State of New York Court of Appeals

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NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

FRIDAY, OCTOBER 14, 2016

Appellate Division, Fourth Department
The Hon. Samuel L. Green Courtroom
50 East Avenue
Rochester, New York

Arguments begin at 10:00 a.m.

State of New York Court of Appeals

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To be argued Friday, October 14, 2016 in Rochester

Nos. 166 & 167 People v Phillip Couser

Phillip Couser was charged with robbery and attempted murder after confronting a group of five people with a handgun in a Rochester park in August 2008. Four of the victims testified that he ordered them to the ground, kicked a woman's purse toward an accomplice and told him to take it, fired a shot that grazed the head of one of the men, and then fled. Couser testified that the gun had a sensitive trigger and discharged accidentally. The jury found him guilty of first-degree robbery, three counts of first-degree attempted robbery and weapon possession, but it was unable to reach a verdict on the top count of first-degree attempted murder.

Supreme Court accepted a partial verdict and imposed consecutive sentences of 18 years on the robbery count and 15 years, 10 years, and 5 years on the three attempted robbery counts, resulting in an aggregate sentence of 48 years in prison.

Regarding the still-pending attempted murder charge, after Couser's attorney advised him that he could face another consecutive sentence if he went to trial and was convicted, Couser entered an Alford plea to first-degree attempted murder in return for a sentence to the minimum term of 15 years to life, to run concurrently with the robbery sentences.

In separate appeals of the two judgments, Couser argued the consecutive sentences imposed on the robbery and attempted robbery counts were illegal under Penal Law § 70.25(2), which requires concurrent sentences for "two or more offenses committed through a single act or omission, or through an act or omission which in itself constituted one of the offenses and also was a material element of the other...." As for his attempted murder plea, he argued the statute prohibits a consecutive sentence in this case and his attorney's misadvice deprived him of effective assistance of counsel and rendered his plea unknowing and involuntary.

The Appellate Division, Fourth Department upheld the attempted murder plea, saying "a concurrent sentence was not required for the attempted murder count ... because the shooting of the male victim was an act separate and distinct from the criminal acts" underlying the robbery counts. It agreed with Couser that the sentences for the attempted robberies must run concurrently with each other because they were all based on "a single act constituting one offense" -- holding a gun on the victims. However, it said the trial court properly ordered the sentence on the robbery count to run consecutively to the attempted robbery sentences because the robbery count "included an additional act, i.e., the taking of the purse, which allowed the court to impose a consecutive sentence thereon." The modification reduced Couser's aggregate sentence to 33 years to life.

Couser argues consecutive sentencing was prohibited for his attempted murder conviction because he was charged under the felony murder statute, since the shooting occurred in the course of committing the robbery and attempted robberies, and thus, "the underlying predicate felony or felonies are an essential element of the crime charged." He says concurrent sentences were required for all of the robbery counts because the "acts that constituted the attempted robberies ... also constituted two material elements of the completed robbery: the threat of force ... and a display of a firearm...."

For appellant Couser: James A. Hobbs, Rochester (585) 753-4213
For respondent: Monroe County Asst. District Attorney Kelly Christine Wolford (585) 753-4674

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To be argued Friday, October 14, 2016 in Rochester

No. 168 Matter of Diegelman v City of Buffalo

James Diegelman was a Buffalo police officer from 1968 to 1995. In August 2012, he was diagnosed with mesothelioma, a cancer caused by exposure to asbestos. He did not serve a notice of claim on the City of Buffalo within the 90-day notice period. In August 2013, Diegelman and his wife brought this action against the City and its Board of Education, seeking permission to serve a late notice of claim. He alleged that he was exposed to asbestos at seven City-owned police stations and that the City was liable under General Municipal Law § 205-e, which gives officers injured in the line of duty a right of action against anyone whose failure to comply with a statute, rule or regulation caused their injury. Diegelman was also entitled to benefits under General Municipal Law § 207-c, which requires municipalities outside of New York City to continue paying the full salary of an officer injured in the line of duty and to pay for their medical care. He was not covered by the Workers' Compensation Law.

The City opposed the application to serve a late notice of claim, arguing Diegelman's personal injury claim was meritless because General Municipal Law § 207-c "provides the exclusive remedy" for injured police officers. Diegelman argued section 207-c did not bar his claim under General Municipal Law § 205-e, which states that the right of recovery it provides is "[i]n addition to any other right of action or recovery under any other provision of law."

Supreme Court, without a written decision, granted the Diegelmans permission to serve a late notice of claim.

The Appellate Division, Fourth Department reversed and denied the application, agreeing with the City that "the claim is barred by section 207-c ... and, 'leave to file a late notice of claim is not appropriate for a patently meritless claim'...."

Diegelman argues that nothing in section 207-c or section 205-e provides that section 207-c benefits are an exclusive remedy or that an injured police officer may not pursue recovery under both statutes. He says the Appellate Division's decision "imposes an invidious and legally baseless distinction" between New York City police officers, who may pursue claims under section 205-e despite their entitlement to full salary and medical coverage under the Administrative Code, and officers in all other municipalities, who would be barred.

