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.

Week of October 8 - 10, 2013

NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

State of New York Court of Appeals

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To be argued Tuesday, October 8, 2013

No. 174 & 175 People v Martin Heidgen *(papers in no. 174 sealed)*
No. 176 People v Taliyah Taylor *(papers sealed)*
No. 177 People v Franklin McPherson

The common question in these appeals, arising from fatal accidents caused by intoxicated drivers, is whether a defendant's intoxication can negate the mental state of depraved indifference to human life. All three defendants were convicted of second-degree murder under Penal Law § 125.25(2), as well as other charges including driving while intoxicated or under the influence of drugs. Section 125.25(2) applies "when, under circumstances evincing a depraved indifference to human life, [a defendant] recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person."

Martin Heidgen is serving 18 years to life for his actions in July 2005. After drinking for nearly ten hours at a Manhattan bar and then at a party in Nassau County, he drove his pickup the wrong way on the Meadowbrook State Parkway for about 2½ miles and collided with a limousine, killing driver Stanley Rabinowitz and 7-year-old Katie Flynn and injuring five other passengers. Heidgen's blood alcohol content (BAC) was 0.28%.

In October 2006, hours after taking one Ecstasy pill, smoking marijuana and drinking a beer, Taliyah Taylor stripped off her clothes during a dispute with her mother and drove away naked in a friend's car. Witnesses saw her speed down Forest Avenue in Staten Island at 80 to 90 miles per hour without headlights, on the wrong side of the street, and run a red light before she struck and killed a pedestrian, Larry Simon. She ran another red light and struck a car, injuring both occupants. Initially found unfit for trial, she was ultimately convicted and sentenced to 22⅓ years to life.

Franklin McPherson was drinking at a Hempstead nightclub for several hours in October 2007, shortly before witnesses saw his car traveling the wrong way on the Southern State Parkway at 70 to 75 miles per hour for about five miles. He collided with a Jeep driven by Leslie Burgess, who was killed. Just over an hour after the collision, McPherson's BAC was 0.19%. He was sentenced to 25 years to life.

The Appellate Division, Second Department affirmed the convictions by votes of 3-1 in Heidgen and McPherson and unanimously in Taylor, rejecting the defendants' arguments that their intoxication rendered them incapable of forming the mental state of depraved indifference. In McPherson, the majority found there was legally sufficient evidence, saying, "... the testimony of the witnesses who observed the defendant speeding directly at them on the parkway, causing those witnesses to swerve in order to avoid a collision, demonstrates that the defendant's mental state was one of depraved indifference to human life.... [T]he record supports a view of the evidence that the defendant was coherent and able to form the requisite mens rea prior to leaving" the nightclub. The dissenter said McPherson, "who had a blood alcohol content more than twice the legal limit, drove at night on a parkway for several miles in the wrong direction," but there was no evidence "which demonstrated, beyond a reasonable doubt, that [he] understood he was driving the wrong way ... with utter disregard for the consequences...." He said the evidence showed McPherson, "by reason of his severe intoxication, acted recklessly by failing to perceive that he was driving the wrong way...."

For appellant Heidgen: Jillian S. Harrington, Monroe Township, NJ (718) 490-3235
For respondent: Nassau County Assistant District Attorney Maureen McCormick (516) 571-3800
For appellant Taylor: Erica Horwitz, Manhattan (212) 693-0085
For respondent: Staten Island Assistant District Attorney Anne Grady (718) 876-6300
For appellant McPherson: Jonathan I. Edelstein, Manhattan (212) 871-0571
For respondent: Nassau County Assistant District Attorney Maureen McCormick (516) 571-3800

State of New York Court of Appeals

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To be argued Tuesday, October 8, 2013

No. 179 Eujoy Realty Corp. v Van Wagner Communications, LLC

Beginning in December 2000, Eujoy Realty leased a roof-top billboard facing the Long Island Expressway in Queens to Van Wagner Communications, an outdoor advertising firm, for a 15-year term. The lease entitled Van Wagner to terminate it if new construction were to substantially obstruct views of the sign from the expressway. The lease also required Van Wagner to pay the full annual rent in advance on January 1st of each year and provided that, "Should this Lease be terminated for any reason prior to the date of its expiration, Tenant shall not be entitled to the return of any additional rent theretofore paid or any basic rent paid in advance...." When construction on a nearby site obstructed motorists' views of the billboard, Van Wagner terminated the lease as of January 8, 2007. It also sent Eujoy a check for $96, 243, the full year's rent for 2007. Van Wagner notified Eujoy that it had sent the check in error and had stopped payment, then sent a replacement check to Eujoy for $2,109.43, the prorated rent for January 1 through 8, 2007.

