

# *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 Thursday, May 2, 2013

## **No. 114 People v Kenneth Padilla**

In June 2008, Kenneth Padilla was arrested in Manhattan for drunk driving after police spotted his Lexus SUV parked at a fire hydrant and obstructing traffic. An officer testified that Padilla was sitting in the driver's seat with the engine running, while Padilla's girlfriend testified that she had been driving and Padilla was standing outside the vehicle, reaching in through the driver's window to retrieve her cell phone when the police arrived. The police impounded the vehicle and, during an inventory search, found a loaded revolver in a compartment beneath a stereo system installed in the trunk. Padilla was then charged with possession of a weapon. He moved to suppress the evidence on the ground the inventory search was improperly conducted.

At the suppression hearing, the officer who conducted the search said that, as a "courtesy," he gave two garbage bags containing Padilla's belongings to Padilla's sister, who was a Transit Authority police officer. He said he inventoried some, but not all of those items. In the trunk, the officer found speakers and an amplifier that "basically filled up the entire space," and he spent 45 minutes to an hour disassembling and removing the stereo system. The officer said it had to be removed and inventoried because it was not original equipment. With the equipment removed, he was able to open the spare tire compartment, where he found the gun in a leather bag. The officer said he searched other compartments for drugs, but found none.

Supreme Court denied the suppression motion, saying the officer "violated provisions of the Patrol Guide in giving items to the Defendant's sister and not keeping a complete record of them," but those actions did not implicate rules that guard against pretextual searches. It said the speakers were properly removed because they were "not an original part of the automobile and would not have been accepted by the police pound." Padilla's first trial ended with a hung jury. At his second trial, he was acquitted of driving while intoxicated, but convicted of second-degree criminal possession of a weapon and was sentenced to seven years in prison.

The Appellate Division, First Department affirmed. "The search produced a 'meaningful inventory list'..., even though the searching officer did not record every item he released to defendant's sister..., and we do not find there were any deficiencies of any kind that would warrant suppression of the revolver," it said. "Regardless of whether the officer suspected that contraband might be present, there was no evidence that the search was conducted as a ruse to discover incriminating evidence."

Padilla argues the inventory search was improper because the officer "admitted that he was searching ... for contraband. Indeed, photographs of the appellant's vehicle ... showed that the back seats had been torn open during the police search. In addition..., the searching officer exercised discretion by turning over numerous personal belongings from the vehicle to the appellant's sister" and "made no attempt to itemize the property he found in the vehicle and therefore failed to prepare a meaningful inventory of the vehicle's contents." He also argues there was insufficient evidence that he knew the gun was concealed in his trunk and that prosecutorial misconduct deprived him of due process.

For appellant Padilla: Randall D. Unger, Bayside (718) 279-4500

For respondent: Manhattan Assistant District Attorney Matthew T. Murphy (212) 335-9000

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## **No. 115 Altshuler Shaham Provident Funds, Ltd. v GML Tower LLC**

In March 2007, Altshuler Shaham Provident Funds, Ltd., entered into an agreement to lend GML Tower LLC \$10 million, consisting of \$5.5 million to refinance a prior mortgage and \$4.5 million to finance construction work on two GML properties: a residential tower and a former department store that were part of the Hotel Syracuse complex in downtown Syracuse. The parties modified the loan agreement in May 2007 and again in March 2008. Altshuler never filed the original loan agreement or the two modifications with the county clerk. Altshuler transferred the loan funds to GML in a series of installments from May 2007 to March 2008. In March 2008, Altshuler filed with the clerk its mortgage increase, modification and spreader agreement with GML to secure the \$10 million loan. The contractor on the tower project, The Hayner Hoyt Corporation, and several unpaid subcontractors began filing mechanic's liens against the tower property in September 2008. The project was not completed and GML defaulted on the loans.

Altshuler brought this action against GML to foreclose on its properties, and against Hayner Hoyt and the subcontractors (including Syracuse Merit Electric and L.A. Painting, Inc.) that had mechanic's liens on the properties. The contractors moved for summary judgment, seeking a determination that their liens had priority over Altshuler's mortgage under Lien Law § 22. They argued Altshuler violated the statute by failing to file the original loan agreement.

Supreme Court granted the contractors' motions and declared that their liens had priority. It said Altshuler's March 2007 loan agreement "on its face comports with the definition of a building loan contract" and, consequently, the lender's failure to file it with the county clerk violated Lien Law § 22, which imposes a "subordination penalty" for failure to file. It rejected Altshuler's alternative argument that it was entitled to priority for the \$5.5 million of the loan funds that was used to purchase the property. The court ruled that if a lender fails to comply with the Lien Law, "its entire mortgage, including the part securing loan proceeds advanced for the purchase of the property, would become subordinate to any subsequently filed mechanic's liens." The Appellate Division, Fourth Department affirmed without opinion.

Supreme Court subsequently awarded Altshuler a judgment of \$10 million in its foreclosure action. GML's property brought \$1.4 million at the foreclosure sale, considerably less than the amount of the mechanic's liens, leaving Altshuler with no recovery.

Altshuler argues, in part, that the "2008 consolidated mortgage was recorded pursuant to the 2008 amended commitment and not pursuant to the 2007 commitment," and that the "2008 consolidated mortgage is not a building loan mortgage under Lien Law § 22 because it was not made pursuant to a building loan contract providing for future advances and expressly requiring use of the mortgage proceeds for improvements to real property." Even if the \$4.5 million building loan is subject to subordination under Lien Law § 22, the lender says, there is no basis for extending that penalty to the \$5.5 million used to buy the property.