For appellant Diegelman: John A. Collins, Buffalo (716) 849-1333
For respondents Buffalo and Board of Education: David M. Lee, Buffalo (716) 851-4333

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To be argued Friday, October 14, 2016 in Rochester

No. 169 People v Matthew A. Davis

Matthew Davis was charged with felony murder after 41-year-old Antoine Bradberry died of a heart attack during or soon after a fight in his Niagara Falls apartment in August 2011. One of Davis's female accomplices testified that she and the other woman socialized with Bradberry while casing his apartment for valuables to steal, then let Davis into the building to commit the robbery while they fled. Bradberry, who was overweight and had heart disease, fought with Davis when he entered the apartment. A security camera recorded video of Davis leaving the scene with a bag of stolen property. Relatives found Bradberry's body two days later, lying in the midst of his shattered coffee table. According to the autopsy report, Bradberry suffered a broken jaw, lacerations on his face, and abrasions on his knees and elbow. The medical examiner who performed the autopsy concluded the cause of death was hypertensive cardiovascular disease, with obesity being a contributing factor, but she was unavailable to take the stand at the trial. The chief medical examiner testified Bradberry's injuries were not a direct cause of his fatal heart attack, but "indirectly they had an effect.... [B]lunt force injuries caused by a struggle, that's all a part of this stressful situation.... [I]t's not the injuries themselves but the stress that they caused that given his underlying heart disease led to his death."

Davis was convicted of two counts of second-degree murder and single counts of first-degree robbery and burglary. He was sentenced to concurrent terms of 25 years to life on the murder counts and 25 years on the robbery and burglary counts.

The Appellate Division, Fourth Department modified by reversing the murder convictions. "[T]he evidence is legally insufficient to support the conviction of the felony murder counts because the People failed to prove beyond a reasonable doubt that his actions caused the victim's death.... Here, we conclude that the People failed to prove ... that it was reasonably foreseeable that defendant's actions, i.e., unlawfully entering the victim's apartment and assaulting him, would cause the victim's death.... [T]he victim died of a heart attack, and the injuries inflicted upon him by defendant were not life threatening.... Notably, the Chief Medical Examiner did not testify that defendant's culpable act was a direct cause of the death or that the fatal result was reasonably foreseeable."

The prosecution argues that it proved the assault "caused the victim's death where the Chief Medical Examiner testified the stress caused by the victim's injuries given his underlying heart disease led to his death," and that it proved the death was reasonably foreseeable. "[T]here is no requirement that there be expert opinion concerning the issue of foreseeability. Rather, that was a fact that the jury was to determine based on all the evidence.... [D]efendant knew that he was attacking an obese person in his own home, that he struck him repeatedly..., that he struck him hard enough to break his jaw, and that the victim fell to the ground and never got up. It is plainly foreseeable that such an attack ... could cause strain on the person's heart leading to his death."

Davis argues the burglary conviction must be reversed because the accomplice's testimony that he entered the apartment was uncorroborated, and the robbery conviction must be reversed because there was insufficient proof that he stole property or caused serious physical injury. He also argues the security video was improperly admitted.

For appellant-respondent: Niagara County Asst. District Atty. Thomas H. Brandt (716) 439-7085
For respondent-appellant Davis: Patricia M. McGrath, Lockport (716) 438-7575

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To be argued Friday, October 14, 2016 in Rochester

No. 170 People v John Gayden

In June 2010, an anonymous 911 caller told a Rochester police dispatcher that two black men were walking together on Ellison Street at Webster Avenue with silver colored handguns in their waistbands. The caller said one was wearing a black t-shirt and the other a white t-shirt with red letters. The first officer to respond, Anthony Bongiovanni, testified at a suppression hearing that he found two "adult males walking side by side" on Ellison Street and that "one of them fit the description and the other one had similarities to the description." As Officer Bongiovanni jogged toward them the men split up and he pursued the man in the black shirt, who discarded a gun as he fled. The other man, John Gayden, was wearing a blue jacket with dark blue sleeves and he continued walking. The second officer at the scene, Antonio Jorge, saw Officer Bongiovanni approach the two men and chase one of them. When Officer Jorge got out of his car, Gayden began to run and Jorge ran after him. Within seconds, he saw a gun fall from Gayden's waist. Officer Jorge caught up to Gayden, cuffed him and placed him in his patrol car. As they pulled away, Gayden called out, "[T]ell grandma they got me for a pistol."

Monroe County Court denied Gayden's motion to suppress the weapon. Gayden pled guilty to criminal possession of a weapon in the second degree (two counts) and third degree, and was sentenced to five years in prison.

