

# *State of New York Court of Appeals*

Summaries of cases before the Court of Appeals are prepared by the Public Information Office for background purposes only. The summaries are based on briefs filed with the Court. For further information contact Gary Spencer at (518) 455-7711.

To be argued Wednesday, September 16, 2015

## **No. 139 Matter of Carver v State of New York**

Walter E. Carver, who received public assistance from the State Office of Temporary and Disability Assistance (OTDA) from 1993 to 2000, was required to participate in the New York City Work Experience Program (WEP). He was assigned to work for the City at Coney Island Hospital and then the Staten Island Ferry Terminal, performing maintenance duties 35 hours per week. In 2007, seven years after he stopped receiving public assistance benefits, he won a \$10,000 New York State Lottery prize. OTDA intercepted \$5,000 of his prize money as partial reimbursement for his past benefits pursuant to Social Services Law § 131-r, which requires lottery winners who received public assistance during the prior ten years to repay OTDA up to half the amount of their winnings. Carver objected that he had repaid any debt by working through WEP in exchange for his benefits. OTDA rejected his administrative appeal, saying, "Work experience is not 'employment' and the amount of public assistance that an individual receives is not 'wages.'"

Carver brought this article 78 proceeding against OTDA claiming, among other things, that the repayment of past benefits from his lottery prize reduced the wage rate for his WEP job below the minimum wage in violation of the Federal Fair Labor Standards Act (FLSA). Supreme Court dismissed the claim, finding Carver was not an employee who received "wages" at his WEP assignment and, thus, the federal minimum wage law did not apply to him.

The Appellate Division, Second Department reinstated the FLSA claim, holding Carver "was an employee within the meaning of the FLSA." It relied on United States v City of New York (359 F3d 83), in which the Second Circuit applied the "economic reality" test and ruled that welfare recipients who are required to participate in WEP in exchange for their benefits are "employees" within the meaning of Title VII of the Civil Rights Act of 1964 and entitled to its protections against racial and sexual harassment. The Appellate Division said the ruling was "persuasive" and, by the same reasoning, WEP participants are employees under the FLSA.

On remittal, Supreme Court ruled "any forfeiture of [Carver's] lottery winnings would ... result in a federal wage violation" because he "would have been paid less than the applicable federal minimum wage for the work he performed" in WEP. In a contingent settlement, the parties agreed OTDA would return the \$5,000 to Carver and pay \$100,000 in attorney's fees unless OTDA prevails on its appeal.

OTDA argues, "As this Court concluded in [Bruckman v Giuliani (94 NY2d 387)], public assistance recipients participating in government administered work experience programs are recipients of government assistance, not government employees. The monetary grants that such persons receive are based on statutory criteria of economic need, rather than on the number of hours they participate in a work experience program. And their grants are not subject to the federal, state, or local taxes that apply to wage income."

For appellant State OTDA: Assistant Solicitor General Valerie Figueredo (212) 416-8019  
For respondent Carver: Susan C. Antos, Albany (518) 935-2845

# *State of New York Court of Appeals*

Summaries of cases before the Court of Appeals are prepared by the Public Information Office for background purposes only. The summaries are based on briefs filed with the Court. For further information contact Gary Spencer at (518) 455-7711.

To be argued Wednesday, September 16, 2015

## **No. 140 People v Michael Sans**

Michael Sans was arrested for possession of a gravity knife on Avenue U in Brooklyn in May 2011 and was charged in a misdemeanor complaint with criminal possession of a weapon in the fourth degree. In the accusatory instrument, the arresting officer (deponent) said he "observed the defendant in possession of a gravity knife, in that the deponent observed the defendant remove a knife from the defendant's pocket, and that the deponent recovered said knife from the defendant. Deponent further states that the deponent tested the above-referenced knife and determined that it was a gravity knife, in that it opens with centrifugal force and locks automatically in place." Sans pled guilty to the weapon charge at his arraignment and was sentenced to time served.

On appeal, Sans argued that the misdemeanor complaint was facially insufficient under People v Dreyden (15 NY3d 100), which said a complaint "must allege 'facts of an evidentiary character' ... demonstrating 'reasonable cause' to believe the defendant committed the crime charged.... An arresting officer should, at the very least, explain briefly, with reference to his training and experience, how he or she formed the belief that the object observed in defendant's possession was a gravity knife." Penal Law § 265.00(5) defines a gravity knife as "any knife which has a blade which is released from the handle or sheath thereof by the force of gravity or the application of centrifugal force which, when released, is locked in place by means of a button, spring, lever or other device."

The Appellate Term: 2nd, 11th and 13th Judicial Districts affirmed, finding no jurisdictional defect in the complaint. It said, given "'a reasonable, not overly technical reading'" of the complaint, "the 'fair implication' ... of its averments supports, or tends to support, the charge of criminal possession of a weapon in the fourth degree. The arresting officer's conclusion that the object he observed in defendant's possession was, in fact, a gravity knife, was based on his personal handling and testing of the knife (cf. Dreyden, 15 NY3d 100)."

