State of New York
Court of Appeals

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NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

Week of October 16 thru October 17, 2018

State of New York
Court of Appeals

To be argued Tuesday, October 16, 2018

No. 121 Matter of Gonzalez v Annucci *(papers sealed)*

Miguel Gonzalez, charged with having sexual relations with a 14-year-old student at a Manhattan school where he had worked as a guard, pled guilty to second-degree rape in 2012 and was sentenced to 2½ years in prison to be followed by 3 years of post release supervision (PRS). He was adjudicated a level one (lowest risk) sex offender and, due to the victim's age, was prohibited by the Sexual Assault Reform Act (SARA) of residing within 1,000 feet of a school or other places where children congregate while he was on PRS. He earned 4 months and 10 days of good time credit, which made his conditional release date May 20, 2014, but he was not released from prison because he had not secured a residence that complied with the SARA restrictions. When he still had not found a SARA-compliant residence by his maximum release date, September 30, 2014, the State Department of Corrections and Community Supervision (DOCCS) transferred him to the Woodbourne Correctional Facility, a medium security prison and residential treatment facility (RTF). After filing an unsuccessful inmate grievance, Gonzalez brought this article 78 proceeding against Acting DOCCS Commissioner Anthony Annucci in December 2014 seeking his immediate release. He argued that DOCCS improperly placed him in the Woordbourne RTF where conditions were "virtually indistinguishable" from prison, improperly deprived him of his good time credit, failed to assist him in finding SARA-compliant housing, and failed to provide required rehabilitation programs. In February 2015, while his suit was pending, DOCCS released Gonzalez to a SARA-compliant homeless shelter in Manhattan.

Supreme Court dismissed the suit as moot because he had been released from Woodbourne. It also said it would have denied his petition on the merits.

The Appellate Division, Third Department modified on a 3-2 vote, applying the mootness exception to reach the merits. The majority declared that when a sex offender subject to "mandatory" SARA housing restrictions is placed in a residential treatment facility, DOCCS "has an affirmative obligation pursuant to Correction Law § 201(5) to provide substantial assistance to the person in locating appropriate housing;" and declared that the services DOCCS provided to Gonzalez at Woodbourne "were not adequate to satisfy that duty." It said DOCCS's "passive approach of leaving the primary obligation to locate housing to an individual confined in a medium security prison facility 100 miles from his family and community, without access to information or communication resources beyond that afforded to other prison inmates, falls far short of the spirit and purpose of the legislative obligation imposed upon DOCCS to assist in this process." The court unanimously rejected Gonzalez's other claims, saying that the decision to withhold his good time credit and deny him conditional release "based upon his failure to find SARA-compliant housing" was rational, and that he failed to show DOCCS "failed to comply with its statutory and regulatory obligations" in placing him at Woodbourne.

In a partial dissent, two justices argued that, based on the record, "it was not irrational, arbitrary or capricious to conclude that [Gonzalez] received adequate assistance in the process of securing SARA-compliant housing." They said "officials met with [him] numerous times to review, investigate and propose potential residences;" investigated 58 residences he proposed, none of which complied with SARA; and "DOCCS ultimately secured a SARA-compliant residence for [him] consistent with his indigent status" in Manhattan.

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State of New York
Court of Appeals

To be argued Tuesday, October 16, 2018

No. 122 People v Damian Jones

Damian Jones and more than two dozen co-defendants were charged with participating in a criminal enterprise in 2011 and 2012 that stole motorcycles in New York City and sold them to customers at home and abroad. The indictment said "the Criminal Enterprise was a New York City-wide association of individuals that worked together to steal, store, dismantle, package, and sell motorcycles ... and to ship the ... stolen motorcycles both domestically and internationally." It identified Jones as one of the "procurers" who stole the motorcycles, while other participants served as distributors who packaged and shipped the bikes or as dealers who made many of the sales. Jones was charged with a single count of enterprise corruption under Penal Law § 460.20, part of the Organized Crime Control Act of 1986, based on allegations that he sold four stolen motorcycles to an undercover police officer on three occasions in the fall of 2011.

He proceeded to a joint jury trial in Manhattan with three co-defendants. At the close of proof, he moved to dismiss the charge on the ground that the prosecution failed to prove the enterprise had a hierarchy of authority and, thus, failed to show it had an "ascertainable structure" as required by the statute. Supreme Court denied the motion, saying "a hierarchical structure ... is not required under the law." The court also denied his request to instruct the jury that the prosecution was required to prove the enterprise had a leadership structure. Jones was convicted of enterprise corruption and sentenced to 5 to 10 years in prison.

