State of New York Court of Appeals

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To be argued Thursday, February 13, 2014 (arguments begin at noon)

No. 40 People v Terence McCray *(papers sealed)*

Terence McCray is serving 22 years in prison for first-degree rape. He first met the complainant, an 18-year-old woman with an extensive history of mental illness, at an Albany bus stop in April 2009, when he was 40. They walked for several hours and talked about various things, including sex, and McCray gave her a back massage in a parked vehicle. She denied anything else happened, but McCray testified at his trial that she performed oral sex. While out on a date in May 2009, they stopped at the apartments of two of McCray's friends, where she admitted exchanging sexual innuendos with him and engaging in consensual kissing and fondling. Then their testimony diverged. She said he insisted on having intercourse, but she refused and left the apartment. McCray said the complainant tried to initiate sex, but he wanted to find a more private place. By both accounts, they ended up in an abandoned house. The complainant testified that McCray demanded to have intercourse and she resisted, he punched and choked her, and she submitted after an extended struggle. She reported the incident to police from a pay phone. McCray testified that after they had consensual intercourse the complainant demanded money, then grabbed his pants and took cash from his pocket, and she was injured as he struggled with her to retrieve his money. Prior to trial, McCray sought disclosure of all the complainant's mental health records. After reviewing the records in camera, County Court turned over a limited number that it found "pertinent to this case."

The Appellate Division, Third Department affirmed McCray's conviction in a 3-2 decision, saying the trial court's approach to the records "properly balanced defendant's 6th Amendment right to cross-examine an adverse witness and his right to any exculpatory evidence against the countervailing public interest in keeping certain matters confidential.... We have reviewed the victim's voluminous mental health records and conclude that the court provided an appropriate sample of documents that covers all of the victim's relevant and material mental health issues." It said the court did not err in withholding records that suggest the complainant may have falsely accused her father of sexually abusing her when she was 13 since "this evidence would not be admissible under New York's Rape Shield Law because it is far too different and attenuated" from this case "and we cannot envision how such information might have led to other material and admissible evidence."

The dissenters, noting the defense received just 28 pages "out of the thousands of pages" of records the trial court reviewed, said "criminal defendants are entitled to more than just a 'sample' of documents addressing a key witness's mental health problems that could affect his or her testimony," especially in a case "which the majority correctly characterizes as presenting 'a classic he-said she-said credibility determination.'" Records of possibly false allegations of sexual abuse are relevant, even if inadmissible, they said. "When considered in conjunction with the many undisclosed records regarding the victim's impaired memory, hallucinations, ability to recall events, sexual fantasies and flashbacks, the failure to disclose these records was error. The undisclosed records all raise issues that would affect the victim's credibility or ability to recall events, and the allegations of prior sexual assault -- if proven to be false -- would be extremely damaging to the People's case. Regardless of their admissibility at trial, defendant was entitled to be aware of and afforded the opportunity to investigate these matters prior to trial."

For appellant McCray: Paul J. Connolly, Delmar (518) 439-7633
For respondent: Albany County Assistant District Attorney Steven M. Sharp (518) 487-5460

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To be argued Thursday, February 13, 2014 (arguments begin at noon)

No. 41 Matter of Gabriela A. *(papers sealed)*

Gabriela, a 15-year-old Westchester County girl who had been adjudicated a person in need of supervision (PINS), appeared in Family Court on three PINS violation petitions in February 2012. The court remanded her to a nonsecure detention facility, but she absconded the same day and the court issued a warrant for her arrest and return to the nonsecure facility. In March 2012, five probation officers executed the warrant at her home. Gabriela refused to cooperate, shouted obscenities at the officers, tried to run away and struggled to prevent them from handcuffing her, at one point grabbing hold of one of the open cuffs, but the officers prevailed. Based on her conduct during the arrest, the County Attorney's Office filed a juvenile delinquency petition charging her with resisting arrest and obstructing governmental administration, among other things.

After a fact-finding hearing, Family Court rejected Gabriela's argument that the agency was improperly "bootstrapping" a PINS case into a juvenile delinquency case. It found she had committed acts which, if committed by an adult, would have constituted the crimes of resisting arrest and obstructing governmental administration, adjudicated her a juvenile delinquent and imposed a conditional discharge.

