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.

NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

April 30 thru May 2, 2019

State of New York
Court of Appeals

To be argued Tuesday, April 30, 2019

No. 36 Matter of Eighth Judicial District Asbestos Litigation (Terwilliger v Beazer East)

Donald Terwilliger worked in the coke oven department of the Bethlehem Steel plant in Lackawanna from 1966 until his retirement in 1993. He died of lung cancer in 2012. His estate brought this products liability action against Honeywell International, Inc. and others, alleging that Terwilliger's cancer was caused by exposure to asbestos and coke oven emissions at the steel plant. Honeywell was sued as successor to the Wilputte Coke Oven Division of Allied Chemical Corp., which designed and built five coke oven batteries -- each battery consisting of 77 coke ovens -- at Bethlehem Steel between 1941 and 1970. Honeywell moved for summary judgment dismissing the complaint against it, arguing that coke ovens are not products for purposes of strict products liability and that Wilputte's contract with Bethlehem to build the coke plant was primarily for services, including the design and construction of coke oven batteries at the Bethlehem site, not a contract for the sale of products. It cited Matter of City of Lackawanna v State Bd. of Equalization & Assessment of State of N.Y. (16 NY2d 222 [1965]), which held that Bethlehem's coke ovens were taxable real property, not tax-exempt "moveable machinery," under the Real Property Tax Law (RPTL).

Supreme Court denied the motion, saying coke ovens, which process coal into coke for steel production, "are more like machines or equipment than a building. Though the oven may be large, size alone does not define the object.... [U]like a structure or building, the oven functioned as a machine or equipment used to transform a raw material into an end product, to wit: coke. Strict products liability applies to machines ... and therefore to the coke ovens.... Lackawanna is not determinative of this motion. While Bethlehem's coke ovens (when grouped together) are considered real property, or more narrowly, not exempt from real property taxation, that does not necessarily preclude them from strict products liability." It noted that, although the RPTL "defines elevators as real property, manufacturers of elevators are subject to strict products liability...." The court also found the Wilputte/Honeywell contract with Bethlehem was not primarily for services because, unlike an architect or construction contractor who provide services, "Honeywell was in the business of selling coke ovens. Incidental to that sale was the service of constructing the coke oven plant.... When these ovens functioned as intended, they released carcinogenic emissions about which defendants failed to warn. The transaction between Honeywell and Bethlehem, when regarded in its entirety[,] is more like the sale of goods than a contract for services."

The Appellate Division, Fourth Department reversed and dismissed the claims against Honeywell. It noted that, in City of Lackawanna, "the Court of Appeals concluded, when discussing the nature of these coke oven batteries, that '[t]here is no doubt that, by common-law standards, these structures would be deemed real property. Their magnitude, their mode of physical annexation to the land and the obvious intention of the owner that such annexation be permanent would, indeed, compel that conclusion." In light of the scale of construction required for just one coke oven battery, "a multistage process that took place over approximately 18 months," the Appellate Division said "we conclude that service predominated the transaction herein and that it was a contract for the rendition of services, i.e., a work, labor and materials contract, rather than a contract for the sale of a product.... We further conclude that a coke oven, installed as part of the construction of the 'great complex of masonry structures' at Bethlehem..., permanently affixed to the real property within a coke oven battery, does not constitute a 'product' for purposes of plaintiff's products liability causes of action...."

For appellant Terwilliger: John N. Lipsitz, Buffalo (716) 849-0701
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State of New York
Court of Appeals

To be argued Tuesday, April 30, 2019

No. 37 Nadkos, Inc. v Preferred Contractors Insurance Company Risk Retention Group

Nadkos, Inc., as general contractor on a Brooklyn construction project, hired Chesakl Enterprises, Inc. as a subcontractor for structural steel work and required it to name Nadkos as an additional insured on its general liability policy from Preferred Contractors Insurance Company Risk Retention Group LLC (PCIC). In May 2015, a Chesakl employee was injured in a fall at the work site and brought a personal injury action against Nadkos and Chesakl, among others. On August 25, 2015, Nadkos's insurer tendered the injury suit to Chesakl and PCIC for defense and indemnification. A week later, on September 1, PCIC disclaimed coverage to Chesakl based on several policy exclusions. On November 16, 2015, PCIC disclaimed coverage to Nadkos based on the same exclusions. Nadkos's insurer advised PCIC that it failed to give timely notice of its disclaimer to Nadkos as required by Insurance Law § 3420(d)(2) and had therefore waived any coverage defenses as to Nadkos. PCIC responded that it was a foreign risk retention group (RRG) chartered under the laws of Montana and, thus, was not subject to section 3420(d)(2), a New York statute. An RRG is insurance company owned and operated by its policyholders, who engage in similar activities and face similar liability risks.