The Appellate Division, First Department affirmed, saying, "There was a sufficiently ascertainable structure in which members of the enterprise played specific roles and worked collaboratively to effectuate the common purpose of the enterprise. There were procurers like defendant, who stole the bikes on the streets, distributors or brokers who found a market for the bikes, and dealers who resold the stolen bikes in the United States and overseas. In addition, the enterprise members worked together to swap parts on bikes, alter vehicle identification numbers, and remove any antitheft devices.... The evidence demonstrated a level of coordinated activity that went beyond what would be expected in a mere market, and instead evinced the existence of a distinct criminal enterprise with a common purpose and ascertainable structure...."

Jones argues the evidence was legally insufficient to support his conviction. He says "courts interpreting the ascertainable structure element have -- until now -- universally required proof of a 'leadership' or other 'system of authority' to sustain an enterprise corruption conviction. Here, the prosecution did not prove any leadership or other system of authority governing the affairs of the alleged 'enterprise.' Quite the contrary: The prosecution's sole cooperating witness ... testified ... that 'there was no boss'.... [T]he evidence showed that buyers, sellers and brokers transacted at arm's length, competed with, and even undermined one another -- conduct antithetical to the very concept of an 'organization.'" He also argues the prosecution failed to prove that he knew of the existence of a criminal enterprise and intended to participate in it.

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For respondent: Manhattan Assistant District Attorney Ross D. Mazer (212) 335-9000

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To be argued Tuesday, October 16, 2018

No. 123 Matter of New York City Asbestos Litigation - Juni v A.O. Smith Water Products

Arthur Juni, Jr. brought this personal injury action against Ford Motor Company and others in 2012, after he was diagnosed with mesothelioma. He claimed his disease was caused by his exposure to asbestos-containing products installed or supplied by Ford -- including brakes, clutches, and manifold gaskets -- when he worked for Orange & Rockland Utilities as an auto mechanic on the Ford vehicles in its fleet from 1964 to 2009. For the first 25 years, he worked without a respirator to protect him from asbestos fibers. Juni died in 2014 and his widow was substituted as the plaintiff. After a 20-day trial, much of it devoted to expert testimony, the jury rendered a verdict for Juni, awarding his estate $8 million for pain and suffering and awarding $3 million to his widow for loss of consortium. It apportioned 49 percent of the liability to Ford and 51 percent to Orange & Rockland Utilities.

Supreme Court granted Ford's motion under CPLR 4404(a) to set aside the verdict on the ground that there was insufficient evidence that Juni developed mesothelioma as a result of his exposure to asbestos-containing products distributed by Ford.

The Appellate Division, First Department affirmed on a 3-1 vote. The majority said that, under Parker v Mobil Oil Corp. (7 NY3d 434 [2006]) and Cornell v 360 W. 51st St. Realty, LLC (22 NY3d 762 [2014]), "[P]laintiff was obliged to prove not only that Juni's mesothelioma was caused by exposure to asbestos, but that he was exposed to sufficient levels of the toxin from his work on brakes, clutches, or gaskets, sold or distributed by [Ford], to have caused his illness. We agree with the trial court that the standards enunciated by Parker and Cornell are applicable here, that they are not altered by Lustenring v AC&S, Inc. (13 AD3d 69 [1st Dept 2004] ...) or other asbestos cases, and that plaintiff's evidence failed to satisfy that standard.... The evidence presented by plaintiff here was insufficient because it failed to establish that the decedent's mesothelioma was a result of his exposure to a sufficient quantity of asbestos in friction products sold or distributed by [Ford]. Plaintiff's experts effectively testified only in terms of an increased risk and association between asbestos and mesothelioma..., but failed to either quantify the decedent's exposure levels or otherwise provide any scientific expression of his exposure level with respect to Ford's products...."

The dissenter said, "The parties produced conflicting expert evidence as to whether chrysotile asbestos in friction products can cause disease, whether asbestos causes disease by cumulative exposures or only after a certain amount of exposure, and whether Juni had been exposed to a sufficient level of asbestos from Ford's products to cause his mesothelioma.... It is well established that it is within the province of the jury to reject or accept an expert's testimony in whole or in part; the weight to be given to opinion evidence and expert evidence is ordinarily entirely for the jury's determination.... This [c]ourt, and others, have accepted a consensus from the medical and scientific communities that even low doses of asbestos exposure, above that in the ambient environment, are sufficient to cause mesothelioma.... Parker explicitly recognized that in toxic tort cases it is often 'difficult or impossible to quantify' a plaintiff's exposure to the toxin.... For these reasons, the standard being adopted by the majority erects an insurmountable hurdle requiring plaintiffs to recreate the work environment, to establish precise exposure levels, dust and fiber counts, air quality levels throughout the day...." He said the evidence "was legally sufficient and the disputed issues were properly submitted to the jury for factual determination. By setting aside this verdict the trial court and the majority have usurped the jury's function and redefined the nature of proof required to establish specific causation in asbestos cases."