Eujoy brought this action to recover the balance of the full year's rent, $94,133.57, plus counsel fees. Supreme Court granted Van Wagner's cross motion for summary judgment dismissing the suit. While the lease allowed Eujoy to keep any basic rent that was paid in advance, the court said, Van Wagner "did not pay any such rent because [it] stopped payment on the rent check before plaintiff cashed it."

The Appellate Division, First Department reversed in a 3-2 decision, awarded summary judgment to Eujoy for $94,133.57 in unpaid rent, and remanded for an assessment of counsel fees. The parties later stipulated to counsel fees of $50,000.

The majority ruled that Van Wagner remained obligated to pay the full year's rent after it terminated the lease on January 8, 2007. "One provision simply makes clear that the rent paid in advance will not be returned upon termination of the lease, while the other plainly provides that the entire year's rent is due on January 1st. It is a contortion of these two provisions to argue, as defendant does here, that if defendant had paid the annual rent on January 1st it would not be entitled to a refund but that since defendant did not pay as required, plaintiff is not entitled to recover the full year's rent. While recovery of the full year's rent under these circumstances is a windfall to plaintiff, it is a result mandated by the lease."

The dissenters argued that Eujoy improperly raised a new claim on appeal that it was entitled to the full year's rent based on the terms of the lease, since at the trial court it sought recovery for the "wrongfully stopped payment." They also said the claim failed on the merits. "[A] tenant is obligated to pay rent, including advance rent, on the date stipulated in the lease. However, the obligation to pay is contingent on the tenant's right to use and occupy the premises, and when that right is terminated the rent obligation thereby ceases.... When [Eujoy] accepted [Van Wagner's] surrender of the premises upon termination of the subject lease, rent ceased to accrue, removing any basis to apply the money advanced by [Van Wagner] to further payments due under the lease."

For appellant Van Wagner: Victor P. Muskin, Manhattan (212) 688-3200
For respondent Eujoy: John C. Schnaufer, Hartsdale (914) 288-9700

State of New York Court of Appeals

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To be argued Tuesday, October 8, 2013

No. 193 Matter of the Council of the City of New York v The Department of Homeless Services of the City of New York

In November 2011, the New York City Department of Homeless Services (DHS) adopted the Single Adults Eligibility Procedure (SAEP) to establish a new application process for single adults seeking temporary housing assistance in the City's shelter system. DHS said it adopted the procedure to carry out its obligations under the 1981 consent decree in Callahan v Carey, State Social Services Regulation 18 NYCRR § 352.35 and related state administrative directives. The SAEP requires applicants to show, by clear and convincing evidence, that they have neither a "viable housing option" nor "sufficient financial resources" (defined as assets in excess of $2,000) to obtain shelter on their own. Applicants must provide a one-year housing history, document their financial assets, and sign a release allowing DHS "to disclose and collect medical and other personal information in conducting its eligibility investigation." Applicants who do not comply are denied shelter "unless the reason for non-cooperation is mental or physical impairment." DHS had not previously required a showing of need and related documentation as a prerequisite for emergency shelter.

The City Council brought this article 78 proceeding against DHS, contending the SAEP is void because the agency failed to comply with the rule-making requirements of the City Administrative Procedure Act (CAPA). DHS argued the SAEP is not a "rule" subject to CAPA because the procedure is discretionary and, in any case, it falls within the CAPA exception for policies that have "no legal effect" because the SAEP merely embodies pre-existing state law.

