State of New York
Court of Appeals

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NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

September 10 thru September 12, 2024

State of New York
Court of Appeals

To be argued Tuesday, September 10, 2024

No. 72 Colt v New Jersey Transit Corporation

The interstate sovereign immunity issues in this case arose in February 2017, when a New Jersey Transit Corporation (NJT) commuter bus struck Jeffrey Colt, a pedestrian who was in midtown Manhattan sidewalk with the "walk" signal in his favor. He suffered a fractured foot, among other injuries. Colt and his wife brought this personal injury action against NJT and its bus driver in New York. Almost three years later, and after the New Jersey statute of limitations expired, NJT moved to dismiss the action on the ground that it was immune from suit in New York under the doctrine of sovereign immunity.

Supreme Court denied the motion to dismiss, saying "it has taken defendants three years to raise a jurisdictionally based defense.... NJT has waived its right to object to jurisdiction in New York." It said, "To hold NJT immune from suit for negligence in motor vehicle accidents in New York would constitute a miscarriage of justice to the victims of accidents involving NJT vehicles, which operate in New York on a daily basis."

The Appellate Division, First Department affirmed in a 3-2 decision. Although it found NJT "did not expressly and unambiguously waive the sovereign immunity defense," the majority declined to dismiss the New York action because the plaintiffs would have been left without any forum. New Jersey law requires suits against municipal corporations to be commenced in the county where the claim arose, so the plaintiffs "cannot seek redress for NJT's tortious conduct in New York State courts under the doctrine of sovereign immunity and are precluded from suing in New Jersey state courts merely because the cause of action did not arise in that state.... Thus, our plaintiffs and other similarly situated plaintiffs are without a judicial forum. This absurd result cannot be jurisprudentially justified. We hold that under these circumstances the dismissal of this action against NJT in the absence of an available judicial forum in New Jersey because the injury occurred in New York is an affront to our sense of justice and cannot be countenanced."

The dissenters argued the majority was "flatly wrong" to find that the plaintiffs could not have filed their suit in New Jersey and, in any case, the U.S. Supreme Court settled the immunity issue in Franchise Tax Board of California v Hyatt (139 S Ct 1485 [2019]) by holding the Constitution does not permit a nonconsenting state to be sued in another state's court. "[E]ven if the majority were correct in believing that this action could not have been maintained in New Jersey, that would have no bearing on this court's duty to honor New Jersey Transit's assertion of its sovereign immunity defense under the United States Constitution, as authoritatively construed by the United States Supreme Court in Hyatt."

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State of New York
Court of Appeals

To be argued Tuesday, September 10, 2024

No. 73 People v Anthony Blue

Anthony Blue and a co-defendant, Carnona Puello, were arrested and charged with a series of burglaries in Washington Heights in August 2012, and the police seized cell phones from both men. On September 5, 2012, a judge issued a search warrant to examine the phones and stated that the warrant was to be deemed executed on the date it was issued. The forensic examination of the phones actually began 19 days later, on September 24, and investigators ultimately recovered incriminating text messages between Blue and Puello discussing the burglaries. The case was initially dismissed and Blue moved to Florida, but the two men were jointly indicted on six counts of second-degree burglary on March 25, 2013. Blue waived extradition from Florida and was arraigned on the charges in Manhattan on June 13, 2013. More than two-and-a-half years later, Blue was convicted at trial in October 2015 of five of the burglary counts and was sentenced to 25 years in prison.

Blue argued on appeal that the search of his phone was improper because it did not comply with Criminal Procedure Law (CPL) § 690.30(1), which states, "A search warrant must be executed not more than ten days after the date of issuance." He said no part of the search authorized by the September 5, 2012 warrant occurred until more than ten days after the warrant was issued and, therefore, the text message evidence should be suppressed. Among other issues, Blue argued his right to a speedy trial under CPL 30.30 was violated by the lengthy delay between his indictment and trial. In particular, he contended the prosecution should be charged with 57 days of delay from April 17, 2013, when Puello filed pre-trial motions, to June 13, 2013, when Blue was arraigned. The trial court declined to charge that time against the prosecution based on CPL 30.30(4)(d), which excludes "a reasonable period of delay when the defendant is joined for trial with a co-defendant...." Blue argued the exclusion did not apply because until he was arraigned he could not be "joined for trial" with Puello. Blue, who represented himself at trial, argues in a pro se brief that his right to counsel was violated because the trial court failed to warn him of the risks of proceeding pro se.

