State of New York
Court of Appeals

To be argued Thursday, June 6, 2019

No. 56 Matter of Wegmans Food Markets, Inc. v Tax Appeals Tribunal of the State of New York

Wegmans Food Markets, Inc., a supermarket chain headquartered in Rochester, has since 1995 contracted with RetailData, LLC to monitor prices charged by its competitors. Wegmans would ask for reports on pricing at particular stores or groups of stores, sometimes for all products and other times for specified products, during a certain period. RetailData would then send its data collectors to the chosen locations to record the prices shown on the stores' shelves. RetailData analyzed and verified the information and generated written reports in a customized format for Wegmans. A confidentiality provision in its contract prohibited RetailData from providing any of the information to third parties. In 2011, auditors with the Department of Taxation and Finance determined that Wegmans' purchases of the pricing reports was subject to sales taxes under Tax Law § 1105(c)(1), which imposes the tax on "[t]he furnishing of information..., including the services of collecting, compiling or analyzing information of any kind or nature and furnishing reports thereof to other persons...." However, the statute excludes from sales taxes "the furnishing of information which is personal or individual in nature and which is not or may not be substantially incorporated in reports furnished to other persons...." Wegmans was assessed an additional $227,270 in sales taxes for the period from June 2007 to February 2010.

The Division of Tax Appeals sustained the assessment and the Tax Appeals Tribunal affirmed, rejecting Wegmans' claim that its purchases of pricing reports qualified for the sales tax exclusion for "information which is personal or individual in nature and which is not or may not be substantially incorporated in reports furnished to other persons." The Tribunal said, "The pricing information that [Wegmans] purchases from RetailData is obtained from products on the shelves of supermarkets that are open to the public. There is nothing that is 'uniquely personal' about the price of an item in a supermarket. Furthermore, such information is obviously not confidential, as it is accessible to anyone who enters a store. These facts thus indicate that the [pricing information] is non-personal and non-individual in nature and therefore taxable."

The Appellate Division, Third Department granted Wegmans' petition to annul the Tribunal's determination, saying that "in the event of ambiguity, 'where, as here, an exclusion rather than an exemption is involved, the statute must be strictly construed in favor of the taxpayer'...." It said, "While there is no question that the pricing information that RetailData collects ... is information that is available to the public, we agree with [Wegmans] that ... such information does not derive from a singular, widely accessible common source or database as that test has previously been applied and commonly understood in determining the applicability of the subject tax exclusion." It said "the information furnished to [Wegmans] was uniquely tailored to [its] specifications and was related exclusively to implementation of its confidential pricing strategy," so the "information services" it purchased "were personal or individual in nature" and "should have been excluded from taxation pursuant to Tax Law § 1105(c)(1)."

The Tax Commissioner argues that the Tribunal's determination that the tax exclusion does not apply "was rational and supported by the statutory language" and therefore should have been upheld. The Commissioner also contends that "any ambiguity in the text of an exclusion from tax must be construed in favor of the State and against the taxpayer" under M/O Mobile Oil Corp. v Finance Adm'r of City of N.Y. (58 NY2d 95).

For appellant Commissioner: Assistant Solicitor General Frederick A. Brodie (518) 776-2317
For respondent Wegmans: Jeffrey J. Harradine, Rochester (585) 454-0700

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.

To be argued Thursday, June 6, 2019

No. 58 People v James R. McIntosh

James McIntosh fatally stabbed his roommate, Michael Burnett, during an altercation at their apartment in East Rochester in August 2013. Both men had been drinking. A third roommate was in his bedroom at the time and heard them arguing, but did not see the incident. McIntosh was indicted on charges of second-degree murder and first-degree manslaughter, both intentional homicides.

McIntosh testified at trial that Burnett began pounding on his bedroom door and threatened to "break your fucking neck." McIntosh said he "poked" his knife at Burnett to hold him at bay as Burnett threatened him and tried to push through his door. McIntosh said he "poked it" toward Burnett's leg, causing what the medical examiner described as a superficial wound. McIntosh said this further enraged Burnett, who charged forward, and McIntosh said he raised the knife to chest level and "poked again, jabbed again." Burnett stepped back and fell with a knife wound that penetrated his heart. McIntosh testified, "I didn't mean to stab him. I just meant for him to just back off; see the knife and back off." He said he did not intend to kill or injure Burnett and did not foresee the risk that his actions might cause his death. Based on this evidence, defense counsel asked County Court to submit charges of second-degree manslaughter and criminally negligent homicide to the jury as lesser included offenses. The court refused; and it also failed to instruct the jury to consider the second-degree murder and first-degree manslaughter counts in the alternative. McIntosh was convicted of both counts and sentenced to 20 years to life in prison on the murder conviction.

The Appellate Division, Fourth Department dismissed the manslaughter count and otherwise affirmed on a 3-2 vote. The court agreed unanimously that the trial court erred in refusing to charge the jury on the two lesser included offenses, but it split on the question of whether the error was harmless.