Nadkos brought this action seeking a declaration that PCIC was obligated to defend and indemnify it based, in part, on PCIC's late notice of disclaimer under section 3420(d)(2). PCIC moved for summary judgment dismissing the suit, contending that section 3420(d)(2) was preempted by the federal Liability Risk Retention Act of 1986 (LRRA), which permits chartering states to regulate the operation of RRGs and preempts most forms of regulation by nondomiciliary states. However, the LRRA preserves the power of nondomiciliary states to regulate in certain areas, including compliance by RRGs with the states' unfair claim settlement practices laws. Nadkos argued that PCIC's late notice of disclaimer was an unfair practice under Insurance Law § 2601(a)(6), which provides that an insurer's failure to "promptly disclose coverage" pursuant to section 3420(d) is an unfair claim settlement practice "if committed without just cause and performed with such frequency as to indicate a general business practice."

Supreme Court granted PCIC's motion and dismissed the suit, ruling that the LRRA preempts the application of section 3420(d)(2) to out-of-state RRGs like PCIC. The court also ruled that "one untimely notice does not arise to the level of an unfair claims settlement practice."

The Appellate Division, First Department affirmed the preemption ruling. It said a violation of the prompt disclaimer requirement of section 3420(d)(2) is not an unfair settlement practice under section 2601(a)(6), which requires insurers to "promptly disclose coverage" and applies only to section 3420(d)(1), which "sets forth time requirements for an insurer to 'confirm' liability limits and 'advise' when sufficient identifying information is lacking (i.e., disclose ... information), while paragraph (2) sets forth time requirements for an insurer to 'disclaim' ... coverage (i.e., make a determination to deny coverage)." Further, because a failure to disclaim under section 3420(d)(2) "results in coverage being extended beyond the scope and clear language of a policy," it said, applying the statute "to PCIC or to any other RRG would directly or indirectly regulate these groups in violation of" the LRRA.

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For respondent PCIC: Diane Bucci, Manhattan (646) 992-8030

State of New York
Court of Appeals

To be argued Tuesday, April 30, 2019

No. 38 People v John Giuca

In October 2003, college student Mark Fisher was shot to death in Brooklyn a few blocks from the home of John Giuca, where Fisher had spent the night drinking with Giuca and others. Giuca and a co-defendant were charged with the murder. At the trial in 2005, three witnesses testified about conflicting statements Giuca made to them implicating himself in the murder. One of those witnesses, John Avitto, testified that Giuca admitted his complicity in the murder while they were jailed together on Rikers Island. Prior to Giuca's trial, Avitto pled guilty to burglary under a deal that his case would be dismissed if he successfully completed drug treatment and, if he failed to complete the treatment program, he would face 3½ to 7 years in prison. In June 2005, about three months before his testimony, Avitto absconded from the treatment program and contacted the police offering information about Giuca's murder case. A warrant was issued for Avitto's arrest, but detectives and a prosecutor accompanied him to a court hearing, informed the court that he was cooperating in a murder case, and he was allowed to reenter the treatment program. Giuca did not learn until after his trial that the prosecutor who accompanied Avitto to his plea violation hearing was the lead prosecutor in his murder trial. Avitto testified at the trial about Giuca's alleged admission at Rikers and also testified that he had been doing well in his drug program and that he had not been promised anything by police or prosecutors in exchange for his testimony. Giuca was convicted of felony murder, first-degree robbery and weapon possession, and was sentenced to 25 years to life in prison.

In 2015, Giuca filed a CPL 440.10 motion to vacate his conviction on the ground that the prosecution violated its Brady obligations by failing to disclose that the lead prosecutor in his case had intervened at Avitto's plea violation hearing, information he said he could have used to impeach Avitto's credibility. Giuca also claimed the prosecution deprived him of a fair trial by failing to correct Avitto's false testimony about his conduct in drug treatment and other matters.