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To be argued Wednesday, October 17, 2018

No. 124 Ferrara v Peaches Café

COR Ridge Road Company, LLC, the owner of a shopping plaza in the Town of Webster, leased space for a restaurant to Peaches Café, LLC in 2008. The lease required Peaches to complete "[a]ll electrical work other than items furnished by" COR; required it to "use only contractors approved" by COR and to obtain COR's approval of its design drawings; and provided that Peaches could not make any improvements to the property "without first obtaining [COR's] consent. The lease stated that "any alterations, additions or improvements" to the property "shall at once become a part of the realty and belong to [COR] and shall be surrendered with the Premises." Peaches hired Quinlan Ferrara Electric, Inc. to perform the electrical work, which was completed in 2009. The restaurant closed shortly thereafter and Peaches stopped making payments to Quinlan, leaving a debt of $50,776.81 for the electrical work. Quinlan filed a mechanic's lien against the property in that amount, naming both Peaches and COR.

In 2011, Quinlan brought this action against COR and others to foreclose on the lien under Lien Law § 3, which provides, "A contractor ... who performs labor or furnishes materials for the improvement of real property with the consent or at the request of the owner thereof, or of [the owner's] agent..., shall have a lien for the principal and interest, of the value, or the agreed price, of such labor...." Quinlan dissolved in 2012 and assigned the lien to its owner, Angelo Ferrara, who later moved for summary judgment enforcing the lien. He said Cor's "consent" was established by the terms of the lease, which required the electrical work to be done and required its approval or consent for all aspects of the work. COR moved for summary judgment to dismiss, arguing the lien could not be enforced against it because it had no direct contact with Quinlan and did not explicitly consent to the work performed by Quinlan.

Supreme Court granted summary judgment to COR and dismissed the complaint. The court relied on Interior Bldg. Servs., Inc. v Broadway 1384 LLC (73 AD3d 529), in which the Appellate Division, First Department ruled a landlord was not liable for the cost of a tenant's improvements where the work "was performed solely for the tenant's benefit," the contractor dealt almost exclusively with the tenant, and it concluded that "any consent provided by the landlord was that consent required under the lease," and thus, was not consent for purposes of the Lien Law. In Ferrara, Supreme Court said, COR "had even less contact" than the landlord in the First Department case. COR "dealt only with [Peaches' owner], except for limited purposes. As in Interior Building Services, any consent was required under the lease."

The Appellate Division, Fourth Department reversed and granted summary judgment to Ferrara. It relied on Jones v Menke (168 NY 61 [1901]), which says a requirement in a lease that the "tenant shall make certain improvements on the premises is a sufficient consent of the owner to charge his property with claims which accrue in making those improvements;" and on McNulty Bros. v Offerman (221 NY 98 [1917]), which says that, when "the liens have been confined to work called for by the lease..., the landlords' estate may be charged to the same extent as if the owners of that estate had ordered the work themselves." The Fourth Department said, "Jones and McNulty Bros. have not been overturned or disavowed.... We acknowledge that our sister Departments have all concluded ... that a lien under Lien Law § 3 is valid only when the property owner directly authorizes the contractor to undertake the relevant improvements.... In our view, however, those cases cannot be squared with McNulty Bros. and Jones, which, of course, we must follow." Since COR's lease "obligated Peaches to install electrical upgrades on the premises," and "Peaches hired Quinlan ... to perform the electrical work contemplated by the lease," Lien Law § 3 obligates COR "to pay for the 'reasonable value of [Quinlan's] services....'"

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To be argued Wednesday, October 17, 2018

No. 125 People v Rodney Watts

Rodney Watts was indicted on 12 felony counts of criminal possession of a forged instrument in the second degree (Penal Law § 170.25) for allegedly selling counterfeit concert tickets in midtown and upper Manhattan between November 2012 and June 2013. The statute applies to a defendant who "possesses any forged instrument" as defined in Penal Law § 170.10: "... a written instrument which is or purports to be.... A deed, will, codicil, contract, assignment, commercial instrument, credit card ... or other instrument which does or may evidence, create, transfer, terminate or otherwise affect a legal right, interest, obligation or status." Watts moved to dismiss the charges as jurisdictionally defective, arguing that counterfeit tickets to events do not fall within the definition of section 170.10. He was arrested again in February 2014, with a female companion, for allegedly attempting to sell counterfeit tickets to a Knicks basketball game. He was indicted on eight more counts of second-degree possession of a forged instrument.