Supreme Court held the SAEP is a rule adopted in violation of CAPA and declared it void. "A plain reading of the SAEP makes it clear that it mandates certain results under certain circumstances.... [W]hile DHS has certain discretion in weighing factors before making a finding of eligibility for temporary housing, that discretion is not unfettered. There are a considerable number of mandated outcomes which leave DHS with no discretion about whether to deny temporary housing. While in some cases there are exceptions to outcomes, the exceptions do not ... otherwise make a mandated outcome discretionary." The court ruled the CAPA exception for policies with "no legal effect" does not apply because the SAEP "is not simply a strict interpretation of the existing State Regulation or the State Administrative Directives, with a filling in of the interstices.... [T]he SAEP imposes many new obligations on applicants, with a concomitant creation and denial of substantive rights." The Appellate Division, First Department affirmed without opinion.

DHS argues the SAEP "does not constitute a rule within the meaning and intent of CAPA because it invests significant discretion in agency decision makers. Utilizing the Procedure's guidelines, DHS investigates and evaluates each application.... The agency bases individual eligibility determinations on the totality of each applicant's circumstances, with an analysis of the applicant's situation in accord with all relevant factors." It also argues that, "because the [SAEP] has no legal effect but is merely explanatory of existing State law, it falls within a stated exception to CAPA's definition of a rule."

For appellant DHS: Assistant Corporation Counsel Ronald E. Sternberg (212) 788-1070
For respondent City Council: Jeffrey P. Metzler, Manhattan (212) 788-9131

State of New York Court of Appeals

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To be argued Wednesday, October 9, 2013

No. 180 Expedia, Inc. v The City of New York Department of Finance

Expedia, Orbitz, Travelocity and other online travel companies brought this action against New York City and its Department of Finance to challenge the constitutionality of Local Law 43, a 2009 amendment that extended the City's hotel room occupancy tax to include service or booking fees the plaintiffs charge for hotel reservations. The companies argued the City had no authority to impose the tax on the fees they charge their customers until 2010, when the State Legislature expressly authorized expansion of the occupancy tax to "room remarketers" such as the plaintiffs.

Supreme Court granted the City's motion for summary judgment dismissing the state constitutional claim, holding that "the plain language" of enabling legislation enacted by the State Legislature in 1970 "clearly and unambiguously provides the City with broad taxation powers to enact" Local Law 43. "On its face, the statute provides the City with the power to impose a tax 'such as the legislature has or would have the power and authority to impose on persons occupying hotel rooms...,'" the court said, and it "clearly provides that 'any tax imposed shall be paid by the person liable therefor to the owner of the hotel room occupied or to the person entitled to be paid the rent or charge for the hotel room....'" The court said the travel companies argue the enabling legislation "'does not authorize a new tax on travel booking services...,' but fail to cite any language in the [statute] that supports that conclusion."

The Appellate Division, First Department reversed and declared that Local Law 43 violates the State Constitution. "[T]he plain language of the enabling legislation did not clearly and unambiguously provide the City with broad taxation powers with respect to imposing a hotel occupancy tax. Rather, it permitted the City to impose the tax on 'hotel occupants,'" the court said. "Given the well-established rule that a statute that levies a tax 'must be narrowly construed' and 'any doubts concerning its scope and application are to be resolved in favor of the taxpayer...,' the plain meaning of this phrase did not encompass the service fees charged by the travel intermediaries and the legislation may not be extended so as to permit the imposition of the tax in a situation not embraced by it. To extend the tax to cover these fees requires action by the State Legislature, such as that taken in 2010...."

The City argues, "A plain reading of the Enabling Act undeniably authorizes the City to enact a local law imposing the [occupancy tax] on the *entire* amount paid for a hotel room by the occupant of such room. This is true notwithstanding how that occupant chooses to pay for the room, be it through a hotel operator, a room remarketer, or otherwise. Moreover, the unambiguous language of the Enabling Act expressly provides for the possibility that an entity other than a hotel operator can be required to collect and pay over the entirety of the tax due, never mind a fraction thereof."