Supreme Court denied the motion, saying Giuca "failed to prove either that there was any understanding or agreement between Avitto and the People about conferring any benefits" or that "the People failed to disclose any such agreement." Even if it was error not to disclose the lead prosecutor's role at Avitto's hearing, the court said there was "no reasonable possibility" that it affected the verdict.

The Appellate Division, Second Department reversed and ordered a new trial, saying "the prosecutor had a duty to disclose the circumstances surrounding Avitto's initial contact with the police regarding the defendant's case, the circumstances surrounding the prosecutor's appearance in court with Avitto [on his plea violation], and the information that the prosecutor provided to the court at that appearance.... The prosecutor further had a duty to correct Avitto's testimony regarding his contact with her and with detectives ... and his progression in drug treatment.... While the evidence presented at the hearing did not demonstrate 'the existence of an express promise' between Avitto and the District Attorney's office, there was 'nonetheless a strong inference' of an expectation of a benefit 'which should have been presented to the jury for its consideration'" because it "tended to show a motivation for Avitto to lie."

The prosecution argues, "The Appellate Division's Brady ruling was incorrect for two reasons. First, there was no agreement with the witness that he would receive a benefit for his testimony, and the prosecutor was not required to disclose information that a defense attorney might have been able to use to suggest, falsely, that such an agreement existed. Second, the undisclosed information was not 'material' under Brady, because it would have been cumulative to the impeachment information already known to the defense, and because there was substantial evidence of defendant's guilt...."

For appellant: Brooklyn Assistant District Attorney Leonard Joblove (718) 250-2511
For respondent Giuca: Mark A. Bederow, Manhattan (212) 803-1293

State of New York
Court of Appeals

To be argued Wednesday, May 1, 2019

No. 39 Andrew Carothers, M.C., P.C. v Progressive Insurance Company

In 2004, radiologist Andrew Carothers formed a professional service corporation -- Andrew Carothers, M.D., P.C. (ACMDPC) -- to perform MRI scans at three clinics in Brooklyn, Queens and the Bronx. ACMDPC leased all three MRI facilities, as well as the medical and office equipment used in them, from Hillel Sher. In 2005 and 2006, ACMDPC performed about 38,000 MRI scans, most of them for patients who were allegedly injured in car accidents. The patients assigned their right to first-party no-fault insurance benefits to ACMDPC, which billed insurance companies for payment. ACMDPC went out of business in 2006 after insurers stopped paying the claims; it also filed thousands of Civil Court collection actions against the insurers, including Progressive Insurance Company.

The insurers raised a defense of fraudulent incorporation under State Farm Mut. Auto. Ins. Co. v Mallela (4 NY3d 313 [2005]), which held that under the no-fault insurance law insurers may withhold payment for medical services provided by a professional corporation which has been "fraudulently incorporated" to allow nonphysicians to share in its ownership and control. The insurers alleged that Dr. Carothers was merely a nominal owner of ACMDPC, which was actually owned and controlled by its landlord, Sher, and its executive secretary, Irina Vayman, who were not physicians. In pre-trial depositions, Sher and Vayman invoked their Fifth Amendment privilege against self-incrimination in response to virtually all questions. At trial, insurers called expert witnesses who testified that ACMDPC's profits were funneled to Sher and Vayman through inflated equipment lease payments to a company owned by Sher, and through Vayman's transfers of funds to her personal accounts. The evidence also showed Dr. Carothers had little involvement in managing ACMDPC. After the parties agreed that Sher and Vayman were not available to testify at the trial, Civil Court permitted the defense to read their deposition testimony to the jury and instructed jurors that they could draw an adverse inference against ACMDPC based on their invocation of the Fifth Amendment. The court refused to charge the jury that the insurers were required to prove the traditional elements of common-law fraud. Instead, it said that for the defense of fraudulent incorporation, the insurers must prove that Sher and/or Vayman were de facto owners or exercised substantial control over ACMDPC. To find de facto ownership, it said jurors must find that Sher and/or Vayman exercised dominion and control over ACMDPC and its assets, and that they shared risks, expenses, and interests in its profits and losses. To find control, the court said jurors must find that Sher and/or Vayman had a significant role in the guidance, management, and direction of ACMDPC. The jury held that the insurers proved by clear and convincing evidence that ACMDPC was fraudulently incorporated, and Civil Court dismissed ACMDPC's complaint.