The Appellate Division, Second Department reversed and dismissed the juvenile delinquency petition. "'A PINS is one who is, inter alia, "incorrigible, ungovernable or habitually disobedient and beyond the lawful control of a parent or other person legally responsible for such child's care"'...," the court said. "Under the particular circumstances of this case, [Gabriela's] conduct was consistent with PINS behavior, not juvenile delinquency." It concluded, "'[T]he Family Court may not do indirectly what it is prohibited from doing directly -- placing a PINS in a secure facility'...."

The County Attorney's Office argues that "Gabriela's conduct crossed the line from PINS behavior over to those of a juvenile delinquent," and the Second Department should have deferred to Family Court's credibility determination. "Gabriela's admitted conduct against peace officers (which fell short of an actual attempted assault...) still constituted acts for which a PINS could be adjudicated a juvenile delinquent, as such acts, if committed by an adult, would unquestionably constitute the crimes of Resisting Arrest and Obstructing Governmental Administration in the Second Degree," it says. "Furthermore, the decision of the Second Department, in essence, changes a prior adjudication as a PINS into a shield against an adjudication as a juvenile delinquent, as well as a sword which can be utilized to justify seriously defiant and unequivocally illegal conduct against any peace officer."

For appellant Westchester County Attorney:
Associate County Attorney Linda M. Trentacoste (914) 995-2839
For respondent Gabriela A.:
George E. Reed, Jr., White Plains (914) 946-5000

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To be argued Thursday, February 13, 2014 (arguments begin at noon)

No. 42 People v Diane Wells

Diane Wells was charged with assaulting her wealthy mother in May 2005 in their Manhattan apartment. After a jury trial in Criminal Court, she was convicted of a misdemeanor count of third-degree assault and sentenced to 60 days in jail. In March 2010, the Appellate Term, First Department reversed the conviction and remanded the case for a new trial, finding the jury had been given improper instructions. The prosecution applied for leave to appeal to the Court of Appeals and, while the application was pending, Criminal Court adjourned the case. A Court of Appeals Judge denied leave to appeal on May 14, 2010. The case was not recalendared in Criminal Court until August 23, 2010. On that date, Wells moved to dismiss the assault charge pursuant to CPL 30.30 on the ground that, because more than 90 days had passed since the date of the Court of Appeals order denying leave to appeal, her statutory right to a speedy trial would be violated.

Criminal Court granted her motion to dismiss, finding the 101-day period from May 14 to August 23, 2010 should be charged to the prosecution. "Pursuant to CPL 30.30(5)(a), where a defendant is to be retried following an order for a new trial, the action is deemed to have commenced on [']the date the order occasioning a retrial becomes final.['] Here, the case law supports, and the parties concede, that the order remanding the matter for a new trial became final on May 14, 2010 when the Court of Appeals denied the People's application for leave to appeal." Therefore, it said, the 90-day speedy trial period began to run on that date and expired on August 12, 2010, without any statement of readiness by the prosecution.

The Appellate Term, First Department reversed and reinstated the assault charge. Relying on People v Vukel (263 AD2d 416 [1st Dept 1999]), it said that, because the case had been adjourned by the trial court while the application for leave to appeal was pending, the entire time from May 14 to August 23, 2010 should be excluded from the speedy trial period. In Vukel, the Appellate Division held that the time from denial of leave to appeal until the next adjourned court date is excludable as a "period of delay resulting from ... appeals" under CPL 30.30(4)(a).

Wells argues that Vukel "eviscerates the long-standing rule that the speedy trial clock starts on the date that this Court denies leave. In virtually every case, the trial court adjourns proceedings during the pendency of this Court's decision on a leave application.... Effectively, the 'Vukel exception' would turn on its head this Court's conclusion that CPL 30.30 was enacted to 'discourage prosecutorial inaction'.... Under Vukel, the People are able to wait through the duration of an adjournment in the trial court -- even after this court has denied leave, and the adjournment has no more legitimate purpose -- without advancing the case, and that inaction has no consequences under CPL 30.30. Such a result is contrary to this Court's jurisprudence, well-settled case law, and the spirit of the speedy trial statute."