For appellant City: Assistant Corporation Counsel Andrew G. Lipkin (212) 356-2114
For respondents Expedia et al: Todd R. Geremia, Manhattan (212) 326-3939

State of New York Court of Appeals

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To be argued Wednesday, October 9, 2013

No. 181 Matter of Lancaster v Incorporated Village of Freeport
Matter of Glacken v Incorporated Village of Freeport

In March 2009, the Village of Freeport Board of Trustees adopted a resolution pursuant to Public Officers Law § 18 authorizing the Village to defend and indemnify current and former officials named in two federal lawsuits brought against it by Water Works Realty Corp. and its owner, Gary Melius. The federal actions alleged that Village officials had conspired to illegally deprive Water Works of real property through a fraudulent sale of tax liens. In November 2009, the Village agreed to settle the federal actions for $3.5 million, and Water Works agreed to discontinue the actions against the individual officials without any cost or admission of wrongdoing if they signed stipulations of settlement that contained non-disparagement clauses. Those clauses required them to agree "not to ever interfere, nor challenge or criticize the terms of [the settlements] in any manner." When some officials refused to sign the stipulations, the Village Board passed a resolution terminating its defense and indemnification of them in January 2010 due to their alleged failure to cooperate in obtaining a global settlement.

The affected officials -- including former Mayor William Glacken, Trustee William White, former Trustees Donald Miller and Renaire Frierson-Davis, former Treasurer Vilma Lancaster and former Village Attorney Harrison Edwards -- filed these suits to overturn the Village's determination to end their defense and indemnification. The officials, one of whom had argued the Village did nothing improper in its tax dispute with Water Works and should not settle, contended the determination violated their constitutional free speech rights and violated the Village's obligation to defend its officials and employees under Public Officers Law § 18.

Supreme Court dismissed the suits, finding the Village had been diligent and reasonable "in seeking to bring about the petitioners' cooperation in agreeing to the settlement" and the petitioners had been "willful" in refusing to consent. Rejecting the free speech claim, it said, "The court finds the condition of non-disparagement of the settlement reasonable, given the benefits achieved by the petitioners from the settlement."

The Appellate Division, Second Department affirmed, saying the determination was not arbitrary, capricious, or an abuse of discretion. "The [petitioners'] conduct, after their cooperation in the defense of those actions was diligently sought, was one of willful and avowed obstruction...." Regarding the constitutional claim, it said, "[U]nder the circumstances of this case, nondisparagement clauses set forth in the stipulations of settlement ... negotiated on their behalf in the underlying civil actions did not constitute prior restraints on free speech...."

The petitioners argue that the free speech provisions of the state and federal constitutions "mean that the government can neither retaliate against an individual for his or her speech nor condition the continued receipt of some government benefit or service on the individual's agreement not to speak." They also say their refusal to accept a settlement conditioned on their silence "is not a failure to cooperate within the meaning of Public officers Law § 18(5)(ii)" and, in any case, the January 2010 resolution is invalid because it was adopted in an executive session held in violation of the Open Meetings Law.

For appellants Lancaster et al: Robert A. Spolzino, White Plains (914) 323-7000
For respondents Freeport et al: Stanley A. Camhi, Garden City (516) 746-8000

State of New York Court of Appeals

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To be argued Wednesday, October 9, 2013

No. 183 People ex rel. Ryan, on behalf of Shaver v Cheverko

In October 2011, Richard Shaver was convicted in White Plains City Court of two counts of petit larceny and one of criminal possession of stolen property in the fifth degree and was sentenced to two consecutive one-year terms at the Westchester County Department of Correction. Eight months later, Shaver was convicted in Westchester County Court of second-degree escape and fourth-degree grand larceny, based on incidents that occurred prior to his October 2011 convictions, and he was sentenced to two consecutive one-year terms, to run consecutively with the terms he was already serving at the same jail.