The Appellate Term affirmed on a 2-1 vote, ruling the jury was properly instructed on the fraudulent incorporation defense. It said "the essence of the defense in [Mallela], as here, was the provider's 'lack of eligibility,' which does not require a finding of fraud or fraudulent intent, but rather, addresses the actual operation and control of a medical professional corporation by unlicensed individuals." It ruled the trial court erred in admitting the depositions of Sher and Vayman, but the majority said the error was harmless; the dissenter said it required a new trial.

The Appellate Division, Second Department affirmed, saying "the jury charge on fraudulent incorporation, read as a whole, adequately conveyed the correct legal principles articulated by the Court of Appeals in Mallela.... [T]he charge properly focused the jury on the question of whether Carothers was a mere nominal owner of [ACMDPC], and if, in actuality, nonphysicians Sher and Vayman owned or controlled [it] such that the profits were funneled to them."

For appellant ACMDPC: Bruce H. Lederman, Manhattan (212) 564-9800
For respondent Progressive: Barry I. Levy, Uniondale (516) 357-3000

State of New York
Court of Appeals

To be argued Wednesday, May 1, 2019

No. 40 Matter of Jordan v New York City Housing Authority

Eileen Jordan had been working for 12 years at the New York City Housing Authority (NYCHA) in Caretaker positions, as a janitor and a truck driver, when she suffered a work-related injury and took a leave of absence in July 2011. Eleven months later, NYCHA advised her that she would be subject to termination "upon a total of 12 months absence from work." In August 2012, NYCHA notified Jordan that she was terminated because she had been "absent for a total of one year by reason of disability." NYCHA further advised her that she could "request reinstatement" to her Caretaker title within one year after the termination of her disability.

In 2014, after undergoing two surgeries, Jordan applied for medical reinstatement pursuant to Civil Service Law § 71. The statute states, "Where an employee has been separated from the service by reason of a disability resulting from occupational injury or disease..., he or she shall be entitled to a leave of absence for at least one year.... Such employee may, within one year after the termination of such disability, make application" for a medical examination and, if certified as physically and mentally fit, "he or she shall be reinstated to his or her former position, if vacant, or to a vacancy in a similar position.... If no appropriate vacancy shall exist..., the name of such person shall be placed upon a preferred list for his or her former position, and he or she shall be eligible for reinstatement from such preferred list for a period of four years. In the event that such person is reinstated to a position in a grade lower than that of his or her former position, his or her name shall be placed on the preferred eligible list for his or her former position or any similar position."

NYCHA responded that Jordan was not eligible for reinstatement because she had held "a labor class Caretaker" position. It said the reinstatement rights in section 71 "only extended to employees who had civil service status prior to their resignation in accordance with civil service law." Jordan and her union brought this article 78 proceeding to challenge the determination.

Supreme Court granted Jordan's petition to order NYCHA to conduct a medical exam and, if fit, reinstate her. It said NYCHA's interpretation that labor class employees were meant to be excluded from section 71 "is arbitrary and capricious" and contrary to the statutory text.

The Appellate Division, First Department affirmed, saying, "NYCHA's argument that [section] 71 does not apply to labor class employees is contradicted by the plain language of the statute, which, by its terms, applies broadly to 'employee[s],' an undefined term. We 'cannot by implication supply in a statute a provision which it is reasonable to suppose the Legislature intended intentionally to omit because the failure of the Legislature to include a matter within the scope of an act may be construed as an indication that its exclusion was intended'.... Indeed, elsewhere in article V of the statute, the legislature included terms that limited protections to certain classes of employee...."