Supreme Court denied his motion to dismiss the first indictment, saying, "The tickets in this case fall within the meaning of both a written instrument and an 'instrument which does or may evidence, create, transfer, terminate or otherwise affect a legal right, interest, obligation or status.' (PL § 170.10) 'Written instrument' is broadly defined in order to cover 'every kind of document and other item deemed susceptible of deceitful use in a "forgery" sense, the main requirement being only that it be "capable of being used to the advantage or disadvantage of some person"'.... A ticket to a theatrical performance is purchased by the holder and in exchange grants the holder the right to enter the venue and view the performance." Another justice denied a similar motion to dismiss the second indictment. Watts pled guilty to two counts of second-degree possession of a forged instrument and was sentenced to 2½ to 5 years in prison.

The Appellate Division, First Department affirmed, saying, "The indictments ... were not jurisdictionally defective. As we determined in an alternative holding in People v Davis, 127 AD3d 614..., such tickets were written instruments that purported to 'evidence, create, transfer, terminate or otherwise affect a legal right, interest, obligation or status' (Penal Law § 170.10[1]). We have considered and rejected [Watts'] arguments for revisiting our determination in Davis."

Watts argues the felony indictments are defective because counterfeit event tickets are not "of the same kind" as a deed, will, contract or other instrument enumerated in section 170.10, and because such tickets "do not affect a legal right, interest, obligation, or status," as required by the statute. "That an event ticket is nothing more than a revocable license privileging its holder to enter a space is a principle that has been chiseled into the stone of New York's jurisprudence for generations. That it does not convey to its holder a right of entry, nor to its issuer an obligation to permit entry, is equally settled." Watts argues the charges should be dismissed or, at the least, reduced to misdemeanor counts of third-degree forgery under Penal Law § 170.05, which applies when, "with intent to defraud, deceive or injure another, [a defendant] falsely makes, completes or alters a written instrument."

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To be argued Wednesday, October 17, 2018

No. 126 The Alliance to End Chickens as Kaporos v New York City Police Department

The Alliance to End Chickens as Kaporos is a Brooklyn-based nonprofit that opposes the use of live chickens in the Orthodox Jewish ritual of Kaporos, which is practiced during the days leading up to Yom Kippur. In it, practitioners hold a live chicken and pass it overhead three times while they recite a prayer asking that their sins be transferred to the bird. The chicken is then killed in accordance with kosher dietary laws by cutting its throat. Usually, edible portions of the chicken, or the monetary equivalent, are given to charity. The ritual is performed outdoors, on public streets. The Alliance contends that the way Kaporos is practiced on the streets of Brooklyn is cruel to the animals and presents a public health hazard, and that it violates many laws and regulations including the State Agriculture and Markets Law and the City Administrative Code and Health Code. The Alliance and individual plaintiffs brought this proceeding seeking a writ of mandamus to compel the City of New York, and its Police Department and Department of Health and Mental Hygiene, to enforce the laws and regulations.

Supreme Court dismissed the proceeding, saying, "Mandamus does not lie to compel the enforcement of a duty that is discretionary, as opposed to ministerial.... Enforcement of such provisions implicates the discretionary function of the executive branch..., which ... is permitted to allocate its resources and prioritize police enforcement action as a matter of its discretion."

The Appellate Division, First Department affirmed on a 3-2 vote. It said, "With the exception of Agriculture and Markets Law § 371..., there is nothing in the plain text of any of the laws and regulations ... to suggest that they are mandatory. Nor is there anything in the legislative history.... There is no express provision designating Kaporos as a prohibited act. There are disputes about whether the conduct complained of is in violation of the implicated laws and regulations.... Rituals involving animal sacrifice are present in some religions and although they may be upsetting to nonadherents..., the United States Supreme Court has recognized animal sacrifice as a religious sacrament ... that is protected under the Free Exercise Clause.... Determining which laws and regulations might be properly enforced against [Kaporos participants] without infringing upon their free exercise of religion involves the exercise of reasoned judgment on the part of the City defendants. The outcome cannot be dictated by the court through mandamus." While section 371 says an officer "must" arrest or issue a summons to anyone who violates its animal cruelty provisions, "it is still subject to the definition of animal cruelty as ... 'unjustifiable physical pain, suffering or death'" and, thus, "implicates discretion and is not susceptible to a predictable, mandated outcome."

The dissenters said "the actions at issue are mandatory not discretionary," citing Health Code and City Charter provisions requiring City agencies to enforce the laws and the "must" arrest provision of section 371. "[W]hile the City defendants may exercise discretion in the process of determining whether a violation has occurred and, if so, how to respond to it, they have, at a minimum, an obligation to determine whether or not a reported violation has occurred.... I disagree with the majority that plaintiffs seek to direct the City defendants how to act. The complaint seeks to compel them to issue summonses or make arrests 'where warranted,' and to refrain from 'aiding and abetting' the non-City defendants in violating the law. I view the complaint as seeking to compel the City defendants not to abdicate their mandatory duty."

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