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 or gspencer@nycourts.gov.

NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

November 19, 20 and 21, 2019

State of New York
Court of Appeals

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To be argued Tuesday, November 19, 2019

No. 99 Vanyo v Buffalo Police Benevolent Association, Inc.

Ann Vanyo, who became a Buffalo police officer in 1998, was charged with a series of disciplinary violations between 2009 and 2014, including a charge that she publically threatened a romantic rival while on duty and in uniform. The charges were referred to arbitration in accordance with the contract between the City of Buffalo and the Buffalo Police Benevolent Association (PBA). The arbitrator found Vanyo guilty of the charges and recommended termination. The City terminated her employment on October 16, 2014.

In February 2015, Vanyo commenced an action against the City and the PBA by filing a summons and complaint, alleging, among other things, that the PBA breached its duty of fair representation and the City breached the contract by firing her. However, she did not serve the defendants with the original complaint. The statute of limitations expired in March 2015. On May 21, 2015, Vanyo filed an amended complaint, which she served on the defendants five days later. It included the four causes of action contained in the original complaint and added a fifth against the City for gender discrimination. The defendants moved to dismiss the amended complaint. Before Supreme Court ruled on their motions, Vanyo moved under CPLR 306-b to extend the time for her to serve the original complaint on the defendants and to deem the original complaint timely served.

Supreme Court, in separate orders, denied Vanyo's motion for additional time; and dismissed the original complaint and amended complaint.

The Appellate Division, Fourth Department affirmed in a 3-2 decision. It agreed unanimously that Supreme Court did not abuse its discretion in denying Vanyo's motion for an extension of time to serve the original complaint, but it split on the dismissal of the first and second causes of action alleging the PBA breached its duty of fair representation and the City breached the contract. The majority said Vanyo's claims were untimely because they accrued when she was fired, "but the amended complaint, i.e., the only pleading with which defendants were served, was filed well beyond the applicable four-month limitations period." Rejecting Vanyo's argument that her claims were timely because they relate back to the original complaint, the majority said the original complaint "was never served on defendants" and "thus did not give defendants notice of the transactions or occurrences to be proved pursuant to the amended complaint. The claims in the amended complaint, therefore, are measured for timeliness by [filing] of the amended complaint."

The dissenters argued that, because "CPLR 306-b contains no authority for the court to dismiss a complaint on its own motion..., the court clearly exceeded its authority in dismissing the [original] complaint without a motion by defendants." They said the first and second causes of action were not time-barred because Vanyo filed the original complaint within the four-month limitations period. "This filing commenced the action and tolled the statute of limitations.... A party may amend a pleading without leave of court at any time before the period for responding to it has expired.... [P]ursuant to CPLR 203(f) the amended complaint, which only added a new cause of action and not a new party, relates back to the timely commencement of the action by the filing of the original complaint."

For appellant Vanyo: Phillip A. Oswald, Buffalo (716) 854-3400
For respondent City of Buffalo: David M. Lee, Buffalo (716) 851-4343
For respondent PBA: Catherine Creighton, Buffalo (716) 854-0007

State of New York
Court of Appeals

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To be argued Tuesday, November 19, 2019

No. 1000 Matter of Franklin Street Realty Corp. V NYC Environmental Control Board

Franklin Street Realty Corp. and three other corporations, which separately own five buildings in Brooklyn and Queens, brought these CPLR article 78 proceedings to annul determinations by the New York City Environmental Control Board (ECB) which found they engaged in unauthorized outdoor advertising in 2014 and imposed fines totaling $380,000. All four corporations are owned by attorney John J. Ciafone or his wife. All five buildings displayed signs on their facades advertising the "Law Offices of John J. Ciafone, Esq." The corporations were charged with violating the Administrative Code by posting outdoor signs promoting Ciafone's law practice, Ciafone, P.C., without obtaining permits or complying with other rules.

The ECB sustained the charges. It found the corporations were acting as outdoor advertising companies under Administrative Code § 28-502.1, which defines the business as "making space on signs situated on buildings and premises within the City of New York available to others for advertising purposes." The ECB has construed the statute to allow building owners to advertise their own business on their buildings, but it said it had clarified in a series of cases "that if the company being advertised and the owner of the building are two separate corporate entities, even though there may be an overlapping of principals, the building owner was making space available to others" and the exception does not apply.