The question in this case is how Shaver's release date should be calculated under Penal Law § 70.30(2)(b) which states, "If the sentences run consecutively and are to be served in a single institution, the terms are added to arrive at an aggregate term and are satisfied by discharge of such aggregate term, or by service of two years imprisonment..., whichever is less." County correction officials subtracted 592 days of time-served and good-time credit from an aggregate term of four years, which would result in a release date of March 9, 2014, and determined that Shaver was instead entitled to release -- after serving two full years -- on October 24, 2013. Shaver brought an article 78 proceeding against the officials, contending that his time-served and good-time credit must be subtracted from the two-year maximum term provided in Penal Law § 70.30(2)(b), which would result in a release date of November 8, 2012.

Supreme Court dismissed Shaver's suit, saying his "contention that the language 'two year[s] imprisonment' must be read as meaning an aggregate sentence of two years with credit for time served and good time applied to further reduce the two-year term to approximately 16 months is contrary to the plain language of the statutes and is not persuasive.... [A]lthough the petitioner has received credit for time served and good time, he will reach his maximum of two years imprisonment and be released from custody before he serves the portion of his sentence affected by the credit. However unfair this may seem to the petitioner, it is a function of serving four definite one year sentences instead of two."

The Appellate Division, Second Department -- treating the article 78 proceeding as one for a writ of habeas corpus -- reversed the judgment, sustained the writ, and ordered Shaver's immediate release. "When the two-year limit on the aggregate term of consecutive definite sentences provided by this section applies, a person's 'release date must be calculated based on a two-year aggregate term of incarceration,'" it said, citing Matter of Serfaty v Jablonsky (236 AD2d 413). "Any credit for time served or good-time credit must be applied against this two-year aggregate term...." When that is done, "petitioner's release date has passed," it said. "Thus, he currently is being illegally detained and must be discharged forthwith."

For appellant Westchester County: Associate County Atty. Linda M. Trentacoste (914) 995-2839
For respondent Shaver: Anne Bianchi, White Plains (914) 286-3400

State of New York Court of Appeals

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To be argued Wednesday, October 9, 2013

No. 184 People v Franklin Hughes
No. 185 People v Harold Jones

Franklin Hughes was charged with murder for fatally shooting Quentin Roseborough at the apartment of Hughes' girlfriend in Hempstead in July 2007. Hughes admitted shooting Roseborough, who went by the nickname "Maniac Guns," but raised a justification defense. Roseborough confronted him and began to draw a gun, Hughes said, so he drew his own gun and fired first in self-defense. At a bench trial, County Court acquitted him of murder, but found him guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03[3]) and third degree (Penal Law § 265.02[1]) based on his previous misdemeanor conviction for resisting arrest. The statutes criminalize possession of a firearm, even in the home, when the defendant "has been previously convicted of any crime."

The Appellate Division, Second Department affirmed, rejecting Hughes' claim that the statutes are unconstitutional under the U.S. Supreme Court ruling in District of Columbia v Heller (554 US 570), which held that the Second Amendment protects an individual's right to keep arms for self-defense in the home. The Appellate Division said the statutes do not impose "an absolute ban on the possession of firearms" and, thus, are "'not a "severe restriction" improperly infringing upon defendant's Second Amendment rights'...." It also ruled "this statutory scheme is not unconstitutionally overbroad merely because it restricts the Second Amendment ... rights of those who have been convicted of 'any crime,'" but is instead "consistent with the Supreme Court's determination in Heller that, although individuals may have the constitutional right to bear arms in the home for self-defense, this right is not unlimited and may properly be subject to certain prohibitions...."

Hughes argues, "Neither statute withstands strict or intermediate scrutiny. Neither respondent nor intervenor Attorney General offer any substantive argument that anyone convicted of any crime at any time in their life becomes a threat to public safety if permitted to keep a handgun in the home for self-defense."

Harold Jones was charged with second-degree weapon possession under Penal Law § 265.03(3), along with other crimes, after police found a loaded handgun during a search of his Manhattan apartment in May 2009. Jones had a 1978 conviction for felony drug possession. Section 265.03(3) generally exempts a defendant from criminal liability if he possesses a loaded weapon in his "home or place of business," "except as provided in" Penal Law 265.02(1). Section 265.02(1) elevates fourth-degree weapon possession to third-degree when the defendant "has been previously convicted of any crime." Supreme Court found the "home or place of business" exception applied despite Jones' prior felony conviction and reduced the second-degree possession count to third-degree.