For appellant Wells: Ross M. Kramer, Manhattan (212) 446-2323
For respondent: Manhattan Assistant District Attorney David M. Cohn (212) 335-9000

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To be argued Thursday, February 13, 2014 (arguments begin at noon)

No. 43 People v Todd Johnson

Todd Johnson and three other men were confronted by police officers as they stood in front of a Harlem deli in October 2010. Johnson's companions were members of a gang called the "40 Wolves," officers said, and one of his companions was partially blocking the entrance to the deli. Several officers ordered them to leave the corner, but the men objected that they lived in the neighborhood and were doing nothing wrong. When they refused to move, they were arrested for disorderly conduct. Johnson was later searched at the precinct and officers found cocaine in a pocket of his gym shorts. He was then charged with drug possession.

Johnson moved to suppress the drug evidence on the ground that the police did not have probable cause to arrest him for disorderly conduct under Penal Law § 240.20(6), which states, "A person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof: ... He congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse." Supreme Court denied the suppression motion. Johnson then pled guilty to criminal possession of a controlled substance in the third degree and was sentenced to two years in prison.

The Appellate Division, First Department affirmed. "Given the information the [arresting] officer had about the gang problems that had occurred at that location in the past and the gang background of several of the men, he had a reasonable basis to believe their presence could cause public inconvenience, annoyance or alarm," the court said. "Defendant's failure to obey the police officer's direction provided probable cause to arrest him."

Johnson argues the prosecution failed to establish probable cause because there was no proof the arrested men "engaged in any disruptive *conduct* demonstrating intent to cause a breach of the peace," and the Appellate Division erred in holding -- based on the "gang background" of his companions and "past 'gang problems' in the vicinity" -- that his "mere *presence* in a public place" could satisfy the public harm element of section 240.20. He says this Court "has *never* found a violation of [section] 240.20 absent evidence of disruptive behavior by the defendant in the presence of members of the public." He argues the Appellate Division decision renders the statute unconstitutionally vague because it "leaves citizens without guidance as to the conduct" it prohibits and "gives police broad discretion to make arrests in an arbitrary fashion."

For appellant Johnson: Stephen M. Sinaiko, Manhattan (212) 715-9100
For respondent: Manhattan Assistant District Attorney Vincent Rivellese (212) 335-9000

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To be argued Thursday, February 13, 2014 (arguments begin at noon)

No. 44 People v Marsha Sibblies

During a traffic stop in the Bronx in November 2006, police officers allege that Marsha Sibblies refused to hand over her license and registration and then physically resisted their efforts to obtain the documents, remove her from the car and finally to arrest her, at one point rolling up her window on an officer's arm. On February 8, 2007, she was charged in a misdemeanor complaint with third-degree assault and other charges, and on February 22 the prosecutor filed an off-calendar statement of readiness for trial. At the next court appearance on March 28, 2007, the prosecutor said, "The People are not ready at this time. The People are continuing to investigate and are awaiting medical records" concerning the treatment of the injured officer. The prosecutor and defense counsel requested adjournments, and the court adjourned the case to June 7 for trial. On May 23, 2007, the prosecutor filed a certificate of readiness for trial.

Sibblies moved to dismiss the charges on speedy trial grounds. She argued the prosecutor's first statement of readiness on February 22 was "illusory" because the prosecutor stated at her next court appearance that she was not ready for trial, and therefore the prosecution should be charged with the period from February 8 to May 23, 2007, when the second statement of readiness was filed. This would exceed the 90 days allowed by CPL 30.30. Supreme Court found the prosecutor acted in good faith and denied the motion. Sibblies was acquitted of assault, but convicted of obstructing governmental administration and resisting arrest and sentenced to a conditional discharge.

The Appellate Division, First Department affirmed, saying, "The People's unequivocal contention that they could have proceeded without the medical records is both undisputed and plainly correct.... The People indicated that they in fact subsequently changed their strategy for presenting the case, and decided to offer the medical records in support of the assault charge (of which defendant was ultimately acquitted). Since the People were plainly ready to present a prima facie case when they filed their certificate of readiness on February 22, that certificate was not illusory...."