The Appellate Division, First Department upheld the ECB decisions on a 3-2 vote, saying ECB's "creation of a narrow exception for circumstances involving a building owned by an individual who advertises for his or her self" was within its authority, and "both ECB's reading of the statute and its application of its own precedent to this case were rational, and not arbitrary or capricious." It said the conduct of the corporations fell within the statutory definition of outdoor advertising companies because they "made space on signs available to Ciafone's law practice (a professional corporation), a separate and distinct entity. Of course, it is fundamental that individuals, corporations, and partnerships are each recognized as separate legal entities, and in this statutory context constitute 'others' regardless of the common principal ownership or connection between the entities.... The record shows that the building owners are not Ciafone or Ciafone, P.C., but separate corporate entities, and that the advertising signs promoted legal services by Ciafone, not any services of the corporate entities that own the buildings."

The dissenters said, "This disparate treatment between buildings owned by an individual who advertises the services of his or her own corporation, and buildings owned by a corporation that advertises the services of its own principal, is so unrelated to the achievement of the legitimate purposes underlying the outdoor advertising laws as to be irrational, and is, therefore, arbitrary and capricious. In either scenario, at one end of the transaction you have a corporation and at the other end its principal, both of whom are distinct but interrelated legal entities, and it is logically absurd to find that the owner is making an outdoor advertising sign 'available to others' in one instance but not the other."

For appellants Franklin Street Realty et al: Lindsay Garroway, Manhattan (212) 566-7081
For respondents ECB et al: Asst. Corporation Counsel Barbara Graves-Poller (212) 356-0817

State of New York
Court of Appeals

To be argued Tuesday, November 19, 2019

No. 101 People v Ramee McCullum

Ramee McCullum was living in one bedroom of his cousin's Brooklyn apartment in January 2012, when all of the occupants were locked out of the apartment by the execution of a "legal possession" by a city marshal, who changed the locks. The marshal's execution of the warrant gave legal possession of the apartment to the landlord, who had commenced a summary nonpayment proceeding against McCullum's cousin for failure to pay rent. Unlike a full eviction, in which the tenants and their property are removed from the premises, in a legal possession only the tenants are removed and their property remains in the apartment under the control of the landlord as bailee. The tenants, as bailors, have 30 days to retrieve their personal property. Later that day, police officers responded to a report of trespassing in the apartment. After arresting the trespasser the officers searched the apartment and found in McCullum's bedroom eight handguns. He was charged with criminal possession of a weapon.

McCullum moved to suppress the guns on the ground that the warrantless search of his bedroom was improper. He argued that he had standing to challenge the search because he had a reasonable expectation of privacy in his bedroom, where he regularly slept and had installed his own lock. The prosecutor argued that McCullum's reasonable expectation of privacy ended when he was "evicted" and the landlord regained legal possession of the apartment. Supreme Court denied the motion to suppress, implicitly finding that McCullum lacked standing to challenge the search. He was convicted of second-degree weapon possession and sentenced to eight years in prison.

The Appellate Division, Second Department affirmed, rejecting McCullum's claim that when the landlord became the bailee of the occupants' personal possessions, he retained a reasonable expectation of privacy in his possessions during the bailment. The court said it is clear he would have had no legitimate expectation of privacy in his bedroom if he had been evicted, and it said the distinction between an eviction and a legal possession "is a distinction without a difference. Here, the legal possession gave the landlord the right to possess the apartment and remove the tenants and occupants. Although their belongings remained in the apartment, thereby necessarily creating a bailment, the tenants and occupants no longer had a legal right to possess or control" the apartment and "any subjective expectation of privacy he manifested in the bedroom ... was not objectively reasonable.... Where, as here, the occupant has been removed from or locked out of the subject premises, the simple fact that his belongings remained thereafter in the premises does not in itself give him an objective expectation of privacy in the premises...."

McCullum argues he had standing to challenge the search because a legal possession, "which removes the occupants of an apartment but not their property..., creates a bailment by operation of law, with the landlord serving as 'bailee' of the property for a period of 30 days.... The general view among courts at the federal and state levels, as well as legal scholars, is that bailors ... retain a reasonable expectation of privacy in their property during the course of a bailment." He says that he, "like any bailor, had both a proprietary and a possessory interest in his property" during the bailment and remained its "sole owner," while the landlord "had only temporary possession and control" of it. "Because he could sue the landlord for losing or damaging his property, appellant also had at least a *de facto* right to exclude others from access to it.... [W]hat made appellant's expectation of privacy even more likely to be recognized by society as reasonable was that the bailment occurred at his home and encompassed almost all of his personal property."