The Appellate Division, First Department reversed and reinstated the second-degree possession count, ruling the exception does not apply. It said section 265.03(3), "by referencing Penal Law 265.02(1), criminalizes the possession of a loaded firearm, even in the home, where a defendant has previously been convicted of any crime...."

Jones does not raise a constitutional claim. He argues the reference to section 265.02(1) does not eliminate the "home or place of business" exception in section 265.03(3), but instead "sets forth the means for prosecuting possession of a loaded firearm in one's home. If the possessor has previously been convicted of a crime, he can be prosecuted, 'as provided in subdivision one ... of section 265.02,' for third-degree possession," but not second-degree possession.

184 -- For appellant Hughes: Michael A. Fiechter, Bellmore (718) 902-4492
For respondent: Nassau County Assistant District Attorney Yael V. Levy (516) 571-3806
For intervenor Attorney General: Assistant Solicitor General Nikki Kowalski (212) 416-8370
185 -- For appellant Jones: David J. Klem, Manhattan (212) 577-2523
For respondent: Manhattan Assistant District Attorney David P. Stromes (212) 335-9000

State of New York Court of Appeals

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To be argued Wednesday, October 9, 2013

No. 238 Nash v The Port Authority of New York and New Jersey

Linda Nash is one of hundreds of people injured in the 1993 bombing of the World Trade Center who sued its owner, The Port Authority of New York and New Jersey, for negligence. After terrorists detonated an explosives-laden van in the parking garage beneath the twin towers, the plaintiffs claimed the Authority had breached its proprietary duty to maintain the premises in a reasonably safe condition. Most plaintiffs were represented by counsel for a steering committee, but Nash and some others had separate counsel. All of the cases were consolidated for a liability trial, at which the jury found the Port Authority was negligent and liable for 68% of the fault. The Appellate Division, First Department affirmed, rejecting the Authority's claim that it was entitled to governmental immunity. The cases were separated for the damages phase, in which Nash was awarded $4.5 million plus interest. The Appellate Division affirmed her judgment on June 2, 2011, and the Authority did not appeal to the Court of Appeals.

After damages were awarded to another plaintiff, Antonio Ruiz, the Port Authority took a direct appeal to the Court of Appeals, which also brought up for review the interlocutory liability judgment. The Court of Appeals reversed in Matter of World Trade Center Bombing Litigation (17 NY3d 428) on September 22, 2011, ruling the Port Authority was entitled to governmental immunity and could not be held liable for negligence. On May 11, 2012, Supreme Court granted the Port Authority's motion to vacate Nash's judgment based on this Court's liability ruling.

The Appellate Division affirmed in a 3-2 decision. "Since the judgment in plaintiff's favor was based on an order that had been reversed, the trial court properly vacated the judgment," the court said, even though Nash's judgment "was no longer subject to appeal." It said, "[S]ince the final judgment in this case holds the defendant liable for 'damages in a case in which, as a matter of law as established by the [Matter of World Trade Ctr. Bombing Litig.] decision..., the [defendant] should not be liable at all'..., the judgment should be vacated."

The dissenters argued that the damages award to Nash "stands as a final judgment in plaintiff's favor which may not now be disturbed...." They said, "... Nash's appeal before our court had been submitted, argued, decided, and the time to move for reargument and/or leave to appeal had already expired prior to the Court of Appeals' determination in [Matter of World Trade Center Bombing Litigation]. Nash's case ... was not 'in the pipeline'.... Since the time to appeal from the order finally determining the rights of the parties in Nash had already expired..., Nash's judgment could no longer be disturbed."