NYCHA argues section 71 does not apply to labor class workers, who are at will employees with no right to object to their termination. The statute's reinstatement rights "obviate the need for competitive class employees to re-take a civil service examination and undergo the appointment process to obtain employment in the same competitive class titles. Labor class employees, however, can be hired without taking a civil service examination...." It says the lower court decisions create "a scenario where a labor class employee could be reinstated under Section 71 -- and terminated the next day. The Legislature surely did not intend for such an absurdity to occur...." NYCHA says "the inclusion of the phrases 'preferred eligible list' and 'preferred list' in Section 71 clearly signify the Legislature's intention to exclude the labor class." Eligible lists "are composed based on competitive examination ratings" and, because labor class workers are not hired through competitive examination, there is no method for placing them on eligible lists.

For appellant NYCHA: Jane E. Lippman, Manhattan (212) 776-5259
For respondents Jordan et al: Joshua J. Ellison, Manhattan (212) 563-4100

State of New York
Court of Appeals

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To be argued Wednesday, May 1, 2019

No. 41 Matter of Kosmider v Whitney

A month after the November 2015 general election, the chair of the Essex County Democratic Committee, Bethany Kosmider, asked the Essex County Board of Elections for copies of the electronic ballot images recorded by the voting machines it had used in the election. The machines scan images of the paper ballots as they are fed through and store the images randomly on flash drives to preserve ballot secrecy, while the paper ballots are placed in a secure box. The board's two commissioners deadlocked on the request, with Democratic Commissioner Mark Whitney arguing the ballot images were accessible under the Freedom of Information Law (FOIL) and Republican Commissioner Allison McGahay arguing that a court order was required. They referred the request to the Essex County Attorney, Daniel T. Manning, who denied it on the ground that the records were exempt from FOIL because a court order would be required for disclosure of ballot images under Election Law § 3-222(2). The then-chairman of the Essex County Board of Supervisors, now succeeded by Randy Preston, upheld the decision on appeal.

Supreme Court annulled the determination and ordered the images released to Kosmider under FOIL, finding they were not exempted from disclosure by Election Law § 3-222. Section 3-222(1) states, "Except as hereinafter provided, removable memory cards or other similar electronic media shall remain sealed against reuse until such time as the information stored on such media has been preserved...," as by copying it to a hard drive or other more permanent storage media. "Provided, however, that the information stored on such electronic media ... may be examined upon the order of any court...." Section 3-222(2) states, "Voted ballots shall be preserved for two years after such election and the packages thereof may be opened and the contents examined only upon order of a court...."

The Appellate Division, Third Department affirmed on a 3-2 vote. Two justices in the majority said the requirement of obtaining a court order to inspect electronic images in section 3-222(1) "applies only *prior* to preservation" of the images and does not restrict access to them "once the preservation process is complete and the information has been permanently stored." At that point, the ballot images "may be accessed through normal FOIL procedures." They said subdivision (2), requiring that "voted ballots" be preserved for two years and that "the packages thereof may be opened" and examined only with a court order, "applies solely to paper ballots" and does not govern this FOIL dispute over digital images. A third justice concurred, saying the statute "does not create a FOIL exemption given that it does not concern the confidentiality of voted ballots," but instead "concerns the preservation of them." She said it is not necessary to decide whether subdivision (2) applies only to paper ballots or to digital images as well because its "requirement that a party obtain a court order to access the voted ballots applies only in the two years following the election," so a court order would no longer be required.

The dissenters argued that "access to the copies of the electronic ballot images is governed exclusively by Election Law 3-222 and, therefore, they are exempt from disclosure under" FOIL. A court order granting access is always required. Section 3-222 "orders preservation of original ballots and permits examination thereof only for the purpose of resolving election disputes or as evidence in criminal prosecution of crimes related to an election," they said. Because Kosmider did not show "that access was being sought for a permissible purpose," she could not obtain a court order and her petition should be dismissed. Once ballot images have been preserved as required by subdivision (1), they said, "access to such images is governed by subdivision (2) because the preserved images are merely electronic copies of the voted ballots," and it would be "illogical" to disclose the images "without a court order when a court order is required to view the actual paper ballots."