For appellant McCullum: Benjamin S. Litman, Manhattan (212) 693-0085
For respondent: Brooklyn Assistant District Attorney Solomon Neubort (718) 250-2514

State of New York
Court of Appeals

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To be argued Wednesday, November 20, 2019

No. 102 People v David Mairena
No. 103 People v Mauricio Altamirano

These appeals, in which the defendants claim that errors by the trial court in instructing the jury violated their right to an effective summation, raise the question of whether such claims are subject to harmless error analysis.

David Mairena was accused of killing Miguel Jimenez with a box cutter during a fight outside a Brooklyn restaurant in 2013. Jimenez had been wielding a machete early in the fight, but witnesses said he dropped it before the fatal wound was inflicted. Prior to summations, Supreme Court said it would grant a defense request that it instruct the jurors they had to find the fatal injury was caused by the box cutter, and not broken glass, in order to convict Mairena of manslaughter. Defense counsel then argued in summation that Jimenez was cut when he fell on a broken bottle and the prosecutor failed to prove he was cut with the box cutter. Counsel also argued that Mairena acted in self defense. After summations, the court refused to deliver the promised charge to the jury. Mairena was convicted of first-degree manslaughter and sentenced to five years in prison.

The Appellate Division, Second Department affirmed. It held the trial court erred in refusing to provide the promised jury charge, but found the error harmless because the evidence of guilt was "overwhelming" and the error did not undermine Mairena's justification defense.

In 2011, Mauricio Altamirano agreed to keep a package in his Brooklyn apartment for an acquaintance he knew only as "Columbia." The package remained there for two or three weeks. When Altamirano learned the package contained a revolver, when is not clear, he told Columbia to take it away. Instead, Columbia came to his apartment, wrapped the gun in a blanket, put it in a bag, and placed it in a trash can, promising to return for it. He did not return. Shortly after Columbia was arrested on an unrelated charge, two police officers spoke with Altamirano at work and asked if he knew about the gun. He said yes, and immediately offered to take them to it. They drove to his apartment, he directed them to the trash can, and they arrested him for weapon possession. Prior to summations, Criminal Court denied defense counsel's request that it charge the jury on the defense of temporary and innocent possession of a weapon and it prohibited counsel from referring to the defense in his summation. After summations, the court reversed itself without prior notice to the parties and provided the requested jury instruction on temporary and innocent possession. The court denied defense counsel's request to reopen his summation to argue the innocent possession defense. Altamirano was convicted of fourth-degree weapon possession and sentenced to three years of probation.

The Appellate Term for the 2nd, 11th and 13th Judicial District affirmed. It held the court erred by instructing the jury on innocent possession without notice and without allowing defense counsel to reopen his summation, thus depriving Altamirano of his right to an effective summation; but it found the error harmless because he was not entitled to the instruction.

The prosecution cites appellate cases that apply harmless error analysis to jury instruction errors that implicate the right to an effective summation, and the defendants cite appellate cases suggesting that such errors cannot be found harmless and should be subject to a per se reversal rule.

For appellant Mairena: Michael Arthus, Manhattan (212) 693-0085
For appellant Altamirano: Anders Nelson, Manhattan (212) 693-0085
For respondent: Brooklyn Assistant District Attorney Thomas M. Ross (718) 250-2534

State of New York
Court of Appeals

To be argued Wednesday, November 20, 2019

No. 104 People v Sixtus Udeke

A police officer arrested Sixtus Udeke, a Nigerian citizen, and Brittany Wise, the mother of his three children, for fare evasion in February 2014 when he saw them "doubling up" to pass through the turnstile together at the Union Square subway station in Manhattan. When the officer found that Civil Court had entered a temporary order of protection against Udeke nine days earlier, requiring him to stay away from and have no contact with Wise, Udeke was charged with an A misdemeanor count of second-degree criminal contempt for violating the order.

Udeke pled guilty in Criminal Court to a reduced charge of second-degree attempted criminal contempt, a B misdemeanor, and was given a conditional discharge. Before accepting the plea, the court told him that he would be waiving his right to a trial by jury, and Udeke asked, "By jury?" When defense counsel reminded the court that the charge would be reduced to a B misdemeanor, a petty offense that does not always require a jury trial under the Sixth Amendment, the court told Udeke that he was waiving his right to a "trial by a jury or a judge, depending on how the People proceed." Udeke said he understood. The court also asked if he understood that "this conviction could have an impact on your ability to remain in this country? You might be deported. You might not be allowed re-entry. You might be denied citizenship, or other things having to do with your immigration status." Udeke said yes.