For appellant Nash: Louis A. Mangone, Manhattan (646) 704-0029
For respondent Port Authority: Gregory Silbert, Manhattan (212) 310-8000

State of New York Court of Appeals

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To be argued Thursday, October 10, 2013

No. 187 People v Kevin W. *(papers sealed)*

Plain clothes officers Jamal Gungor and Chester Indiviglio were patrolling subway stations in Queens in November 2006, looking for suspects in a recent robbery, when they focused on Kevin W. and his brother because they appeared to be "canvassing" the station. Indiviglio signaled to Gungor that one of the youths made a gesture suggesting he had a gun. When the officers stopped them, both youths refused to provide identification and struggled with them. The youths slipped free and fled, but Kevin W. left behind his jacket and backpack, in which the officers found a loaded revolver. Kevin W. was arrested the next day and charged with second-degree criminal possession of a weapon and resisting arrest.

Kevin W. moved to suppress the gun. The prosecutor called Gungor to testify at the hearing, but not Indiviglio, the officer who reported seeing the "gun" gesture. The judicial hearing officer (JHO) issued a report recommending the suppression motion be granted. Supreme Court adopted the report and suppressed the gun. The prosecutor then moved to reargue the motion, and the court ordered the suppression hearing reopened to permit Officer Indiviglio to testify. After the reopened hearing, the JHO issued a report recommending the motion be denied. Supreme Court adopted the report and denied the suppression motion. Kevin was convicted of both charges at a jury trial, and the court granted him youthful offender status.

The Appellate Division, Second Department reversed, suppressed the gun, and dismissed the indictment. "The Supreme Court erred in reopening the suppression hearing, as '[t]he People were given every opportunity to present their evidence at the original hearing and there is no basis to justify their being provided with a second bite of the apple,'" the court said, citing People v Havelka (45 NY2d 636). It said, "In the initial suppression order..., the Supreme Court correctly determined that the police lacked reasonable suspicion to stop the defendant. Consequently, the physical evidence should have been suppressed" and the weapon charge dismissed. Without probable cause for the arrest, it said the resisting arrest charge must also be dismissed.

The prosecution argues the evidence at the initial suppression hearing was sufficient to find reasonable suspicion and, even if it were not, the trial court "had the power to reconsider its own adoption of the JHO's initial report denying suppression and direct that the JHO take additional evidence." Trial courts "frequently reconsider their own rulings" and the "need to re-open or reconsider hearing evidence is all the more important where the ... court is reviewing the hearing before a JHO, in which the ... court had no say." Citing People v Crandall (69 NY2d 459), the prosecution says Havelka and related cases allow reopening of a hearing for additional evidence "where the People have no incentive to call additional witnesses due to the court's initial ruling or under existing law."

For appellant: Queens Assistant District Attorney Danielle S. Fenn (718) 286-5838
For respondent Kevin W.: Joshua M. Levine, Manhattan (212) 693-0085 ext. 212

State of New York Court of Appeals

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To be argued Thursday, October 10, 2013

No. 188 People v Carl D. Wells

A police officer, responding to a report of a car accident in the Bronx in December 2006, found Carl Wells slumped over the wheel of a stolen car that was stopped on the sidewalk, its lights on, facing the wrong direction on a one-way street. The officer, who said Wells exhibited signs of intoxication after he was awakened, arrested him and took him to the precinct, where she found seven rocks of crack cocaine in his pocket. His blood alcohol level was .09. After he was given Miranda warnings, Wells admitted driving the car and said, "I have been smoking cocaine and drinking for weeks. I've been smoking cocaine all morning, this afternoon and this evening. I have been smoking all week, for 4-5 days. I passed out, I don't know what happened. I don't know how I got here." The officer searched the car and found a crack pipe and an open bottle of Baccardi on the floor.

Supreme Court denied Wells' motion to suppress his statements and the physical evidence. Regarding the search of the car, the court said, "Having arrested the defendant and impounded the vehicle in which he was seated, the police had the right to inventory the contents of the vehicle.... Accordingly, the crack pipe and the bottle of Baccardi were legally seized by the police." Wells then accepted a plea bargain, pleading guilty to driving while ability impaired by drugs and/or alcohol in return for a sentence of six months in jail.

