

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.

To be argued Thursday, March 23, 2017

No. 40 Matter of Acevedo v New York State Department of Motor Vehicles

No. 41 Matter of Carney v New York State Department of Motor Vehicles

No. 42 Matter of Matsen v New York State Department of Motor Vehicles

These petitioners, drunk driving offenders whose driver's licences were revoked pursuant to the Vehicle and Traffic Law, are challenging restrictive regulations the Department of Motor Vehicles adopted in 2012 for issuing new licenses to recidivist drunk or impaired drivers. The petitioners were convicted and applied for new licenses prior to 2012, but DMV held their applications in abeyance until it adopted the emergency regulations in 15 NYCRR part 136, which it then applied to deny or restrict their driving privileges. The Appellate Division, Third Department rejected their challenges in three split decisions.

Kevin Acevedo was convicted of driving while intoxicated in 2008, his third alcohol-related driving offense in 10 years. DMV denied his license application under 15 NYCRR 136.5(b)(3), which provides that, for at least five years after the statutory revocation period expires, it must deny the application of anyone with three alcohol-related offenses, but no "serious driving offense," during a 25-year look-back period. After five years, if DMV grants an application, it must issue a restricted license "for a period of five years and shall require the installation of an ignition interlock device."

Michael Carney was convicted of DWI in 2011. It was his sixth alcohol-related offense, but he was treated as a first time offender under the Vehicle and Traffic Law because his prior convictions were more than 10 years old. DMV denied his application under 15 NYCRR 136.5(b)(1), which requires it to deny relicensing if an applicant "has five or more alcohol- or drug-related driving convictions or incidents ... within his or her lifetime."

The Appellate Division ruled the regulations cases were valid in separate 3-2 decisions, finding DMV did not exceed its regulatory authority because "it did not act on its own ideas of public policy, but rather implemented the Legislature's policies of promoting highway safety," and because the regulations represent "an appropriate discretionary determination" to deny relicensing to persons who pose a danger to the public. It ruled the regulations did not conflict with governing statutes and were not impermissibly applied retroactively. The dissenters argued the DMV Commissioner exceeded her authority by "abdicat[ing] her statutory mandate to exercise her discretion" on a case-by-case basis "in favor of a hard and fast rule, waivable only under extremely limited circumstances."

Caralyn Matsen was convicted of DWI in 2010, her third offense in 10 years. DMV denied her relicense application for life under 15 NYCRR 136.5(b)(2) because she had "three or four alcohol- or drug-related driving convictions ... and ... one or more serious driving offenses within the 25 year look back period." The regulations define "serious" offense as "(i) a fatal accident; (ii) a driving-related Penal Law conviction; (iii) conviction of two or more violations for which five or more points are assessed...; or (iv) 20 or more points from any violations." Matsen had two prior six-point speeding convictions.

The Appellate Division said the Commissioner's inclusion of a conviction of two or more five-point violations "in the definition of 'serious driving offense' has a rational basis and is well within her discretionary authority. This rational determination cannot be rendered irrational by the fact that the definition also includes other types of offenses with more serious practical consequences." The dissenter said the "categories that make up a 'serious driving offense' are far too broad. While one can readily comprehend including a 'fatal accident' within the definition, it is extraordinary and irrational to equate two five-point violations with a fatal accident...."

For appellants Acevedo, Carney and Matsen: Eric H. Sills, Albany (518) 456-6456

For respondent DMV: Asst. Solicitor Gen. Jeffrey W. Lang (518) 776-2027 (Acevedo & Matsen)

Assistant Solicitor General Jonathan D. Hitsous (518) 776-2044 (Carney)

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No. 43 People v Omar A. Smalling

Omar Smalling was at a party in Queens with his wife and a friend in January 2009 when a fight broke out and they fled with a crowd into the street, then got into Smalling's car and he began to drive away. Police officers heard gunshots, and one of them saw muzzle flashes coming from the driver's side of Smalling's car. They pulled Smalling over and found a .380 caliber handgun with one live round on the ground outside the car. They also found a spent shell casing on the driver's side of the windshield and another inside the car. Smalling, who was driving, was charged with criminal possession of a weapon in the second and third degrees, among other things. His friend, who had been in the rear seat of the car, testified at trial that Smalling fired shots into the air through his side window. Smalling's wife, who was estranged from him over his relationship with another woman, testified that she saw a gun in his lap, then heard shots and saw a flash in his direction. When the officers activated their lights and siren, she said, Smalling tossed her the gun and told her to throw it out the window, which she did.

