State of New York
Court of Appeals

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NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

Tuesday, June 2, 2020

10:00 a.m. and 12:00 p.m.

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To be argued Tuesday, June 2, 2020 Time: 10:00 a.m.

No. 27 People v David R. Lang

In June 2012, 70-year-old David Lang fatally shot his 63-year-old brother, Russell, outside of the farmhouse they shared in the Town of Crown Point. At 2:35 pm, Lang called 911 and told the dispatcher he had just shot his brother. When the dispatcher asked if he had been drinking, Lang said, "Of course I've been drinking. I drink every godddamn day." Two state troopers arrived at about 3 pm and arrested him. Both testified they smelled alcohol on his breath, but his speech was clear. At Lang's arraignment in Town Court that day, the judge said he would "re-arraign" him the next day because, due to his apparent intoxication, the judge was not sure Lang could understand the charges against him. At 4:42 pm, while Lang was in custody at the State Police barracks, his attorney asked the troopers by fax to have his blood tested as soon as possible to determine his blood alcohol content (BAC). The troopers did not have his blood tested until 9:06 pm, more than four hours later, when his BAC was found to be .18 percent, more than twice the legal limit to drive.

Lang raised an intoxication defense, arguing that he was too inebriated at the time of the shooting to form the intent to commit murder. He presented an expert witness who testified that, based on his intoxication level at 9:06 pm, Lang's BAC at the time of the shooting would have been between .27 and .36 percent, a level at which he would have been nearing physical incapacitation and would have had trouble forming a conscious intent. The prosecutor elicited from the defense expert that, because the 9:06 pm blood test was so remote in time, she could not be certain whether Lang became intoxicated before the shooting or immediately afterward by drinking a large amount of alcohol before the troopers arrived. She said, if the BAC test had been conducted when it was requested, it would have made the time of intoxication much clearer. Lang asked County Court for a curative instruction informing the jurors that they could infer from the lack of a timely blood test that a timely one would have been favorable to the defense. The court denied the request. Near the end of the trial, the court informed counsel that a seated juror was unable to finish the trial and she would be discharged and replaced with an alternate juror. The court told them, "We'll discuss this later," and the trial proceeded. Later, during a break in testimony, the court discussed the matter with defense counsel and, after making inquiries, reported the discharged juror had told a court attendant two days earlier that she would be taking her son to a medical appointment in Rochester, five hours away. The court denied defense motions to adjourn for two hours or for the day to inquire into the juror's unavailability. Lang was convicted of second-degree murder and sentenced tp 17 years to life in prison.

The Appellate Division, Third Department affirmed, finding Lang was not entitled to a curative instruction for the troopers failure to obtain a more timely BAC test. It said, "Where, as here, evidence of defendant's intoxication was 'unnecessary to their prosecution,' the police were not required to acquire 'potentially useful evidence' for defendant." It also rejected Lang's claim that in discharging the juror the trial court violated CPL 270.35, which requires a court to "make a reasonably thorough inquiry" into a juror's unavailability and "afford the parties an opportunity to be heard before discharging a juror."

Lang argues he was entitled to a curative instruction for the delayed BAC test because the government must preserve material evidence it possesses "where defense counsel requests them to do so and counsel has no reasonable means of obtaining the evidence.... While the police may not have a general obligation to obtain evidence helpful to the defense, they cannot take a defendant into custody, delay giving him an obviously relevant test requested by his lawyer, and then argue to the jury that the lack of a timely test undercuts the defense. That is precisely when a curative instruction is warranted." He also says the trial court violated CPL 270.35 by discharging a juror "without making any inquiry, much less a reasonably thorough one, or giving counsel the opportunity to be heard."

For appellant Lang: Matthew S. Hellman, Washington, DC (202) 639-6000
For respondent: Essex County Assistant District Attorney Michelle A. Bowen (518) 873-3335

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To be argued Tuesday, June 2, 2020 Time: 10:00 a.m.