Sans argues the complaint was jurisdictionally defective because it charged him with possessing a gravity knife "based solely on the assertion that a police officer tested the knife and that the blade opened with centrifugal force and locked automatically in place. It contained no factual allegations of an evidentiary character that the blade actually 'locked in place by means of a button, spring, lever or other device,' as specified by [Penal Law] § 265.00(5), and stated only conclusory allegations with respect to how the blade was tested and opened. In addition, it failed to indicate that the officer had any training or experience in the identification of gravity knives."

For appellant Sans: Denise Fabiano, Manhattan (212) 577-3917

For respondent: Brooklyn Assistant District Attorney Allison Ageyeva (718) 250-3003

# *State of New York Court of Appeals*

Summaries of cases before the Court of Appeals are prepared by the Public Information Office for background purposes only. The summaries are based on briefs filed with the Court. For further information contact Gary Spencer at (518) 455-7711.

To be argued Wednesday, September 16, 2015

## **No. 141 People v Thomas Barnes**

Thomas Barnes was arrested for trespassing in the lobby of a New York City Housing Authority apartment building in 2011. He was charged in a misdemeanor information with criminal trespass in the second and third degrees. In his deposition in support of the charges, the arresting officer said he "observed [Barnes] inside the lobby of the dwelling beyond the vestibule and ... beyond a posted sign which read, 'No Trespassing.'" The officer said he determined Barnes was neither a tenant of the building, because he provided a different address, nor an invited guest, because he "was unable to provide the identity of a resident of whom defendant was an invited guest." Barnes pled guilty the next day to criminal trespass in the second degree and was sentenced to time served.

On appeal, Barnes argued that criminal trespass in the second degree (Penal Law § 140.15), which occurs when a defendant "knowingly enters or remains unlawfully in a dwelling," does not apply to the common areas of public housing projects because they are public property. He also argued the misdemeanor information was jurisdictionally defective because it did not contain factual allegations establishing that the lobby was not open to the public.

The Appellate Term, First Department affirmed, saying, "Inasmuch as the common areas of a restricted access Housing Authority building can be shown, upon proper proof, to be open only to building residents and their invitees, and not the general public..., we reject defendant's sweeping contention that the proscriptions of the second-degree criminal trespass statute can never be applied to conduct occurring in such areas." It also said the factual allegations of the misdemeanor information -- that Barnes was seen in the lobby beyond a "No Trespassing" sign and that he was not a resident or invited guest -- "were sufficient, for pleading purposes, to establish that the lobby area was part of the dwelling ... and that defendant knowingly entered or remained unlawfully therein..."

Barnes argues, "Where a public property is concerned, a person is licensed and privileged to be on such property unless such license is lawfully withdrawn. Indeed, in 1992, the Legislature recognized that, because a public housing project is 'public property,' the existing trespass laws -- which included the second-degree criminal trespass statute at issue here -- were inapplicable to such properties." He contends that provisions of the third-degree trespass statute, enacted "to address the public property 'loop hole,'" are the only trespassing laws that apply to common areas of public housing. He also argues the misdemeanor information did not sufficiently "allege that the lobby of the public housing project was not open to the public or that appellant knew that it was not open to the public."

For appellant Barnes: Laura Boyd, Manhattan (212) 577-3571

For respondent: Manhattan Assistant District Attorney Sheila O'Shea (212) 335-9000

# *State of New York Court of Appeals*

Summaries of cases before the Court of Appeals are prepared by the Public Information Office for background purposes only. The summaries are based on briefs filed with the Court. For further information contact Gary Spencer at (518) 455-7711.

To be argued Wednesday, September 16, 2015

**No. 142 Matter of Teixeira v Fischer**

*(papers sealed)*

George Teixeira was an inmate at the Upstate Correctional Facility in 2012, when he was charged with violating numerous prison disciplinary rules months earlier while he was housed at the Attica Correctional Facility. The charges included smuggling, threatening to injure two other inmates, and impersonating a third inmate. Teixeira pled not guilty and asked to have all three inmates named in his misbehavior report appear as witnesses at his disciplinary hearing. Two of them agreed to testify, but the third -- one of the inmates Teixeira allegedly threatened -- refused to appear. That inmate signed a refusal form and gave as his reason, "I was never at Upstate ever. I came here from Attica!" He had been transferred from Attica to the Elmira Correctional Facility. Contending that the inmate appeared to be confused or misinformed about the nature of his requested testimony, Teixeira asked the hearing officer to contact him and clarify that the request was for his testimony about events at Attica, not Upstate. The hearing officer agreed to have the inmate "re-interviewed," but there is no indication in the record that he took any steps to follow up. The hearing officer found Teixeira guilty of all charges and imposed a penalty of 24 months in the Special Housing Unit and loss of 24 months of good time credit.