For appellant Altshuler: Bruce H. Lederman, Manhattan (212) 564-9800

For respondent Hayner Hoyt: Timothy M. Bittel, Cleveland, Ohio (216) 621-0150

For respondent Syracuse Merit: Jordan R. Pavlus, Syracuse (315) 474-6448

For respondent L.A. Painting: Thomas P. Givas, Syracuse (315) 472-4481

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**No. 116 People v Robert Mitchell**

**No. 117 People v Josue Deliser**

In these otherwise unrelated cases, the defendants' pro se motions to withdraw their guilty pleas were summarily denied. Both defendants argue that statements their assigned counsels made in response to their motions were adverse to their interests and deprived them of effective assistance of counsel.

Robert Mitchell pled guilty in 2007 to two counts of second-degree murder arising from the 1996 robbery and murder of Esteban Martinez and Linda Leon in the Bronx. Mitchell, who faced a minimum sentence of 80 years to life if convicted at trial, was promised concurrent terms of 25 years to life. He moved to withdraw his plea on the ground he had been coerced by his attorney. After announcing that it would appoint new defense counsel, Supreme Court asked Mitchell's current counsel if he wanted to respond to his client's allegations. The attorney expressly denied that he in any way coerced the plea from Mitchell. The court then relieved the defender and adjourned the hearing. Mitchell appeared with new counsel at the rescheduled hearing, and the court denied his motion to withdraw his plea.

The Appellate Division, First Department affirmed, saying that before the court denied his motion to withdraw his plea, it "properly exercised its discretion" and "afforded defendant a full opportunity to present his claims both orally and in writing, and with the assistance of newly appointed counsel." The court said his claim of ineffective assistance "was conclusory, unsubstantiated and contradicted by the record."

Mitchell argues that because he "advanced a potentially valid claim of ineffective assistance of counsel," and his newly appointed counsel at the final hearing "added specific and troubling allegations concerning prior counsel's ineffectiveness," Supreme Court "erred in summarily denying his motion ... without any meaningful inquiry." He also says the court "elicited self-serving statements" from his first attorney "that were clearly adverse to his client" while that attorney was still representing him. "Because his own attorney advocated against him, Mr. Mitchell was deprived of the effective assistance of conflict-free counsel."

Josue Deliser, who was accused of two crimes in Brooklyn -- a stabbing in 2006 and a gunpoint robbery in 2007 -- with a sentencing exposure of about 50 years, pled guilty to second-degree attempted murder and first-degree robbery in exchange for a promise of two concurrent 10-year terms. When Deliser moved to withdraw the plea on the ground his attorney had coerced him, the attorney defended his handling of the case and said "...I think they were two strong cases against him and I think he made a knowing plea and I think it was in his best interest." Without appointing new defense counsel, Supreme Court denied the motion. The Appellate Division, Second Department affirmed.

Deliser argues he "was 'represented' by an attorney who not only failed to act in a representative capacity but who, in effect, became a witness against his client." When the court denied his motion without assigning new conflict-free counsel "at this critical stage of the proceedings," he says, "appellant was effectively without the representation to which he was constitutionally entitled." Arguing there was no conflict, the prosecution says, "[A]dvocating for withdrawal of defendant's guilty pleas would not have been a plausible defense strategy because there was no reason to believe [the motion] could have succeeded, and because ... withdrawal of the pleas would not have been in defendant's best interests, given the likelihood of a significantly higher sentence...."

No. 116 For appellant Mitchell: Rebekah J Pazmiño, Manhattan (212) 402-4100

For respondent: Bronx Assistant District Attorney Richard J. Ramsay (718) 838-6693

No. 117 For appellant Deliser: Winston McIntosh, Manhattan (212) 693-0085

For respondent: Brooklyn Assistant District Attorney Diane R. Eisner (718) 250-2489

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## **No. 118 Manhattan Telecommunications Corporation v H&A Locksmith, Inc.**

Manhattan Telecommunications Corporation (d/b/a MetTel) brought this breach of contract action against Manhattan locksmith Ariq Vanunu and more than a dozen of his business entities in January 2008, alleging they had failed to pay nearly \$150,000 owed under a contract for telephone services with MetTel. When Vanunu did not appear, MetTel moved for a default judgment in April 2008. Supreme Court ordered additional service of the motion on Vanunu, which MetTel completed in May 2008. The court granted the default motion in June 2008, and the final judgment was entered in November 2008. Vanunu moved to vacate the default judgment in November 2009.

Supreme Court denied Vanunu's motion to vacate, saying, "[S]omeone who is served, sometime I would say after the first of the year in 2008 and waits until sometime in October or November of 2009 to do anything about it, is not someone who should ... have the opportunity to, at this later date, proffer a claim of a meritorious defense."

The Appellate Division, First Department reversed and granted the motion to vacate. "[T]he complaint does not allege that [Vanunu] was a party to the contract individually, so as to bind him to its terms," the court said. "Some proof of liability is ... required to satisfy the court as to the prima facie validity of ... [an] uncontested cause of action'..., and here [MetTel] failed to provide the motion court with evidence that [Vanunu] was personally liable for the stated claims. Accordingly, the default judgment was a nullity...."

MetTel argues that its complaint is not defective because it identifies Vanunu individually as a defendant and "then details the causes of action against all defendants," including the allegation that, "Pursuant to a written agreement, [MetTel] provided telephone service to Defendants." It says the Appellate Division ruling "rested on *no* case that held that when a complaint names more than one defendant, the complaint is a *nullity* if it does not set forth each allegation of the complaint individually against each defendant." MetTel also argues that New York law "requires a showing of excusable neglect in order to vacate a default" and that the Appellate Division "improperly vacated" the judgment "on grounds that [Vanunu] had never raised" in the lower courts.

For appellant MetTel: Jonathan David Bachrach, Manhattan (212) 977-2400

For respondent Vanunu: Mark F. Heinze, Manhattan (212) 343-2662