State of New York
Court of Appeals

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NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

October 23 and 24, 2019

State of New York
Court of Appeals

To be argued Wednesday, October 23, 2019

No. 87 People v Victor Thomas
No. 88 People v Nicole Green
No. 89 People v Storm U. Lang *(papers sealed in No. 89)*

These defendants all pled guilty in unrelated cases and each signed a waiver of their right to appeal. The common question raised in these cases is whether an appeal waiver that overstates the rights the defendant is surrendering renders the waiver unenforceable.

Victor Thomas pled guilty in Bronx Supreme Court to attempted assault in the first degree in exchange for a promised sentence of five years in prison. Prior to entering his plea, Thomas signed an appeal waiver which provided that he was waiving "the right to file a notice of appeal." The written form did advise him that there were exceptions to the waiver, including any constitutional speedy trial claim, the legality of his sentence, his competency to stand trial, and the voluntariness of his waiver and plea.

Nicole Green and Storm U. Lang pled guilty in separate cases in Genesee County Court, with Green receiving six years in prison for attempted burglary in the second degree and Lang receiving three years for sexual abuse in the first and second degrees. Both signed appeal waivers after the judge explained the rights they were giving up in nearly identical language. The court told Green, "Do you understand that the waiver goes to almost all issues of conviction and sentence, including the terms and length of your sentence, whether your sentence was excessive, you won't be able to hire an attorney to file an appeal for you, you won't get an assigned attorney to file an appeal for you, you won't be able to file your own appeal, you won't get waived filing fees. There is just going to be no review in any other court." The judge noted the same exceptions to the waiver as in Thomas.

The Appellate Division ruled the waivers were valid, the First Department in Thomas and the Fourth Department in Green and Lang. The First Department said the waiver Thomas signed "did not contain any language this court has previously found to be unenforceable.... There was no language that 'discourages defendants from filing notices of appeal even when they have claims that cannot be waived, such as one concerning the lawfulness of the waiver or the plea agreement itself,'" citing its 2014 ruling in People v Santiago (119 AD3d 484). It said the waiver form did not "suggest that the filing of a notice of appeal could be deemed a motion to vacate, or that it would have any other unwanted consequences (see Santiago ...)." The Fourth Department said in Lang, "While we agree with defendant that the colloquy and written waiver contain improperly overbroad language concerning the rights waived by defendant, '[a]ny nonwaivable issues purportedly encompassed by the waiver are excluded from the scope of the waiver [and] the remainder of the waiver is valid and enforceable'...."

The defendants argue, in part, that defendants cannot knowingly and voluntarily execute and courts cannot enforce an appeal waiver that purports to waive rights that cannot be waived under the Constitution, such as these waivers that they say required them to surrender any right to file an appeal. Thomas says, "New York's Constitution guarantees every criminal defendant a first appeal as-of-right to the intermediate appellate court, and no one is empowered to bargain away the filing of a notice of appeal." The defendants also argue the waivers violated their right to counsel, among other things.

For appellant Thomas: Louis O'Neill, Manhattan (212) 819-8200
For respondent in No. 87: Bronx Assistant District Attorney Justin J. Braun (718) 838-6135
For appellant Green: James. M. Specyal, Buffalo (716) 853-9555 ext.520
For respondent in No. 88: Genesee County Asst. Dist. Atty. Shirley A. Gorman (585) 344-2550
For appellant Lang: Susan C. Ministero, Buffalo (716) 853-9555 ext. 263
For respondent in No. 89: Genesee County Asst. Dist. Atty. Shirley A. Gorman (585) 344-2550

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To be argued Wednesday, October 23, 2019

No. 90 People ex rel. Prieston o/b/o Beaubrun v Nassau County Sheriff's Department

This habeas corpus proceeding stems from a dispute over the sufficiency of the collateral pledged for an insurance company bail bond posted by Kenel Beaubrun, who was indicted in Nassau County in September 2017 on a charge of second-degree conspiracy to possess and distribute narcotics. He was indicted again four months later on a charge of first-degree criminal possession of a controlled substance, an A-1 felony, and multiple felony counts of drug and weapon possession. Supreme Court set bail for both indictments at $500,000 insurance bond or $250,000 cash.

After Beaubrun posted a $500,000 bond through I.C. Bail Bonds, Inc., the court held a bail sufficiency hearing under CPL 520.30, which permits a court to "conduct an inquiry for the purpose of determining the reliability of the obligors or person posting cash bail, the value and sufficiency of any security offered, and whether any feature of the undertaking contravenes public policy." It authorizes a court to consider, among other things, the source of any money or property offered as collateral, including whether the collateral "constitutes the fruits of criminal or unlawful conduct," and the "background, character and reputation of any person who has ... agreed to indemnify an obligor upon the bond." A representative of the bonding company testified the collateral consisted of three houses put up by relatives and friends of Beaubrun, four automobiles, and 20 promissory notes from "close family members and/or family friends who are gainfully employed."