The Appellate Division, Fourth Department affirmed, saying, "[T]here was a radio dispatch concerning an anonymous tip that two individuals were carrying handguns in a certain location, and a police officer who arrived at the scene less than two minutes after the dispatch observed that [Gayden] and another individual matched the general description of the suspects and were within a block of the location described in the tip. The officer thus had a founded suspicion that criminal activity was afoot, justifying his initial common-law inquiry of defendant.... Defendant's flight upon seeing the officer exit his vehicle provided the officer with the requisite reasonable suspicion of criminal activity to warrant his pursuit of defendant.... Defendant dropped the gun during the pursuit, which gave rise to probable cause to arrest defendant..., and 'the recovery of the gun discarded during [defendant's] flight was lawful inasmuch as the officer's pursuit ... of defendant [was] lawful'...."

Gayden argues the gun should have been suppressed in the absence of "reasonable suspicion of criminal activity" to justify the pursuit, where the officers neither confirmed his "'identity' as a suspect" nor "the 'criminality' suggested by the anonymous tip." He says he was wearing a "light blue jacket with dark blue sleeves and a dark shirt underneath," not "a white t-shirt with red letters. He was not walking near Webster Avenue. He was not engaged in any suspicious behavior. He displayed no telltale signs of possessing any weapon. At most, the ... officers ... had 'an articulable reason' to approach Mr. Gayden for information (DeBour level 1) based upon his mere presence on Ellison Street...." Without a founded suspicion of criminality, he says, "his flight alone" did not justify a forcible stop. Because Officer Jorge "had no personal or imputed knowledge of any criminal activity before he began to chase John Gayden, the handgun, dropped during the unlawful pursuit, must be suppressed...."

For appellant Gayden: David R. Juergens, Rochester (585) 753-4093
For respondent: Monroe County Assistant District Attorney Daniel Gross (585) 753-4588

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To be argued Friday, October 14, 2016 in Rochester

No. 171 People v Harvert Stephens

Syracuse police stopped Harvert Stephens' car to cite him for violating the Syracuse Noise Control Ordinance in August 2010. Officers testified that his stereo could be heard "from well over 100 feet away." During the stop, the officers saw a white substance on the passenger seat, searched the car and found 2.5 grams of cocaine. Stephens was charged with drug possession and the noise violation.

Stephens moved to dismiss the noise violation on the ground that the ordinance is unconstitutionally vague, and moved to suppress the drug evidence as the result of an illegal stop. He was cited under Section 40-16(b) of the ordinance, which provides, "No person shall operate, play or permit the operation or playing of any radio ... or similar device which produces, reproduces or amplifies sound ... [i]n such a manner as to create unnecessary noise at fifty (50) feet from such device, when operated in or on a motor vehicle on a public highway." Section 40-3(u) defines "unnecessary noise" as "any excessive or unusually loud sound or any sound which either annoys, disturbs, injures or endangers the comfort, repose, health, peace or safety of a reasonable person of normal sensibilities...."

Supreme Court denied the motions. The ordinance "may be unconstitutional because the words used in the Town of Poughkeepsie Unnecessary Noise Control Ordinance, which the Court of Appeals found unconstitutional in People v New York Trap Rock Corp., 57 NY2d 371 (1982), are almost identical to those found in the Syracuse Noise Control Ordinance," it said, but "the court feels that the Appellate Division should make the determination as to whether or not the ordinance passes constitutional muster." It also found the officers acted under a good faith belief the ordinance was constitutional and, thus, the stop was legal under the good faith exception to the exclusionary rule. Stephens was convicted of drug possession in the third and fifth degrees and the noise violation, and was sentenced to five years of probation.

The Appellate Division, Fourth Department affirmed. It ruled the ordinance is not void for vagueness because, unlike the one struck down in Trap Rock, it "defines 'unnecessary noise' with reference to an objective standard of reasonableness rather than a subjective standard.... Specifically, it defines 'unnecessary noise' as noise that would offend 'a reasonable person of normal sensibilities,'" while the ordinance in Trap Rock "contained a subjective standard, which defined 'unnecessary noise' as that which offends 'a person.'" It also said the ordinance is sufficiently definite "because the section under which [Stephens] was convicted was tailored to a specific context -- the creation of 'unnecessary noise' beyond 50 feet of a motor vehicle on a public highway..., 'and any ordinary motorist should have no difficulty in ascertaining' whether the noise in question violates the applicable standard...."

Stephens argues that, despite its objective "reasonable person" standard, the ordinance "is still subject to the same broad definition and unhelpful standards for 'unnecessary noise' and thus it does not provide sufficient notice of what conduct is prohibited, and permits arbitrary and discriminatory enforcement.... If a police officer can determine that some noise coming from the car radio 50 feet away is unnecessary and some is not, this ordinance is arbitrary and vague" and "is particularly susceptible to be used as a tool of law enforcement to make pretext stops and conduct searches." He says it may be even more vague than the one struck down in Trap Rock, which had a decibel standard, because the Syracuse ordinance does not.

For appellant Stephens: Kristen McDermott, Syracuse (315) 422-8191 ext. 0138
For respondent: Onondaga County Chief Asst. District Atty. James P. Maxwell (315) 435-2470
For amicus City of Syracuse: John A. Sickinger, Syracuse (315) 448-8400