The Appellate Division, First Department affirmed the conviction, saying the trial court "properly admitted text messages and other information obtained from [Blue's] cell phone. Although the forensic examination of the phone occurred more than 10 days after issuance of a warrant, there was no violation of CPL 690.30(1), because the warrant expressly stated that it was 'deemed executed at the time of issuance,' and the phone remained in police custody throughout." The court found there was no statutory speedy trial violation, implicitly rejecting Blue's claim that the 57 says of pre-arraignment delay should not be excluded. It said the prosecution was chargeable with 180 days of delay, "which falls short of the 184 days required for dismissal of this case."

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For respondent: Manhattan Assistant District Attorney Philip V. Tisne (212) 335-9000

State of New York
Court of Appeals

To be argued Tuesday, September 10, 2024

No. 74 People v Kerbet Dixon

Kerbet Dixon was arrested in June 2011 for allegedly sexually assaulting three underage girls in Queens in 2008 and 2009, when they ranged in age from 5 to 14 years old. The police also seized two computers from his home, on which they found hundreds of images of child pornography. After obtaining new assigned counsel appointed by the court three times, Dixon, a veteran court officer in New York City Civil Court, represented himself at trial. He complained during the trial that jail authorities had recorded his phone calls to witnesses as he was preparing them to testify and that the prosecutor obtained an unfair tactical advantage by listening to those recordings and using them during cross-examination of his witnesses. He said, "I believe ... it violates my attorney/client relationship because [the prosecutor] is now listening to me. I'm a pro se defendant. He's listening to me talk to my witnesses.... He had all these things set so he has an unfair advantage of listening to me talk to my witnesses and I don't think that's fair because if I was in his office while he's talking to his witnesses that wouldn't be fair." The trial court told Dixon that he knew his calls from jail would be recorded, and ruled there was no violation of attorney-client privilege because a phone conversation in jail is not private.

Dixon was convicted of multiple charges including first-degree course of sexual conduct against a child, third-degree rape and sexual abuse, and more then 600 counts of possessing and promoting a sexual performance by a child. He was sentenced to 25⅓ to 30 years in prison.

The Appellate Division, Second Department affirmed, rejecting Dixon's claim that the trial court failed to determine that his decision was unequivocal, knowing, voluntary, and intelligent, rendering his waiver of his right to counsel in order to proceed pro se invalid. It said "Supreme Court conducted the requisite 'searching inquiry'..., including 'warn[ing] [the] defendant forcefully that he did not have the training or knowledge to defend himself, that others who had done so had been unsuccessful and that if he insisted upon appearing pro se he would be held to the same standards of procedure as would an attorney'...." The Appellate Division did not explicitly address his claims concerning the prosecutor's use of his phone calls from jail to his witnesses, saying only that his "remaining contentions ... are partially unpreserved for appellate review, and, in any event, without merit."

Dixon argues that the trial court erred in permitting him to proceed pro se because "(1) his request to do so was, by the court's own admission, 'equivocal' and had been conditioned upon the refusal to assign him new counsel, and (2) he was not warned of the 'dangers' of proceeding pro se.... [I]ndeed, the court neither explained appellant's 641 charges nor his multi-decade sentencing exposure." Regarding his recorded phone calls from jail, Dixon says, "The prosecutor violated appellant's Sixth Amendment right to present a defense by monitoring his pro se witness preparation calls and repeatedly using them throughout trial to gain a tactical advantage.... The prosecutor's decision to actively seek out a pro se defendant's witness preparation calls, listen to the calls without having the court or a 'taint team' first screen them, and weaponize the calls to obtain a tactical advantage at trial has never been sanctioned by this Court – or any other court nationwide."