Sibblies argues, "[T]his Court has never held that 'actual readiness' encompasses only the minimum level of preparedness to [go] forward as a matter of law. Such a limited interpretation of the phrase 'ready for trial' is inconsistent with the legislative purpose -- to promote speedy trials by sanctioning prosecutorial delay.... The point of CPL 30.30 was to require the prosecutor to be actually ready for trial within the designated time frame. This means doing all that is necessary to proceed, including determining what evidence is needed to go to trial. Indeed, even assuming that the prosecution only concluded they needed the medical records to go to trial after declaring ready, this only indicates that the prosecution was mistaken about their own state of readiness; the declaration of readiness was still illusory."

For appellant Sibblies: Jonathan Garelick, Manhattan (212) 577-3607
For respondent: Bronx Assistant District Attorney Kayonia L. Whetstone (718) 838-7143

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To be argued Thursday, February 13, 2014 (arguments begin at noon)

No. 24 Melcher v Greenberg Traurig, LLP

James L. Melcher is asking the Court to reinstate his damages claim for attorney deceit under Judiciary Law § 487 against Greenberg Traurig, LLP and a partner in the firm, Leslie D. Corwin. Melcher's claim arises from their defense of Apollo Medical Fund Management and its principal, Brandon Fradd, in a prior action Melcher brought to recover his membership share of profits under Apollo's operating agreement. Melcher alleges Corwin told him and his attorney at a January 27, 2004 meeting that his rights to a share of Apollo's profits had been diminished by a 1998 amendment to the agreement and that he had confirmed the authenticity of the amendment with Jack Governale, the lawyer who was said to have drafted it. Days after the meeting, according to Melcher's complaint, Fradd told Corwin he had accidentally set fire to the two-page amendment while making tea, destroying the first page and singeing the second. Melcher moved to compel production of the signed original of the amendment and, on February 17, 2004, Greenberg and Corwin moved to dismiss the suit against Apollo based on the amendment. In a March 20, 2004 letter to Supreme Court, Melcher's attorney accused Fradd, Greenberg and Corwin of "concealment of material facts" and "misleading representations" regarding the amendment, including its partial destruction. Melcher contends he first learned the amendment was a "back-dated forgery" when Governale was deposed on December 7, 2005 and denied drafting the amendment or having any knowledge of it.

Melcher commenced this action against Greenberg and Corwin on June 25, 2007. Supreme Court, applying a three-year statute of limitations, denied the defendants' motion to dismiss the lawsuit as time-barred.

The Appellate Division, First Department reversed and dismissed the suit on a 3-2 vote. The majority said the March 20, 2004 letter by Melcher's counsel demonstrates that he knew of Greenberg's and Corwin's "alleged deceit concerning Fradd's destruction of the purported amendment more than three years before this action was commenced." It said, "Corwin's concealment from the court of information regarding the claimed incineration of the purported document upon which he based his clients' motion to dismiss the Apollo Management complaint was actionable under [Judiciary Law § 487].... This action is time-barred by reason of plaintiff's admitted awareness of the alleged concealment for more than three years before he filed suit."

The dissenters said the March 20, 2004 letter did not trigger the statute of limitations because it "did not accuse the defendants of collusion or deceit under Judiciary Law § 487," but instead "only accused Fradd and Apollo Management of concealment in connection with an already submitted motion to dismiss and merely accused the defendants of omissions to the court in connection therewith." Melcher's claim is based on Corwin's alleged violation of section 487 on January 27, 2004, when he allegedly told Melcher about the amendment, the dissenters said. Melcher "did not become aware of this alleged deception until December 7, 2005, when Governale was deposed. Therefore, it was not until this date, when all the facts necessary to a cause of action ... were known that plaintiff's cause of action accrued."

For appellant Melcher: James T. Potter, Albany (518) 436-0751
For respondents Greenberg Traurig et al.: Roy L. Reardon, Manhattan (212) 455-2000