuse and Maltreatment was created in 1973 with the enactment of Social Services Law § 422 to encourage reporting of child abuse or neglect. The State Office of Children and Family Services (OCFS) maintains the register and refers reports of alleged abuse or neglect to local social services agencies for investigation. Prior to 2007, all reports were investigated to determine whether they were supported by some credible evidence or were unfounded. The statute requires that unfounded reports be sealed and after ten years expunged. Section 422 also gives OCFS discretion to expunge an unfounded report before ten years has passed if the subject of the report "presents clear and convincing evidence that affirmatively refutes the allegation," among other things. In 2007, the Legislature enacted Social Services Law § 427-a to create an alternative Family Assessment Response (FAR) track for less serious abuse or neglect reports, where the child's safety is not at risk. The FAR track focuses more on providing services to families than investigation. Section 427-a provides that reports placed on the FAR track must be sealed and must be maintained on the statewide register for ten years. Unlike section 422, section 427-a does not address the issue of early expungement.

In 2013, OCFS received a report that petitioners neglected their nine-year-old son's education by allowing him to miss at least 25 days of school. OCFS referred the report to the Westchester County Department of Social Services which, after a safety assessment, placed it on the FAR track. The agency determined that the boy's absences were due to serious medical conditions, primarily doctors' appointments related to his liver transplant in infancy, and that he was keeping up in school. The petitioners and school officials agreed on accommodations for the boy's medical absences and the agency closed the case a month after the initial report was made.

The petitioners sought expungement of the neglect report and related records. OCFS denied the request, saying it did not have statutory authority to grant early expungement of FAR reports, and the petitioners brought this proceeding to challenge the determination.

Supreme Court denied the petition, finding the determination was consistent with the legislature's intent "to foster a less adversarial relationship" between the agencies that investigate reports and the families they serve. It rejected the petitioners' equal protection claim, saying section 427-a "does not involve a suspect class based upon race, national origin or religion" and is "rationally related to a legitimate government objective."

The Appellate Division, Second Department affirmed, saying the determination was not arbitrary or capricious because section 427-a "expressly requires that FAR reports and records be maintained for 10 years" and makes no provision for early expungement. It said "the early expunction provision of [section] 422 is focused on the falsity of the report," while "the stated purpose in enacting ... section 427-a was to avoid any consideration of the truth or falsity of the allegations ... in appropriate cases."

The petitioners argue the OCFS determination was arbitrary and capricious and "runs wholly in contravention to the legislative intent [in section 427-a] of strengthening families rather than assessing blame;" and denying early expungement to subjects of FAR reports, while allowing it for those subject to more serious investigation under section 422, violates the equal protection clause. They say the sections are part of the same statutory scheme and should be interpreted together to permit early expungement in FAR cases.

For appellants Corrigan and Herder: Peter D. Hoffman, Katonah (914) 232-2242
For respondent OCFS: Assistant Solicitor General Valerie Figueredo (212) 416-8019