For appellant Dixon: David Fitzmaurice, Manhattan (212) 693-0085 ext. 222
For respondent: Queens Assistant District Attorney Danielle S. Fenn (718) 286-5838

State of New York
Court of Appeals

To be argued Tuesday, September 10, 2024

No. 76 Szypula v Szypula

The primary question in this matrimonial action is whether pension credits earned prior to a marriage, but acquired during the marriage with marital funds, are marital property subject to equitable distribution. When John and Meredith Szypula married in 1996, the husband had served nearly nine years in the U.S. Navy. Roughly two years later he left the Navy for private employment without ever joining the Navy's pension plan. In 2012, he joined the U.S. State Department as a foreign service officer, was automatically enrolled in the Foreign Service Pension System, and was given the opportunity to buy back the 11 years of pension credit he had earned in the Navy. The couple opted to purchase the Navy service credits, which was accomplished through deductions from the husband's paychecks over the next six years. The wife sued for divorce in 2019, after the cost of the Navy pension buy-back was fully paid. In settlement negotiations, the parties did not agree on whether the Navy pension benefits were a marital asset or the husband's separate property.

Supreme Court ruled the entire 11 years of Navy pension credits were marital property and ordered equitable distribution, citing the Appellate Division, Second Department's 2019 decision in Burke v Burke (175 AD3d 458). Supreme Court said the husband "received some pension benefits from his service" in the Navy prior to the marriage. "However, at no time during his service, before or after the marriage, did he obtain vested benefits.... [T]he parties, during the course of their marriage, used marital funds to buy back Husband's US NAVY pension benefits to enhance his entire retirement benefits. Consequently, the choice of how the parties chose to use those marital funds in the concept of their economic partnership will not be disrupted."

The Appellate Division, Third Department modified by reversing the determination that nine years of Navy pension credits earned prior to the marriage were marital property. It said whether a pension is marital property "is determined by the time period in which the credit for the pension was earned.... The time rules applicable to pension plans ... reflect compensation to the titled spouse for past services. As such, compensation for past services earned prior to the marriage is separate property. The nine years of premarriage Navy credits were earned outside the marriage and are based on the fruit of the [husband's] sole labors" and "they are not due in any way to the indirect contributions of the [wife]." The court said, "The acquisition of the separate pension credits cannot serve to transform such property into a marital asset." However, it said the marital funds used to purchase the Navy credits for 1987 to 1996 are subject to equitable distribution and it directed Supreme Court on remittal to order payment of half of that cost to the wife, a total of $3,525.

Meredith Szypula, citing Burke, argues the Navy pension is marital property because her husband had no vested right to the pension, or even to buy back the pension credits, until he joined the State Department during the marriage and purchased the pension credits with marital funds. She says "the correct inquiry with respect to retirement benefits is not necessarily when the service occurred but rather when the right to ... the thing of value" was actually acquired.

For appellant Meredith Szypula: R. James Miller, Ithaca (607) 273-4200
For respondent John Szypula: Emily Barnet, Manhattan (212) 230-8868

State of New York
Court of Appeals

To be argued Wednesday, September 11, 2024

No. 79 People ex rel. Neville, on behalf of Ralph S. v Toulon

In 2006, Ralph S. pled guilty to first-degree sexual abuse for fondling a 4-year-old girl and was sentenced to 1½ to 3 years in prison. Prior to his release, the State commenced a civil management proceeding under Mental Hygiene Law (MHL) article 10 and in 2010, after he was found to be "a dangerous sex offender requiring confinement," Ralph S. was committed to a secure treatment facility. In October 2016, a court found he was no longer a dangerous sex offender and released him on a program of strict and intensive supervision and treatment (SIST) under MHL § 10.11. Three years later, he was taken into custody for violating conditions of his SIST program by drinking alcohol and tampering with a device that monitored his alcohol use. On December 24, 2019, the State filed a petition to revoke his release on SIST and commit him to a secure facility. On the same day, Supreme Court found under MHL § 10.11(d)(4) that there was probable cause to believe Ralph S. was a dangerous sex offender requiring confinement – based solely on the State's allegations in its petition for confinement – and authorized the State to hold him at the Suffolk County Jail until the petition for confinement was decided.