The Appellate Division, First Department affirmed, though it found the search of the car was improper. "The court erred in relying on the inventory search doctrine in denying suppression of physical evidence recovered from the car defendant was driving, because the People did not introduce any evidence to establish a valid inventory search...," it said. "However, there was overwhelming evidence of defendant's guilt, independent of the physical evidence at issue. Although the harmless error rule regarding suppression issues does not normally apply to cases where a defendant pleads guilty (People v Grant, 45 NY2d 366, 378-380 [1978]), the particular circumstances of this case warrant a finding of harmless error (see People v Lloyd, 66 NY2d 964 [1985]...)."

Wells argues the Appellate Division improperly applied harmless error analysis to his guilty plea in violation of Grant, which explained that harmless error generally does not apply to pleas because, "when a conviction is based on a plea of guilty an appellate court will rarely, if ever, be able to determine whether an erroneous denial of a motion to suppress contributed to the defendant's decision, unless at the time of the plea he states or reveals his reason for pleading guilty." Wells says that, prior to his plea, he "affirmatively stated that he would have taken his case to trial if he had secured a favorable suppression ruling" and "stated that the impetus for his decision to plead guilty was the negative suppression ruling by the hearing court. Thus, the record conclusively establishes that appellant's decision to plead guilty ... was predicated on the negative suppression ruling that he received." Wells, who had stolen the car at gunpoint in Manhattan, is now serving 20 years to life in prison for first and second-degree robbery.

For appellant Wells: Harold V. Ferguson, Jr., Manhattan (212) 577-3548
For respondent: Bronx Assistant District Attorney Megan R. Roberts (718) 838-7085

State of New York Court of Appeals

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To be argued Thursday, October 10, 2013

No. 189 People v Malik Howard
No. 190 People v Hilbert Stanley

Malik Howard and Hilbert Stanley were charged with robbing Domingo Lopez at gunpoint near his home in the Bronx in April 2006. Lopez said Howard stood in front of him and put a gun to his head while Stanley stood behind him. At trial, Lopez testified, "... I felt the other person [Stanley] was touching me with something else on my back.... I cannot say if it was a gun or something else." Police arrested the defendants a short time later and called Lopez for a showup identification, which was conducted an hour and a half after the robbery and five miles from the scene. Officers recovered a black BB gun from the trunk of the defendants' car. Lopez testified that it looked like the type of gun that was pointed at his head during the robbery.

Howard and Stanley were convicted of first-degree robbery under Penal Law § 160.15(4), which applies where a defendant "[d]isplays what appears to be a pistol ... or other firearm." The statute provides an affirmative defense that reduces the charge to second-degree robbery if the defendant can prove the object displayed was not a loaded firearm, but the defendants' attorneys did not raise that defense at trial. Howard was sentenced to 14 years and Stanley to 15 years in prison. They argued on appeal that because the object Howard displayed was a BB gun and not a firearm, the affirmative defense was established as a matter of law and their convictions should be reduced to second-degree robbery. They also said Lopez's testimony that Stanley placed something against his back was insufficient to support the convictions.

The Appellate Division, First Department affirmed in a 3-2 decision. The majority said their claims were unpreserved because the defendants did not ask for a jury instruction on the affirmative defense nor argue that the evidence failed to satisfy the "display" element of first-degree robbery, and it declined to review the claims in the interest of justice. As an alternative holding, the majority found the verdict was supported by legally sufficient evidence. "... Lopez could reasonably have perceived Stanley's object to be a gun, particularly since Lopez saw Howard holding a gun and at the same time felt Stanley place something against his back.... The fact that Lopez acknowledged that the object Stanley placed against his back could have been something other than a gun is of no legal consequence." The court held the showup identification was valid.

The dissenters argued the convictions should be reduced to second-degree robbery in the interest of justice since "the prosecution's case hinged upon the display of what appeared to be a weapon" and "the only gun recovered or even discussed during the trial was the BB gun." They said the majority's alternative holding was not supported by the evidence because there was "only one statement made during the entire trial referring to what the majority relies upon" -- Lopez's testimony that Stanley touched "something else" to his back. "[A]n ambiguous statement about feeling 'something' should not be sufficient to establish the display element under Penal Law § 160.15(4). In all of the cases cited by the majority, the victim perceived the item at issue to be a gun. In this case, the victim made only one reference to 'something' and specifically stated he id not know if it was a gun."

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