Supreme Court annulled the disciplinary determination, finding that Teixeira's right to call a witness "was clearly violated;" but it denied his request to expunge all references to the disposition from his records and, instead, remitted the matter to the Department of Corrections and Community Supervision (DOCCS) for a new hearing. "An outright denial of a witness by a hearing officer without any good-faith reason provided or a lack of any effort to obtain a requested witness's testimony constitutes a constitutional violation requiring expungement..." it said. "However, where a good-faith reason for the denial appears on the record any violation amounts to a regulatory violation and remittal is the appropriate remedy. In [Teixeira's] case, a reason for the refusal was provided."

The Appellate Division, Third Department affirmed, saying remittal for a new hearing was appropriate because "the record confirms that the Hearing Officer made some, albeit insufficient, effort to obtain petitioner's witness and did not deny the witness outright 'without a stated good-faith reason'.... Accordingly, this error constituted a violation of petitioner's regulatory right set forth in 7 NYCRR 254.5, thus 'requiring annulment of the determination but not mandating expungement'...."

Teixeira argues that the proper remedy for violation of an inmate's right to call a witness is expungement, not remittal for a new hearing, and that the "distinction between a 'constitutional' and a 'regulatory' right to witnesses is a false one." He says, "In [Matter of Barnes v LeFevre] (69 NY2d 649), this Court made clear the nature of the right itself -- the denial of a witness -- takes precedence and is what mandates expungement, not the purported source of that right.... The constitutional right to call witnesses and the regulatory right to call witnesses are simply one and the same.... A violation of one will be a violation of the other." The right to call witnesses "derives in the first instance from the Constitution and is merely echoed in the state regulation."

For appellant Teixeira: Michael E. Cassidy, Plattsburgh (518) 561-3088

For respondent Fischer (DOCCS): Assistant Solicitor General Martin A. Hotvet (518) 776-2048

# *State of New York Court of Appeals*

Summaries of cases before the Court of Appeals are prepared by the Public Information Office for background purposes only. The summaries are based on briefs filed with the Court. For further information contact Gary Spencer at (518) 455-7711.

To be argued Wednesday, September 16, 2015

## **No. 143 Tiraldo v Lynn**

In August 1996, John Tiraldo was promoted to Acting Assistant Commissioner for Planning in New York City's Department of Transportation (DOT). In November 1996, he told his immediate supervisors that DOT Commissioner Christopher Lynn and First Deputy Commissioner Richard Malchow violated City bidding rules by purchasing \$6,000 worth of "Don't Honk" signs from a company owned by an acquaintance, then used back-dated documents to cover up the violation. One or two days later, he reported the matter to the DOT Inspector General of the Department of Investigation (DOI). He did not mention his concerns to Lynn or Malchow. After he was demoted in February 1997, Tiraldo brought this action against Lynn, Malchow and the City under Civil Service Law § 75-b, the "whistleblower's statute," alleging they had retaliated against him. In 1998, the DOI issued a report on its investigation, which found Tiraldo "suffered an adverse personnel action taken in retaliation for his having reported to the [DOI] information concerning conduct which he knew or reasonably believed to involve an abuse of authority" by City officials. It recommended he be reinstated, but he was not.

Supreme Court granted summary judgment to the City defendants and dismissed the suit, ruling Tiraldo's claim was barred by his failure to first report the alleged violation's to DOT's "appointing authority," as required by Civil Service Law § 75-b.

The Appellate Division, First Department reversed, reinstated the suit and granted partial summary judgment on liability to Tiraldo. Because Lynn and Malchow were DOT's appointing authority, "reporting the violation to them would have been futile," the court said, and Tiraldo's "good faith efforts in the manner and timing of his reporting, first informally to his immediate supervisors, and then soon thereafter to the [DOI]," satisfied the statute's reporting requirement. After a nonjury trial, Supreme Court awarded Tiraldo \$175,000 in back pay, but it denied his claim for prejudgment interest, saying neither Civil Service Law § 75-b nor Labor Law § 740 "makes any provision for interest" on back pay.

The Appellate Division modified by ordering the City to reinstate Tiraldo and remanded the case for Supreme Court to recalculate his back pay based on the calculations of his economics expert. It also ruled he was entitled to prejudgment interest based on cases interpreting the Human Rights Law, which does not expressly provide for it, but in which courts have found a legislative intent to provide prejudgment interest. "Like the Human Rights Law, Civil Service Law § 75-b has the goal of remediating adverse employment actions which, if allowed, would undermine an important public policy, that is, encouraging public employees to expose fraud, waste and other squandering of the public fisc. It makes no sense that the Legislature would have intended victims of employment discrimination to be made 'whole' through an award of prejudgment interest, but not whistleblowers like plaintiff."

Tiraldo was ultimately awarded \$388,243 in back pay, \$274,478 in interest, and \$153,506.81 in attorney's fees and costs.

For appellants Lynn et al: Assistant Corporation Counsel Marta Ross (212) 356-0857

For respondent Tiraldo: Brian J. Isaac, Manhattan (212) 233-8100