For appellant McGahay: James E. Walsh, Ballston Spa (518) 527-9130
For appellant Preston: Daniel T. Manning, Elizabethtown (518) 873-3380
For respondent Kosmider: Daniel R. Novack, Madison, NJ (201) 213-1425
For respondent Whitney: James E. Long, Albany (518) 458-2444

State of New York
Court of Appeals

To be argued Thursday, May 2, 2019

No. 42 People v David Mendoza

In November 2014, David Mendoza entered the lobby of a condominium building in Williamsburg, Brooklyn, where he did not reside. Surveillance cameras recorded him as he took two pairs of jeans from a mail order package that had been left in the lobby. Mendoza returned two weeks later and was again recorded as he took a mail order box of 200 "Neat 'n Dry" puppy training pads from the lobby. He was arrested for burglary and petit larceny six days after the second visit and admitted to officers that he took the packages. While in detention at Rikers Island, he called his mother and was recorded telling her that he had taken the packages.

Mendoza's defense counsel pursued a jury nullification defense at trial, telling jurors that his client had been "overcharged." Counsel did not contest the evidence of the thefts; and he did not argue that the lobby was not a dwelling, that Mendoza did not enter the building illegally, or that he did not intend to commit a crime when he entered. In his opening statement, counsel said, "Why are we here? That's a rock solid case. It's on video. There's a phone call. That's what the evidence is going to show. That's a rock solid case.... The reason why we're all here is because ... the evidence will show that these burglary charges do not fit the facts." In summation, defense counsel said, "Fair, that's what this is about, being fair, being fair to David.... The government will have you believe that doggy diapers and a pair of pants ... equal burglary in the second degree.... This case, I submit to you..., is overcharged. We're talking about packages laid out in the open, not going to anyone's apartment.... The man took doggy diapers and pants. He did not commit the crime of the century." He told jurors that "[y]ou're going to have to decide" whether those facts warrant burglary charges. Mendoza was convicted of two counts each of second-degree burglary and petit larceny, and was sentenced to five years in prison.

The Appellate Division, Second Department affirmed, rejecting Mendoza's claim that his attorney's nullification defense deprived him of effective assistance of counsel. "'[I]t is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations for counsel's alleged shortcomings.... As long as the defense reflects a reasonable and legitimate strategy under the circumstances and evidence presented, even if unsuccessful, it will not fall to the level of ineffective assistance,'" it said, citing People v Benevento (91 NY2d 708). "Here, defense counsel pursued a reasonable strategy and provided meaningful representation."

Mendoza says his attorney "did not advance any legal or factual defense, conceded [his] guilt of all charges, and urged the jury 'only' to 'be fair.' In light of this Court's clear precedent that defense attorneys may not argue for jury nullification, and the longstanding rule that jurors must apply the law in accordance with the court's instructions, defense counsel's strategy was neither reasonable nor legitimate. Indeed, by failing to advance available legal defenses, including that appellant did not knowingly enter a building unlawfully and did not intend to commit a crime at the moment of entry, counsel all but guaranteed appellant's conviction. This plainly deficient performance deprived appellant of ... the effective assistance of counsel."

For appellant Mendoza: Caitlin Halpern, Manhattan (212) 693-0085
For respondent: Brooklyn Assistant District Attorney Gamaliel Marrero (718) 250-5270

State of New York
Court of Appeals

To be argued Thursday, May 2, 2019

No. 43 People v Jaime Lopez-Mendoza *(papers sealed)*

Jaime Lopez-Mendoza was employed at the Dream Hotel in Manhattan in December 2009, when he was charged with sexually assaulting a guest in her room. The complainant said she and her boyfriend were drunk when they returned to the hotel and Lopez-Mendoza helped them get into their room, where they passed out. She said Lopez-Mendoza returned later and had sex with her while she was unconscious. Lopez-Mendoza told the police and a grand jury that, right after he let them into their room, he had consensual sex with the complainant on the bed next to her sleeping boyfriend.

At trial, defense counsel said in his opening statement that when they entered the room, the complainant "appeared to be in an amorous mood" and induced Lopez-Mendoza to have sex with her an hour before the alleged assault occurred. He told the jury his client would take the stand and testify to those facts. When the prosecutor offered into evidence surveillance video showing that Lopez-Mendoza was in the basement at the time he had said the consensual encounter took place, a colloquy revealed that defense counsel was given a copy of the video before trial and was told that it proved his client's grand jury testimony was false, but apparently did not recognize its significance. Defense counsel said, "I received a hard drive with a huge amount of material equivalent to maybe a hundred movies." In the end, defense counsel did not call his client to testify, and he presented a different theory of the case in his summation. Lopez-Mendoza was convicted of first-degree rape and sentenced to 15 years in prison.