No. 29 Matter of National Fuel Gas Supply Corporation v Schueckler

National Fuel Gas Supply Corp. is proposing to build a 97-mile natural gas pipeline from Pennsylvania into western New York along a route that would cross property in Allegany County owned by Joseph and Theresa Schueckler, who would not agree to sell. In February 2017, the Federal Energy Regulatory Commission (FERC) granted National Fuel's application for a certificate of public convenience and necessity to build the pipeline, finding the project would be in the public interest, but the certificate was conditioned, in part, on the company obtaining a water quality certification (WQC) from the New York Department of Environmental Conservation (DEC). In March 2017, while its WQC application was pending in Albany, National Fuel brought this vesting proceeding under Eminent Domain Procedure Law (EDPL) article 4 to acquire easements over the Schuecklers' land by condemnation. One month later, the DEC denied National Fuel's WQC application because the project "fails to avoid or adequately mitigate adverse impacts to water quality." In August 2018, FERC determined the DEC had waived its water quality certification authority because it failed to act on the WQC application within a year.

In May 2017, Supreme Court granted National Fuel's eminent domain petition and authorized the acquisition of the pipeline easements over the Schuecklers' land, based largely on FERC's finding that the project would serve the public interest.

In November 2018, the Appellate Division, Fourth Department reversed in a 3-2 decision and dismissed the petition, saying New York "has blocked the entire pipeline project by denying [National Fuel] the necessary environmental permits" and the company cannot "involuntarily expropriate privately-owned land when the underlying public project cannot be lawfully constructed." FERC's certificate of public necessity "authorized construction of the pipeline 'subject to' various conditions, including ... the State's issuance of a WQC," it said. "[W]hen the State denied the very permit upon which [National Fuel's] authority to construct the pipeline was conditioned, [the company] – by definition – lost its contingent right to construct the public project that undergirds its demand for eminent domain" and its power to take land for the project was "necessarily extinguished.... To say otherwise would effectively give a condemnor the power to condemn land in the absence of a public project, and that would violate the plain text of the State Constitution." Although FERC had recently ruled that DEC waived its WQC authority, the court said, "That ruling is not final ... and it is subject to administrative rehearing as well as to judicial review.... Given its non-finality..., we decline to take judicial notice of the new FERC ruling."

The dissenters argued National Fuel's project is not dead and it currently has the power to seize the easements. Because FERC ruled DEC waived its WQC authority, "as things now stand, the DEC's denial of the WQC is no longer an impediment to construction of the pipeline.... [T]he August FERC order is binding unless and until it is vacated or overturned on appeal..., and it is no less final than the DEC's denial of the WQC, which has been appealed" to the Second Circuit. "In any event, although the issuance of a WQC by the DEC is a condition that must be met prior to construction of the pipeline, it is not, in our view, a condition precedent to the commencement of this eminent domain proceeding.... The National Gas Act ... grants private natural gas companies the power to acquire property by eminent domain," and National Fuel has obtained the required certificate of public necessity from FERC. "There are ... various other conditions in the authorizing FERC order, many of which cannot be met until [National Fuel] has obtained possession of the rights-of-way.... If [it] is prohibited from exercising its eminent domain authority until it satisfies all of the conditions..., the pipeline can never be built...."

For appellant National Fuel: Eamon P. Joyce, Manhattan (212) 839-8555
For respondent Schueckler: Gary A. Abraham, Great Valley (716) 790-6141

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To be argued Tuesday, June 2, 2020 Time: 12:00 p.m.

No. 31 Matter of the Hon. Paul H. Senzer

Paul H. Senzer, a justice of the Northport Village Court in Suffolk County since 1994, is challenging a determination of the State Commission on Judicial Conduct that he should be removed from office for his repeated use of obscene and sexist language in email communications with clients in his private law practice over a four-month period in 2014 and 2015. In the emails, which were provided by a married couple he was representing in Family Court, he referred to their adversary (their daughter) as an "asshole," a "bitch," and a "scumbag;" referred to her lawyer as "a cunt on wheels;" and to the Family Court referee as an "asshole." Senzer admitted using the language contained in the emails, but denied a separate allegation that, while representing one of the same clients in an administrative proceeding, he referred to the African-American administrative law judge on their case with a racially offensive epithet during a brief conversation with his client outside the hearing room. The Commission's referee sustained the misconduct charge based on the emails, finding that Senzer "repeatedly used profane, obscene and vulgar language" to denigrate the opposing party and officers of the court; but he did not sustain the charge based on the racial epithet, saying the allegation "is the most serious but also the one with the least proof. We have a typical 'she says, he says' situation."