Michael Neville, Director of Mental Hygiene Legal Service, filed this habeas corpus petition for the release of Ralph S. on the ground that his detention under the statute deprived him of due process. MHL § 10.11(d)(4) provides that, when the State files a petition for confinement, "the court shall promptly review the petition and, based on the allegations in the petition and any accompanying papers, determine whether there is probable cause to believe that the respondent is a dangerous sex offender requiring confinement." If probable cause is found, the statute authorizes detention of the respondent until the proceeding is concluded. Neville argued the statute, in directing the court to determine probable cause based only on the State's allegations and with no opportunity for Ralph S. to be heard, is unconstitutional on its face and as applied to him.

Supreme Court rejected the constitutional claims and denied the petition. The court subsequently denied the State's petition for confinement and released Ralph S. on SIST.

The Appellate Division, Second Department invoked an exception to the mootness doctrine and declared the statute does not violate due process on its face or as applied. Rejecting the facial challenge, it noted that offenders facing SIST revocation have already been found at trial to have a mental condition that predisposes them to commit sex offenses and it said the statutory procedures "are sufficient, at least in some circumstances, to protect offenders' liberty interests from erroneous deprivation, especially when balanced with the State's 'strong interest in providing treatment to sex offenders with mental abnormalities and protecting the public from their recidivistic conduct.'"

For appellant Neville, obo Ralph S.: Timothy M. Riselvato, Garden City (516) 493-3975
For respondent State: Assistant Solicitor General Kwame N. Akosah (212) 416-8025

State of New York
Court of Appeals

To be argued Wednesday, September 11, 2024

No. 80 Orellana v Town of Carmel

A light snow was falling in December 2018 when Town of Carmel Highway Superintendent Michael Simone drove out in a town-owned SUV to assess the condition of the roads. After about 20 minutes, he radioed his office to direct the snow removal crews to clear the roadways, then headed back to the office. About five minutes later he stopped at an intersection, looked to his left but not his right, where a minivan was approaching, then drove forward and broadsided the van in the middle of the intersection. The driver of the van, Ana Orellana, had the right of way.

Orellana filed this negligence action against the Town and Simone to recover damages for her injuries. The defendants moved for summary judgment dismissing the suit, arguing they were exempt from liability under Vehicle and Traffic Law (VTL) § 1103(b), which states that the ordinary rules of the road "shall not apply to persons [or] motor vehicles ... while actually engaged in work on a highway." The statute further provides that the exemption does not protect "such operators of motor vehicles or other equipment from the consequences of their reckless disregard for the safety of others."

Supreme Court granted the motion to dismiss, finding the defendants had statutory immunity from liability under VTL § 1103(b). "Simone was 'actually engaged in work on a highway' at the time of the collision," it said. "While he was not operating a snowplow, he was operating his work vehicle to assess the conditions of the road for snow treatment and possible removal.... [T]hese actions constitute maintenance of the Town roads." The court further found that Simone's actions, "while clearly negligent, are insufficient to constitute recklessness."

The Appellate Division, Second Department affirmed, finding that "Simone was actually engaged in work on a highway" and that his "conduct did not rise to the level of reckless disregard, but rather evinced a momentary lapse in judgment."

Orellana argues that Simone "was not actually performing work on a highway at the time of the accident" because he had already ordered his snow removal crews into action five minutes earlier and was simply traveling back to his office. "There was nothing about his return to his office that prevented him from complying with the rules of the road." She says the lower courts "improperly and unnecessarily" expanded the scope of the statute "to all supervisors" with responsibility for public roads so that "any time [they] are driving through their town [and] happen to notice a street or sidewalk condition that might need attention, [they] would be shielded from the rules of the road unless their conduct meets the reckless disregard standard." Alternatively, she says whether Simone was actually working on a highway or his conduct was reckless are issues of fact that should be decided by a jury.

For appellant Orellana: Enoch C. Brady, Port Chester (914) 690-0800
For Carmel et al: Brendan T. Fitzpatrick, Garden City (516) 307-0990

State of New York
Court of Appeals

To be argued Wednesday, September 11, 2024

No. 81 People v Randall K. McGovern

Randall McGovern was convicted of charges including second-degree forgery and third-degree grand larceny after engaging in a fraudulent scheme to steal tires and other property from three vendors in Erie County. In a phone call in July 2017, he impersonated the owner of Basil Ford Truck Center, a dealership in Cheektowaga, when he ordered 22 truck tires worth nearly $10,000 from Exxpress Tire Delivery. When the tires arrived the next day, McGovern had them loaded into his truck, signed the invoice with the name of the dealership owner, and left with the bill unpaid. He was arrested in Buffalo two months later, after a similar theft by fraud of electrical equipment and an attempted theft of more tires.