The Appellate Term, First Department affirmed, rejecting Udeke's claim that his plea was not knowing and voluntary because the lower court had told him incorrectly that his right to a jury trial would depend on how the prosecution chose to proceed. The Appellate Division said his "contention that he should have been informed that he was entitled to a jury trial..., because as a noncitizen he would allegedly be deportable if convicted, is unavailing.... In any event, even assuming that defendant was entitled to a jury trial, the court's omission of the word 'jury' in discussing a defendant's right to a trial does not, by itself, vitiate the validity of a guilty plea...."

Six months after the Appellate Term's ruling, the Court of Appeals decided People v Suazo (32 NY3d 491), which held that "a noncitizen defendant who demonstrates that a charged crime carries the potential penalty of deportation – i.e removal from the country – is entitled to a jury trial under the Sixth Amendment."

Udeke argues his waiver of his right to a jury trial, and therefore his guilty plea, were invalid because Criminal Court misinformed him that his right to a jury would depend "on how the People proceed." He says that, as "a lawful permanent resident who faced a deportable offense," he "was entitled to a jury trial" under Suazo "however the prosecution decided to proceed." He says he "could not knowingly waive a right the court told him he might not have. Mr. Udeke did not, therefore, knowingly waive his right to a jury trial, and his guilty plea was invalid."

For appellant Udeke: Benjamin Wiener, Manhattan (212) 577-2523
For respondent: Manhattan Assistant District Attorney Jonathon Krois (212) 335-9000

State of New York
Court of Appeals

To be argued Wednesday, November 20, 2019

No. 105 Centi v McGillin

Mark Centi brought this action for breach of an oral agreement against Michael McGillin, a longtime friend and participant in Centi's bookmaking operation in Amsterdam, New York. Centi claimed that, in 2003, he loaned McGillin $170,000 in cash to be repaid with 3.95% interest over the next 11 years. Centi claimed McGillin made payments through 2009, then refused to make any further payments. McGillin denied borrowing money from Centi and, instead, testified that Centi asked him to hold $210,000 in cash for him as a "favor" in 2005, after both men were convicted of promoting gambling (Centi was fined $100,000 and McGillin was fined $50,000). McGillin said he paid Centi $400 per week for spending money until 2007, when he said the men had a falling out over the purchase of a liquor store and he returned all of the remaining cash to Centi. Centi testified that all of the cash he used for the loan to McGillin was obtained through his illegal bookmaking business.

Supreme Court found the two men "clearly" entered into the loan agreement and awarded $131,484.93 to Centi, plus prejudgment interest. It ruled that, whatever the source of the money, the terms of the loan were not illegal and the agreement was enforceable. The court said, "[I]t's a very strong argument that Mr. Centi has not resorted to self help, has not sought to enforce this loan by illegal means, that he's been forthright testifying.... As a general rule forfeitures by operation of law are disfavored, particularly where a defaulting party seeks to raise illegality as a sword for personal gain rather than a shield for public good."

The Appellate Division, Third Department affirmed on a 3-2 vote. It agreed unanimously that Centi loaned $170,000 to McGillin and was only partially repaid, but split on the question of whether the loan agreement could be enforced, since the loan funds were derived from illegal gambling. The majority found that McGillin "waived his right to challenge the loan on the basis of illegality because it was not raised as an affirmative defense (see CPLR 3018[b]...). Were we to consider the issue, we would find that, because neither the agreement nor the performance of the agreement was illegal, the judgment was enforceable...."

The dissenters argued that, "even though the subject contract may not have been intrinsically illegal, the fact that the money [Centi] loaned to [McGillin] was garnered directly from the fruits of an illegal bookmaking operation, the loan constitutes money laundering, and public policy and the fundamental concepts of morality and fair dealing should preclude [Centi] from accessing the court in order that he may obtain additional profit from the proceeds of his criminal activities...."

For appellant McGillin: Edward B. Flink, Buffalo (716) 849-8900
For respondent Centi: Daniel J. Centi, Albany (518) 452-3710

State of New York
Court of Appeals

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To be argued Thursday, November 21, 2019

No. 106 Matter of The Plastic Surgery Group, P.C. v Comptroller of the State of New York

In 2015, the State Comptroller began an audit to determine whether the state had overpaid The Plastic Surgery Group (PSG) for medical services provided to members of the State Health Insurance Program's Empire Plan for claims submitted since 2011. The state, which is self-insured, pays medical providers through United Healthcare, which processes claims for treatment of public employees and retirees belonging to the Empire Plan. To conduct the audit, the Comptroller served a subpoena on PSG for the billing records of Empire Plan members, including the names and addresses of patients, services rendered, and amounts paid by the patients. PSG commenced this special proceeding to quash the subpoena on the ground that it did not comply with CPLR 3122(a)(2), which generally requires that a subpoena for patient medical records, "other than a trial subpoena issued by a court," must be "accompanied by a written authorization by the patient," which the Comptroller did not provide.