The Commission accepted the referee's findings and determined that Senzer should be removed from the bench, saying his "gender-based slurs, which denigrate a woman's worth and abilities and convey an appearance of gender bias..., were included in emails he composed to his clients, where he had an opportunity to consider his written words before sending messages that could be preserved and shared.... By denigrating and insulting their adversary's lawyer and the court referee in obscene and vulgar terms, he conveyed disrespect and disdain for the legal process itself, which was inconsistent with his role as a judge.... Every judge must be mindful of the duty to avoid any conduct or statements, even off the bench, that undermine public confidence in the judiciary or respect for our system of justice as a whole and judges are held to standards of conduct 'on a plane much higher' than those for others." In a partial dissent, three of the eight Commission members agreed with the sanction of removal, but voted to sustain the charge based on "use of a shocking racial epithet."

Senzer argues the sanction of removal is "unduly excessive" and should be reduced to censure." "[T]here is no precedent for the extreme punitive sanction of removal from the bench regarding misconduct undertaken while engaged as an attorney, which misconduct was not only outside the scope of judicial duties, but limited to private communications. Moreover..., the Commission failed to consider several mitigating factors, such as the Petitioner's reputation for honesty, integrity and judicial demeanor, as well as his sincere remorse. Finally, the Commission ... failed to consider the fact that the misconduct herein did not constitute a pattern of misconduct and was contained to private communications with a single-unit client, which limited both the severity of the misconduct and its effect upon the judiciary. Summarily, the misconduct at issue herein was a stark departure from a judicial career otherwise deemed as 'impeccable.'"

For petitioner Senzer: Michael Blakey, Westhampton Beach (631) 255-7005
For respondent Commission: Edward Lindner, Albany (518) 453-4613

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To be argued Tuesday, June 2, 2020 Time: 12:00 p.m.

No. 32 Matter of Seon v New York State Department of Motor Vehicles

In November 2014, 88-year-old Julian Mendez was struck by a Transit Authority bus at the corner of Vyse Avenue and East 174th Street in the Bronx. The responding officer's accident report said Mendez was struck as he was crossing Vyse Avenue in the crosswalk, with the "walk" signal in his favor, and the bus was making a right turn onto Vyse with a green light. The bus driver, Wayne Seon, said he did not see any pedestrians, but stopped when he heard a thump and found Mendez lying beneath the bus. The accident report said Mendez was "pinned under the passenger side body of the bus behind the front wheel." Mendez was taken to St. Barnabas Hospital, where he died about a month later, and the New York Police Department then issued Seon a summons for violation of Vehicle and Traffic Law § 1146(c)(1). The statute imposes liability on "[a] driver of a motor vehicle who causes serious physical injury as defined in article ten of the penal law to a pedestrian or bicyclist while failing to exercise due care." Penal Law § 10.00(10) states, "'Serious physical injury' means physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ."

After a hearing by the Traffic Violations Bureau of the State Department of Motor Vehicles (DMV), at which Seon and a NYPD accident reconstruction specialist testified, an administrative law judge (ALJ) found a violation of VTL 1146(c)(1) was established by clear and convincing evidence that Seon caused serious physical injury while failing to exercise due care. DMV suspended Seon's drivers license for six months.

The Appellate Division, First Department annulled the determination on a 3-2 vote and reinstated Seon's license. The court agreed unanimously that there was "ample evidence to find that [Seon] failed to exercise due care" before the accident, but split on whether there was sufficient proof to meet the "serious physical injury" element of the statute.

The majority said "'physical injury ... which causes death' ... "is presumably the basis for the charge against [Seon] since he was not issued a summons until after the pedestrian died in the hospital. Thus, DMV was required to present clear and convincing evidence" that his failure to exercise due care "led to the pedestrian's demise.... DMV presented no evidence at all tying the pedestrian's death to the injuries suffered by him in the accident, not even a death certificate." It said DMV "did not proceed on the theory, much less offer any medical proof, that the pedestrian sustained" any other injury involving disfigurement or impairment of health or organ function.

The dissenters said, "The majority's conclusion that DMV charged [Seon] under the death provision of the statute solely because the summons was served upon [him] after the pedestrian's death is rank speculation and should be outright rejected. The evidence ... clearly showed that DMV proceeded in its charge against [Seon] under the entire provision of section 1146(c)," allowing it to establish the injury element with proof of "protracted impairment of health or protracted loss or impairment of the function of any bodily organ." They said "any person, let alone an 88 year old, admitted to the hospital for a month based on injuries sustained after being run over and pinned under a bus, has suffered serious physical injuries."

For appellant DMV: Assistant Solicitor General Linda Fang (212) 416-8656
For respondent Seon: Vannessa M. Corchia, Manhattan (212) 809-7074