He was sentenced in Erie County Court to 9 to 18 years in prison, including consecutive terms of 3½ to 7 years for the forgery and grand larceny convictions based on the truck tire thefts in Cheektowaga. The court said "consecutive sentencing is both warranted and lawful because these crimes constitute separate and distinct acts, even if some of them occurred on the same date and were part of a single transaction. Specifically, the act of forgery under count two is distinct from the act of larceny under count one. Although these two crimes took place on the same day and although the forgery occurred during the larceny, these two crimes were successive, separate acts. Furthermore, the statutory elements of each crime are categorically discrete. One is not a legal component of the other, nor do the material elements of these offenses overlap."

McGovern argued on appeal that the consecutive sentences for forgery and grand larceny were illegal under Penal Law § 70.25(2), which states, "When more than one sentence of imprisonment is imposed on a person 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 was also a material element of the other, the sentences ... must run concurrently." The Appellate Division, Fourth Department affirmed the judgment with expressly addressing the consecutive sentencing issue.

McGovern argues it was unlawful to impose consecutive terms for forgery and grand larceny "because both counts represent the same criminal transaction. The forgery of the second count was the final act in the grand larceny of the first count, it occurred at the same time as the first count and could have served no other purpose than to further that larceny." He says "the actus reus is the same in both counts" because "the larceny and forgery ... share the same act of signing a false name to the Exxpress Tire invoice. While the larceny also involved the physical act of taking the tires, the signing of the invoice was part and parcel of the theft.... And the mens reus is clearly identical. The unlawful intent in both counts was to deprive the rightful owner [of] possession of the twenty-two tires by means of fraud."

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For respondent: Erie County Assistant District Attorney Michael J. Hillery (716) 858-2424

State of New York
Court of Appeals

To be argued Wednesday, September 11, 2024

No. 77 Matter of O'Reilly v Board of Education of the City School District of N.Y.C.
No. 78 Matter of Clarke v Board of Education of the City School District of N.Y.C.

Eight tenured New York City school teachers commenced these proceedings to challenge the implementation of a COVID-19 vaccination mandate by the City Department of Education in 2021, which resulted in their being placed on unpaid leave when they did not comply. The mandate was originally issued by the City Department of Health (DOH) in August 2021, shortly after the federal Centers for Disease Control approved the COVID-19 vaccine for persons aged 16 or older and shortly before public schools were to open for the 2021-2022 academic year, and it required "all DOE staff" and other employees who worked inside school buildings to provide proof they were vaccinated. The United Federation of Teachers (UFT) sought to negotiate the implementation of the mandate with DOE and, after an impasse was declared pursuant to Civil Service Law § 209, an arbitrator issued an "Impact Award" that established a procedure for handling requests for religious and medical exemptions and gave DOE unilateral authority to place unvaccinated employees without exemptions on unpaid leave. The award stated, "Placement on leave without pay for these reasons shall not be considered a disciplinary action for any reason." In these suits, the teachers sought, among other things, to compel DOE to provide them with evidentiary hearings and other due process protections required for tenured teachers under Education Law §§ 3020 and 3020-a before taking action against them.

Four Supreme Court justices dismissed the teachers' lawsuits based, in part, on their conclusion that being placed on leave without pay was not a disciplinary action that would trigger the tenure protections of the Education Law, but instead was a response to the teachers' refusal to comply with a condition of employment.