Supreme Court granted PSG's petition to quash, ruling the subpoena was "deficient on its face" because it did not include patient authorizations. It rejected arguments of the Comptroller's Office that it was not subject to the patient authorization requirement of CPLR 3122(a)(2) based on the subpoena powers granted to it by State Finance Law § 9, and that it was exempt from privacy requirements of the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA) because it qualified as a "health oversight agency" under HIPAA regulations.

The Appellate Division, Third Department reversed and granted the Comptroller's motion to compel compliance, saying "the subpoena was validly issued in furtherance of [the Comptroller's] constitutional and statutory authority and obligation to audit payments made by the state for medical services provided under the Empire Plan (see NY Const, art V, § 1; Civil Service Law § 167[7]...)." In M/O Martin H. Handler, M.D., P.C. v DiNapoli (23 NY3d 239), it said, the Court of Appeals "recognized that 'the Legislature has granted [the Comptroller] broad subpoena powers in furtherance of [its] investigatory functions under State Finance Law § 9.'" CPLR 3122(a)(2), and its patient authorization requirement, "only applies, by its terms, to subpoenas issued by a party to litigation seeking discovery under CPLR 3120 or 3121, after an action or proceeding is commenced." It also held that HIPAA did not bar disclosure of the records because the Comptroller "falls squarely within HIPAA's definition of a health oversight agency."

PSG argues that State Finance Law § 9, which gives the Comptroller subpoena power, states that such subpoenas "shall be regulated by" the CPLR, which would include the patient authorization requirement in CPLR 3122(a)(2). "[T]here is nothing in the text of CPLR 3122(a)(2) that limits its application exclusively to subpoenas duces tecum issued pursuant to CPLR 3120 or 3121 in the course of discovery in a pending action," it says, and "the plain meaning of the words used in the statute" require the Comptroller to supply signed authorizations by each patient whose records are sought. PSG also argues that "requiring the Comptroller to comply with CPLR 3122(a)(2) promotes public policy protecting patient confidentiality."

For appellant Plastic Surgery Group: Matthew F. Didora, Lake Success (516) 328-2300
For respondent Comptroller: Deputy Solicitor General Jeffrey W. Lang (518) 776-2031

State of New York
Court of Appeals

To be argued Thursday, November 21, 2019

No. 107 People v Tyrell Cook

Tyrell Cook was arrested in 2013 for allegedly attempting to rob a livery cab driver at knife-point in the Bronx. The driver told police that the perpetrator was a black man wearing a red shirt and black pants. He said that when the man cut him on the neck, he crashed his cab into parked cars and the man fled. Other officers detained Cook -- a black man wearing black pants and a black sweatshirt with a red zipper and red trim around the neck – on the platform of a nearby subway station minutes after the crime. The cab driver was taken to the station for a show-up identification. Cook was brought out to the street in handcuffs and the driver identified him as the robber.

Cook moved to suppress the identification, contending the police lacked reasonable suspicion to justify his detention in the subway station. The prosecutor presented one witness, a sergeant, who testified that the detaining officer had said over the radio that Cook was the only person on the platform who fit the driver's description. After both sides rested, defense counsel argued that the driver's description was too vague to provide reasonable suspicion and, in any case, Cook's shirt did not match the description. The court then suggested that the detaining officer might have made some other observation about Cook that would justify the stop. The court granted the prosecutor's motion to reopen the suppression hearing over a defense objection that the prosecution had been given a full and fair opportunity to justify the stop and that reopening the hearing would create a risk of tailored testimony. At the reopened hearing, the prosecutor called an officer who first encountered Cook in the station, and who testified that Cook, the only person "wearing red," was sitting on the platform behind a barrier that obstructed views of him. The court then denied the motion to suppress the identification, finding that Cook was lawfully detained. Cook was convicted of first-degree attempted robbery and second-degree assault and was sentenced to six years in prison.