The Appellate Division, First Department affirmed, saying, "Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record.... The brief exchange in which the video surveillance was discussed by trial counsel, the People, and the trial court is insufficient to establish that trial counsel promised defendant's testimony in his opening statement because he did not adequately review the video surveillance before trial."

Lopez-Mendoza argues that he "was denied effective assistance of counsel where his trial attorney failed to properly review the surveillance video provided to him by the prosecution before trial, and then pursued a defense theory, and promised Mr. Lopez-Mendoza's testimony in support of it, that would be shown to be false when the video was later played at trial." He says his claim can be reviewed on direct appeal, without resort to a CPL 440 proceeding, because "the record establishes that defense counsel's uninformed adoption of a provably false defense theory was a major blunder for which there could be no reasonable strategic basis."

For appellant Lopez-Mendoza: Christina Swarns, Manhattan (212) 402-4100
For respondent: Manhattan Assistant District Attorney Susan Axelrod (212) 335-9000

State of New York
Court of Appeals

To be argued Thursday, May 2, 2019

No. 44 People v Samuel J. Smith

Paris Bullock was wounded by gunfire in May 2013 as she was walking in Rochester with her boyfriend, James Dees. A surveillance camera recorded the gunman as he got out of a car and followed them. Dees called out "he's got a gun" and tried to push Bullock to the ground. Bullock said she turned and saw the gunman smile before he opened fire. She was struck once and Dees was unharmed. Police recovered five bullet casings at the scene. Bullock initially told officers that she did not know the shooter and could not identify him. She later identified Samuel Smith as the gunman after viewing surveillance video taken shortly after the shooting.

Bullock testified at trial, identifying Smith as the shooter. Dees was also on the prosecution's witness list, but he was not called to testify. Smith's attorney asked the court to give a missing witness charge instructing jurors that, based on the prosecution's decision not to put Dees on the witness stand, they could draw an adverse inference that his testimony would not have been favorable to its case. Defense counsel said Bullock "claims it was Mr. Dees who sees the shooter first and turns around and then pushes her and moves and runs around the side of the house. We believe his testimony is not cumulative." The prosecutor replied there was "absolutely no indication that [Dees] would be able to provide anything that wasn't provided by Paris Bullock and it is the People's position he would be cumulative." Supreme Court denied the defense request. Smith was convicted of second-degree attempted murder, first-degree assault and criminal use of a firearm. He was sentenced to an aggregate term of 23 years in prison.

The Appellate Division, Fourth Department affirmed in a 3-2 decision, ruling the trial court did not err in denying Smith's request for a missing witness charge because he did not show that Dees' testimony would not have been cumulative. It said the First, Second, and Third Departments all hold that the party requesting such a charge has the initial burden of proving the missing witness has noncumulative testimony to offer and it adopted an identical rule that, "when seeking a missing witness instruction, the movant has the initial, prima facie burden of showing that the testimony of the uncalled witness would not be cumulative of the testimony already given." It said any "alleged deficiencies" in Bullock's testimony "are not relevant to the question of cumulativeness, which requires a comparison of the uncalled witness's likely testimony against the evidence adduced at trial to determine whether the missing testimony would have "'contradicted or added" to the testimony of the other witnesses'...."

The dissenters said the decision conflicts with the "burden-shifting framework set forth in" People v Gonzalez (68 NY2d 424), which requires the party seeking a missing witness charge to show "that an uncalled witness is knowledgeable about a pending material issue and that such witness would be expected to testify favorably to the opposing party." They said the burden then shifts to the opposing party to "demonstrate that the charge would not be appropriate," as by showing the testimony would be cumulative. "Indeed, it would make no sense to require the moving party to establish that the missing witness's testimony is not cumulative in view of the fact that the missing witness, by definition, is not in the control of the moving party, and the moving party cannot be expected to know the substance of the missing witness's testimony...."

For appellant Smith: Drew R. DuBrin, Rochester (585) 753-4947
For respondent: Monroe County Assistant District Attorney Daniel Gross (585) 753-4588