The Appellate Division, First Department affirmed the dismissals in a pair of decisions, by a 4-1 vote in O'Reilly and 5-0 in Clarke. The majority in O'Reilly said that the teachers' "placement on leave for failure to prove vaccination, a condition of employment, is 'unrelated to job performance, misconduct or competency' and does not constitute 'teacher discipline'.... Therefore..., Education Law §§ 3020 ... and 3020-a ... 'are inapplicable inasmuch as they address issues relating to a teacher's competency and the applicable procedures and penalties attendant thereto.'" The court said "due process mandates only notice and some opportunity to respond.... Because petitioners were given the opportunity to submit proof of vaccination, request religious or medical exemptions and accommodations if immunocompromised, or opt for extended benefits and severance on more favorable terms, their due process rights were not violated...."

The dissenter said, "The pandemic may have necessitated excluding unvaccinated teachers from classrooms, but it did not somehow erase the precedents of the Court of Appeals addressing the due process to which tenured teachers are entitled before they may be terminated.... Since the legislature has never authorized the imposition of a new condition [of employment] upon tenured teachers..., that condition may lawfully be enforced against petitioners only as an ordinary work rule, through the procedural mechanisms prescribed by Education Law § 3020-a."

For appellants O'Reilly and Clarke et al: Jimmy F. Wagner, Brooklyn (929) 477-8889
For respondents DOE et al: Assistant Corporation Counsel Jesse A. Townsend (212) 356-2067

State of New York
Court of Appeals

To be argued Thursday, September 12, 2024

No. 82 Matter of Jeter v Poole

In June 2019, a 13-year-old girl in New York City told her teacher that her adoptive mother, Shani Jeter, had beaten her with an extension cord the previous day to punish her for defacing a family computer screen. A school aide took the girl to a local precinct, where a police officer interviewed her and observed cuts and bruises on her upper body. The officer arrested Jeter on a charge of second-degree assault the same day and reported the matter to the State Central Register of Child Abuse and Maltreatment (SCR), initiating an investigation by the City Administration for Children's Services (ACS). The next day, ACS filed a neglect proceeding against Jeter under Family Court Act article 10 alleging excessive corporal punishment, which Jeter denied. In July 2019, ACS classified the SCR report as "indicated," meaning it found "some credible evidence" of the alleged abuse. Criminal Court dismissed the assault charge in September 2019 and Family Court dismissed neglect petition in February 2020.

Jeter requested a fair hearing by the State Office of Children and Family Services (OCFS) to clear her name by amending the "indicated" SCR report to "unfounded." Prior to her hearing in August 2020, OCFS advised her that she had "the right to hire an attorney" and, if she could not afford one, she "may be able to obtain free legal assistance" from a legal aid group. She appeared at the hearing without counsel, denied the abuse allegation, and sought without success to introduce a letter from her adopted daughter recanting her accusation of abuse. In September 2020, OCFS denied Jeter's request to reclassify the abuse report as unfounded. It said ACS established that the "indicated" report was supported by a fair preponderance of the evidence.

Jeter filed this suit to challenge the OCFS determination in January 2021, asserting that OCFS and ACS violated her right to due process by failing to provide her with appointed counsel for the hearing. In her opening brief to the Appellate Division, she added a new claim that Family Court's dismissal of the neglect petition entitled her to a presumption that the SCR abuse report was unfounded, based on Social Services Law (SSL) § 422(8)(b)(ii) which took effect on January 1, 2022, while her court challenge was pending. The amendment, approved in April 2020, states that when a neglect petition is based on an SCR abuse report and the petition is dismissed, "there shall be an irrebuttable presumption in a fair hearing" challenging the SCR report "that said allegation ... has not been proven by a fair preponderance of the evidence."

The Appellate Division, First Department confirmed the OCFS determination and dismissed the suit, finding there was no due process violation. "In administrative proceedings before OCFS, the individual need only be 'provided with an adequate opportunity to obtain legal representation,'" which it said she was given. It said SSL § 422(8)(b)(ii) "does not impact her case" because the fair hearing was held and the OCFS decision was rendered before it took effect and it found no basis to apply the amendment retroactively.

Jeter argues that due process required the State to provide her with counsel for her OCFS hearing in view of the consequences "of being branded a child abuser." She says, "The liberty at stake for Ms. Jeter and the millions of others listed on the Register includes 'some of life's most important interests, earning a livelihood in one's chosen field and establishing a family'.... That liberty interest must be protected by counsel for individuals at name-clearing hearings." She says SSL § 422(8)(b)(ii) should apply retroactively to her case because it is a remedial statute that "makes much-needed reforms to how accusations [of child abuse] are handled;" and because it took effect while her case was pending at the Appellate Division.