The majority said, "[H]ad the jury acquitted defendant of the highest offense of murder in the second degree and convicted him of the intermediate offense of manslaughter in the first degree only, the court's error in refusing to charge the remote lesser included offenses would have constituted reversible error..., inasmuch as such a verdict would fail to dispel any significant probability that the jury, had it been given the option, would have instead convicted defendant of a remote lesser included offense.... By contrast, a determination of harmless error is warranted where, as here, the jury convicts the defendant of the highest charged offense, thereby foreclosing the defendant's contention that there was a significant probability that, had the jury been given the option, it would have rejected both the highest charged offense and the intermediate lesser included offense in favor of conviction of a remote lesser included offense...."

The dissenters said the trial court's error in refusing to charge the lesser included offenses was not harmless and was instead "compounded when the court erred in failing to instruct the jurors to consider the charged offenses in the alternative.... Due to the fact that the jury convicted defendant of both the" murder and manslaughter counts, "defendant correctly contends that we 'cannot know with certainty how the jury's deliberations would have been impacted if [it] had been instructed that [it] could convict [on] only one of the two counts.' We are thus unable to determine whether we should deem the lesser count dismissed or deem there to be an acquittal on the greater count.... As the Court of Appeals has written, '[t]he fact that defendant was convicted of both offenses ... does not establish that there was no significant probability the jury would have acquitted him of those charges and convicted him of [the remote lesser included offenses] if that option were available to it' (Green, 56 NY2d at 435-436)."

For appellant McIntosh: James A. Hobbs, Rochester (585) 753-4213
For respondent: Monroe County Assistant District Attorney Scott Myles (585) 753-4541

State of New York
Court of Appeals

To be argued Thursday, June 6, 2019

No. 57 People v Emmanuel Almonte

Joshua Chinga, planning to sell a pair of $500 sneakers, was expecting an old friend, Emmanuel Almonte, to pick them up at Chinga's apartment building in the Bronx in February 2012. When Almonte arrived with a cousin, who Chinga had also known for years, Chinga left his apartment without the sneakers to meet them in the third-floor stairwell. Chinga said the men ambushed him – striking him on the head with a gun, punching and kicking him, and dragging him down the stairs – and stole his cell phone. When they fled, Chinga returned to his apartment and his sister called 911. He did not describe the incident to his sister, but discussed it with his mother in the bathroom while he cleaned up his wounds. The 911 operator called back within minutes and spoke with Chinga, who said, "Somebody put a gun to my head and they beat me up." In response to questions, Chinga described his assailants, but did not disclose their names to the operator or to the officers who arrived to investigate. The officers drove him around the neighborhood, but they saw no one matching his descriptions. Chinga went to the precinct the following night and told officers who had assaulted him.

At Almonte's trial, Supreme Court allowed the prosecutor to play a recording of the 911 callback, in which Chinga mentioned the gun, under the excited utterance exception to the hearsay rule. The court denied Almonte's request to instruct the jury on third-degree assault, which does not involve the use of a dangerous instrument, as a lesser included offense of second-degree assault, which does. Almonte was convicted of second-degree robbery, first-degree attempted assault, and second-degree assault. He was sentenced to five years in prison.

The Appellate Division, First Department affirmed, saying, "The court properly admitted a 911 phone call between the victim and a 911 dispatcher under the excited utterance exception to the hearsay rule.... The victim's statements were made within minutes after he was attacked. The record indicates that he was still under the influence of the stress of the incident despite the lapse of time..., and that his statements were spontaneous and trustworthy, and not the product of reflection or possible fabrication." It said the trial court properly denied Almonte's request to submit third-degree assault to the jury because there was "no reasonable view of the evidence, viewed most favorably to defendant, that the injury at issue was inflicted without the use of a deadly weapon or a dangerous instrument."

Almonte argues the 911 recording was improperly admitted. He says the lower courts "ignored the fact that Chinga deliberately omitted critical information about his alleged assailants during the 911 Callback. Moreover, Chinga spoke with the 911 operator *after* he had retreated to the safety of his home, spoken with his mother (but, deliberately, not his sister), and tended to his injuries. Under similar circumstances, " New York appellate courts have held that the excited utterance exception is not satisfied." Further, he says the Court should "abandon" the exception, which "is premised on the erroneous assumption that a statement made during or shortly after a startling event is inherently reliable. Advances in modern science have debunked this assumption, showing that such statements lack the guarantees of trustworthiness required for the exception to survive." He says third-degree assault should have been submitted to the jury because it could have reasonably found "that Chinga's injuries were not caused by a gun, but instead by coming into contact with any other sharp object during the altercation, such as the stairs or the stair railing."

For appellant Almonte: Avi Gesser, Manhattan (212) 450-4000
For respondent: Bronx Assistant District Attorney Joshua P. Weiss (718) 838-6229