The Appellate Division, First Department affirmed, saying, "The court providently exercised its discretion in reopening a suppression hearing, before rendering a decision, in order to permit the People to call an officer with additional information tending to establish reasonable suspicion for defendant's detention.... The court had not made any ruling, and the circumstances did not pose a risk of tailored testimony." It also ruled suppression was properly denied. "Although the People did not meet their burden of going forward during the initial hearing, on the reopened hearing they sufficiently demonstrated reasonable suspicion to justify defendant's detention."

Cook argues, "This Court's well-settled law entitled the prosecution to one full and fair opportunity to make its case against suppression, and the prosecution chose to make its case by relying solely on the vague description offered by the complainant. The failure of that strategic choice did not entitle the prosecution to another bite at the apple.... It is immaterial that the court had not rendered a formal decision on the merits; the court's comments during oral argument after the first hearing identified the deficiencies in the prosecution's proof and described the factual showing it would require to deny suppression, creating the same risk of tailoring as if it had made a formal decision." He asks this Court to make clear that People v Kevin W. (22 NY3d 287) "applies to preclude reopening a suppression hearing in the circumstances presented here."

For appellant Cook: Alexandra L. Mitter, Manhattan (212) 577-2523
For respondent: Bronx Assistant District Attorney Shera Knight (718) 838-6057

State of New York
Court of Appeals

To be argued Thursday, November 21, 2019

No. 108 People v Clinton Britt

A police officer patrolling Times Square in 2014 saw Clinton Britt standing in front of a haunted house attraction called Times Scare and drinking from a container in a paper bag. Britt fled into Times Scare, where the officer detained him and found he had a Lime-a-Rita cocktail in the bag. The officer intended to issue a summons for an open container violation, but arrested him instead when he could not produce valid identification. Subsequent searches found Britt was carrying $300 in counterfeit currency – 17 bills in denominations of $10 and $20 – and small amounts of cocaine and ecstasy. He also had $148 of genuine currency in loose bills the officer found in the same pocket. The counterfeit bills were folded over and held together with a rubber band. At the precinct, Britt told the officer, "I want to talk to a detective, and I will give up who I got the currency from, the counterfeit bills from, if you make the drug charges go away."

Britt was charged with 17 felony counts of criminal possession of a forged instrument in the first degree (Penal Law § 170.30), along with misdemeanor drug possession. At the close of evidence in his trial, Britt moved to dismiss all of the forged instrument charges on the ground there was insufficient proof of his intent to defraud. Penal Law § 170.30 requires proof that a defendant possessed a forged instrument "with knowledge that it is forged and with intent to defraud, deceive or injure another." He cited People v Bailey (13 NY3d 67), which held that knowledge that currency is counterfeit "is not sufficient to hold defendant criminally liable for possessing a forged instrument. Knowledge and intent [to defraud] are two separate elements that must each be proven beyond a reasonable doubt by the People." Supreme Court denied the motion to dismiss. Britt was convicted of all the forged instrument counts and one drug count. He was sentenced to 3 to 6 years in prison.

The Appellate Division, First Department affirmed, saying the evidence of intent "went beyond mere possession. Defendant carried 17 bills ... totaling $300. Furthermore, defendant separated the counterfeit bills from his genuine currency by securing them with a rubber band, which suggested an intent to use the counterfeit bills selectively, in situations where they would be least likely to be detected. Based on this combination of factors, and the exercise of common sense, the jury could reasonably have concluded that defendant had no reason to carry these counterfeit bills except to spend them, as soon as the opportunity arose...." Distinguishing Bailey, it said that while the defendant in that case, a pickpocket in Times Square, "had three $10 counterfeit bills in his pocket, there was no indication that he intended to defraud, deceive or injure another with counterfeit bills, only that he intended to steal real currency from his intended victims."

Britt argues there was insufficient evidence of his intent to defraud under Bailey, which "teaches that knowing possession cannot give rise to an inference of intent to defraud..., prohibits the prosecution's argument that intent can be established by Mr. Britt's presence in Times Square" and "also prohibits the prosecution's argument that intent can be established by the quantity of counterfeit bills found on Mr. Britt." He says, "If anything, the fact that the counterfeit bills were ... tied up with a rubber band would suggest a *lack* of intent to use those bills" because his "genuine bills were 'loose' in his pocket and more readily accessible, indicating that those were the bills that Mr. Britt intended to use."

For appellant Britt: Jenny C. Wu, Manhattan (212) 373-3000
For respondent: Manhattan Assistant District Attorney Sheila L. Bautista (212) 335-9000