For appellant Jeter: Carolyn A. Kubitschek, Manhattan (212) 349-0900
For respondent State: Assistant Solicitor General Elizabeth A. Brody (212) 416-6167
For respondent ACS: Assistant Corporation Counsel Amy McCamphill (212) 356-2317

State of New York
Court of Appeals

To be argued Thursday, September 12, 2024

No. 83 People v Codie Hayward

In March 2018, Police officers surveilling an apartment building in Gloversville for drug activity saw a driver park and go inside. When he drove away, they followed him to a nearby parking lot and took him into custody after he told them he had just bought heroin from Codie Hayward at his apartment in the building. The officers obtained a search warrant, which did not contain a no-knock provision that would have allowed them to enter without warning. Officers later testified that, after one of them breached the door with a battering ram, they shouted "Police. Search warrant" as they rushed in, but they were not asked what had transpired prior to the breach. During the search, the officers found large amounts of heroin, cocaine and cash.

Hayward moved to suppress the drug evidence, contending the search warrant was based on unreliable information from an admitted drug user. Fulton County Court denied the motion and Hayward was convicted at trial of third-degree criminal possession of a controlled substance and a related misdemeanor. He was sentenced to ten years in prison.

The Appellate Division, Third Department affirmed in a 3-2 decision. The court agreed unanimously that Hayward failed to preserve his claim that police violated the "knock-and-announce rule" by ramming open his door without first announcing their presence; but it split on whether his defense attorney provided ineffective assistance of counsel by failing to move for suppression on that ground.

The majority said Hayward failed "to establish that a no-knock violation occurred in the first place.... [T]he record is silent as to what the police said or did prior to effectuating entry into the apartment.... [T]he fact that officers yelled out 'Police. Search warrant' as they entered and that occupants of the apartment were surprised ... sheds no meaningful light on what occurred before that point in time, as those things ... likely would have occurred whether or not the police had first announced their presence." It also said a no-knock provision would have been justified because the warrant application provided probable cause to believe the apartment contained "saleable quantities" of drugs "which could be quickly destroyed.... [B]ecause 'authorization for a [no-knock entry] would have been given had the proper request been made,' suppression would not have been an appropriate remedy...." The court concluded that, in light of a U.S. Supreme Court ruling that the exclusionary rule does not apply to knock-and-announce violations, Hayward's attorney "cannot be faulted for failing to raise a speculative and meritless claim."

The dissenters said the police testimony about shouting "Police. Search warrant" and their other conduct as they entered "confirms that the officers effectuated a no-knock entry, despite lacking the authority to do so.... In a situation so fraught with danger, dealing with the forcible entry into the sanctity of the home, the failure to abide by the knock-and-announce rule is not a mere technical violation" and "the evidence seized as a result should be suppressed." They concluded, "Despite having made a motion to suppress, defense counsel completely failed to challenge the no-knock aspect of the officers' entry into the apartment. There is no apparent strategic or other legitimate explanation for this omission.... In our view, counsel's failure to do so deprived defendant of his constitutional right to meaningful representation."

For appellant Hayward: Kristin Bluvas, Plattsburgh (518) 477-7137
For respondent Fulton County D.A.: Bridget Rahilly Steller, Albany (518) 432-1100

State of New York
Court of Appeals

To be argued Thursday, September 12, 2024

No. 84 People v Jorge Baque

Jorge Baque was charged with second-degree manslaughter after his five-month-old daughter, Alaia, was found dead in her crib in the family's Queens apartment in July 2016. An autopsy determined that she died of neck injuries that were consistent with violent shaking and that she would have died within minutes of being shaken. Since no one had witnessed Baque or anyone else shaking the child, the evidence against him was circumstantial. Alaia's mother testified that the girl woke up crying at 2 a.m. and Baque tried to console her, got her to stop crying, and placed her back in her crib in the couples' bedroom about 4 hours before she was found dead. A police officer testified that Baque told him that he heard the girl crying at about 2 a.m., picked her up, and rocked her until she fell asleep.