At the pre-charge conference the prosecutor, who had presented evidence that Smalling himself possessed and fired the gun, asked Supreme Court not to instruct the jury on constructive possession and the court agreed. The court instructed the jury that possession means "to have physical possession or otherwise exercise dominion or control over property, in this case, the gun." During deliberations, when jurors asked for the definition of "dominion and control," the court read them the definition from the CJI charge on constructive possession, saying, "Under our law, a person exercises dominion or control over property not in his physical possession when that person exercises a level of control over the area in which the property is present which is sufficient to give him the ability to use or dispose of the property. Additionally, the law recognizes the possibility that two or more individuals can jointly have property in their possession ... when they each exercise dominion or control over the property...."

Smalling was convicted of both weapon possession counts and sentenced to three and a half years in prison. The Appellate Division, Second Department affirmed, saying the trial court "did not err when it gave a supplemental instruction regarding constructive possession of a weapon in response to a note from the jury...."

Smalling argues, "The court violated appellant's rights to due process and the effective assistance of counsel when it (A) issued a constructive possession and acting-in-concert charge in response to a jury note, having previously assured the parties that such a charge would not be given, thereby permitting the jury to find appellant guilty based on a theory for which there was no evidence and that defense counsel had no opportunity to contest; and (B) failed to apprise the parties that it intended to give the instruction prior to doing so, thereby violating the established procedure for responding to jury notes and depriving defense counsel of the ability to influence the court's response."

The prosecution argues, "[D]efendant failed to monitor the charge and object to the concept of dominion and control, and failed to request to see the proposed definition of the concept, but now attempts to lay the blame for those inactions on the trial court.... Moreover, the jury was entitled to a definition of the term the court had used, three times without objection, and the court gave one that even defendant concedes was legally correct."

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For respondent: Queens Assistant District Attorney Jill A. Gross-Marks (718) 286-5882

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No. 44 Coffed v McCarthy

James Coffed was killed when the bicycle he was riding collided with a dump truck in the Village of Lancaster, Erie County, in July 2012. Coffed and the truck, driven by John McCarthy, had been traveling in the same direction on Walden Avenue when the truck stopped at an intersection for a red light, then began to make a right turn. Coffed, riding in a bike lane to the right of the truck, struck the side of the truck as it made the turn, suffering fatal injuries. Police investigators cited McCarthy for equipment violations, including an inoperative right rear turn signal, but found no criminal culpability and concluded "this incident was simply a tragic accident.... It is believed that a combination of sun glare, the dump truck's height and the bicyclist's geographical position relative to the dump truck prevented Coffed from observing the red light.... Coffed did proceed through a solid red light and struck the dump truck who had the right of way."

Coffed's wife brought this negligence action on behalf of his estate against McCarthy and the owner of the truck, Gasperino Fulfaro. Supreme Court denied the defendants' motion for summary judgment dismissing the complaint.

The Appellate Division, Fourth Department reversed and dismissed the suit on a 3-2 vote, saying Coffed's failure to stop for the red light was the sole proximate cause of the accident. The majority said, "Defendants established that [McCarthy] came to a complete stop at the red light and cautiously entered the intersection to make a legal right turn..., that [McCarthy] was unable to see decedent approaching the intersection ... and that decedent was negligent as a matter of law in proceeding into the intersection against the red light" in violation of Vehicle and Traffic Law § 1111(d)(1). It said "the allegedly inoperable condition of the right rear turn signal ... was not a proximate cause of the accident.... The record establishes that there was an operable right turn signal on the truck's dump box that was activated and would have been visible from behind the truck, and further establishes that decedent was riding with his head down and not paying attention to his surroundings."

The dissenters argued there are questions for a jury to resolve. They said the plaintiff "submitted evidence concerning the position of the bicycle after the accident that raised an issue of fact whether decedent proceeded into the intersection at all, thereby raising an issue of fact whether he violated" section 1111(d)(1) by riding through the red light. "Even assuming ... that decedent was negligent..., we conclude that a jury should resolve the issue whether decedent's negligence was the sole proximate cause of the accident" because there was also evidence McCarthy could have been negligent. McCarthy "testified that he saw decedent in the bicycle lane a mile before the intersection where the collision occurred. Even if we credit [his] further testimony that he did not see decedent immediately before the accident, we conclude that triable issues of fact remain whether [McCarthy] 'failed to see what was there to be seen through the proper use of his senses'" and whether he "should have anticipated that a bicyclist would be in the bicycle lane." They said a jury should also decide whether the truck's broken turn signal was a proximate cause of the accident.

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For respondents McCarthy and FulFaro: Nicole B. Palmerton, Williamsville (716) 810-1320