Supreme Court instructed the jury that, in order to convict, "it must appear that the inference of guilt is the only one that can fairly and reasonably be drawn from the facts and the evidence excludes, beyond a reasonable doubt, every reasonable hypothesis of innocence." The jury acquitted Baque of manslaughter and convicted him of the lesser included offense of criminally negligent homicide. He was sentenced to 1⅓ to 4 years in prison.

On appeal, Baque argued that his conviction was not supported by the weight of the evidence because the circumstantial evidence did not exclude "to a moral certainty" the possibility that someone else had shaken Alaia. He contended the Appellate Division was required to apply the same "moral certainty" standard of proof as the jury. The prosecution argued the moral certainty standard applies to jurors in a case based on circumstantial evidence, not to an appellate court assessing the weight of the evidence.

The Appellate Division, Second Department affirmed without applying the moral certainty standard. "Upon reviewing the record here, we are satisfied that the verdict of guilt was not against the weight of the evidence...," it said. "[B]ecause Alaia lost consciousness and died after the defendant cared for her, it was reasonable for the jury to conclude beyond a reasonable doubt that the defendant violently and forcefully shook Alaia, causing her death...."

Baque argues that the Appellate Division, "like any other fact finder, must apply the circumstantial-evidence [or moral certainty] rule when it weighs the evidence in a circumstantial case. It must do so because the rule is obligatory upon the finder of fact; it must do so to uphold the standard of de novo factual review that a weight analysis requires; and it must do so to effectuate this State's policy of subjecting circumstantial convictions to heightened judicial scrutiny on appellate review."

For appellant Baque: Sean H. Murray, Manhattan (212) 693-0085
For respondent: Queens Assistant District Attorney Charles T. Pollak (718) 286-5984

State of New York
Court of Appeals

To be argued Thursday, September 12, 2024

No. 85 People v Eric D. Sharp

In December 2016, Eric Sharp was arrested for weapon possession in Rochester after police officers, responding to the scene of a domestic dispute, saw him pull out a pistol and hide it in a brick retaining wall before trying to run away. Sharp was apprehended after a brief chase and the officers recovered a defaced semiautomatic handgun from a crack in the retaining wall.

Prior to trial, Supreme Court held a conference with the prosecutor and defense counsel – in chambers, off-the-record, and without Sharp present – which included discussion of the prosecutor's Sandoval application to cross-examine Sharp about his prior criminal history if he took the stand to testify. At a subsequent court appearance, with Sharp present, the court said it would rule on the application and asked defense counsel if he wanted to be heard. Defense counsel declined, saying "I would stand by our discussion in chambers," and the prosecutor did not raise any issues. The court then ruled the prosecutor could cross-examine Sharp about three prior misdemeanor convictions and one felony. Sharp was convicted at a bench trial of second- and third-degree criminal possession of a weapon and was sentenced to five years in prison.

The Appellate Division, Fourth Department affirmed on a 4-1 vote, rejecting Sharp's claim that the in-chambers discussion of the Sandoval issue, held in his absence, violated his right to be present at a material stage of his trial. The majority said, "Although defendant was not present at the in-chambers conference, the court held a subsequent proceeding in open court in defendant's presence, at which the court offered defendant an opportunity to be heard on the People's application. Defense counsel declined. The court then made, and explained, its ruling on the People's application. Under those circumstances, we conclude that defendant was afforded a meaningful opportunity to participate at the court's subsequent de novo inquiry and his absence from the initial conference does not require reversal...."

The dissenter said Sharp was entitled to a new trial "because, after improperly conducting a Sandoval hearing in his absence..., Supreme Court did not give defendant an opportunity to meaningfully participate in the purported de novo Sandoval hearing it conducted in his presence. In my view, the court's mere offer to defense counsel of an opportunity to be heard on the Sandoval application in defendant's presence – standing alone – was insufficient to constitute a de novo hearing on the issue. Consequently, defendant was denied his right 'to be present during proceedings that involve factual matters for which the defendant possesses peculiar knowledge of the salient facts'.... [T]he record demonstrates that the court's ultimate Sandoval ruling was based entirely on the 'discussion in chambers,' conducted outside of defendant's presence."

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