Supreme Court disapproved the bond, saying, "It's not my job to question the wisdom of the bail bondsman in issuing the bond, but I do have to be convinced there is sufficient collateral being posted to incenti[vise] the defendant to return to court.... [T]he collateral that is being pledged is virtually nonexistent and provides the defendant with no incentive to return to court." It said one of the houses was in foreclosure; there was only $8,000 in equity in another; and the owner of the third house was a co-defendant in the conspiracy case who claimed he was eligible for assigned counsel because he was indigent. It also expressed concern that the third house "may have been acquired at least in part by unlawful means." As for the people providing promissory notes, the court said "it doesn't seem like most of them really have the means to indemnify on the bond so I don't see that they would really have much to worry about if the defendant flees, and the defendant would really not be putting them at risk."

Evans D. Prieston, an attorney for Beaubrun, filed a petition for a writ of habeas corpus at the Appellate Division, Second Department. The court granted the petition and ordered Beaubrun released on bail, saying, "While CPL 520.30 allows a court to conduct an inquiry into the source of collateral pledged to secure issuance of an insurance company bail bond, the court cannot question the business judgment of the issuing company with regards to the amount of collateral it requires to secure the bond.... Here, the Supreme Court erred in disapproving the bail on the ground that the amount of collateral posted to secure the bond was insufficient...."

The County argues that courts have the statutory authority to examine the collateral securing a bail bond, "not to reassess its commercial value, but to confirm ... that the undertaking serves the State's interest in ensuring that a defendant returns to court. Ensuring that bail will induce a defendant's return to court is the paramount policy underlying bail in New York.... Section 520.30 expressly authorizes a bail-setting court to examine the sufficiency of a proposed bail bond to determine, *inter alia*, 'the value and sufficiency of any security offered, and whether any feature of the undertaking contravenes public policy.'"

For appellant County: Nassau County Asst. District Atty. Sarah S. Rabinowitz (516) 571-3800
For respondent Prieston: Evans D. Prieston (pro se), Long Island City (718) 424-2444

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To be argued Thursday, October 24, 2019

No. 91 Matter of Krug v City of Buffalo

This case arose from an encounter between Buffalo Police Officer Corey Krug and a civilian, Devin Ford, in a downtown parking lot near Chippewa Street in November 2014. A video of a portion of the incident shows Krug attempting to pin Ford to the hood of a car, then shoving him to the ground and kneeing him in the side. As Ford lay on his back, and two other officers approached, Krug repeatedly struck Ford on the legs with his baton. Krug did not arrest Ford or charge him with any offense. A year later Ford brought a civil suit against Krug and the City of Buffalo, alleging use of excessive force by Krug in violation of his constitutional rights.

Krug requested that the City defend and indemnify him in the civil action pursuant to General Municipal Law § 50-j, which requires a municipality to "provide for the defense of any civil action" against its police officers and to "indemnify and save harmless" an officer from civil liability "arising out of a negligent act or other tort ... committed while in the proper discharge of his duties and within the scope of his employment." When the City declined, Krug brought this article 78 proceeding to compel it to defend and indemnify him. The City moved to dismiss the suit, arguing that he had not been acting in the proper discharge of his duties. It noted that Krug had been indicted in federal court for his conduct toward Ford and had disciplinary charges pending against him.

Supreme Court granted the petition only to the extent of ordering the City to defend Krug against Ford's claims. "[R]elying on an indictment to deny defense to a police officer or any other public employee ... is arbitrary and capricious. They are presumed to be not guilty.... If there is a conviction in this matter, [Krug] would have to reimburse the City. But until there is one, I cannot rule that General Municipal Law does not apply." As for indemnification, the court said Krug's request was "premature" because there was no civil verdict in Ford's action and, thus, "right now there's nothing to indemnify."

The Appellate Division, Fourth Department affirmed on a 3-2 vote, saying, "Here, it is undisputed that [Krug] was on duty and working as a police officer when the alleged conduct occurred.... We respectfully disagree with the view of our dissenting colleagues that a 30-second long video recording of a portion of the incident, considered in conjunction with the indictment, provides a factual basis for [the City's] implicit determination that [Krug] was not acting within the scope of his employment and duties as a police officer. First..., '[a]n indictment is a mere accusation and raises no presumption of guilt'.... Second, the video recording captured only part of the encounter between [Krug and Ford], and did not capture the beginning or the end of the encounter. As a result, the recorded images of [Krug] striking [Ford] in the area of his legs and feet with a baton are unaccompanied by contextual factual information that would be essential to support a determination that [Krug's] actions fell outside the scope of his employment...."

The dissenters said the video "shows enough of the encounter to demonstrate, persuasively to our mind, that [Krug] was not acting out of any immediate fear for his life or safety or out of any need to subdue [Ford], who was lying prone on his back.... But ultimately, our conflicting interpretations of the videotape are beside the point, for they demonstrate – at most – that reasonable people could disagree about what is depicted thereon. And <u>that</u> is simply an insufficient predicate for striking down an administrative determination as arbitrary and capricious; quite the opposite, it is well established that administrative action 'may <u>not</u> be characterized as arbitrary and capricious' so long as '[r]easonable [people] might differ as to the wisdom of such a determination'...."

For appellant Buffalo: Assistant Corporation Counsel David M. Lee (716) 851-9691
For respondent Krug: Ian H. Hayes, Buffalo (716) 854-0007

State of New York
Court of Appeals

To be argued Thursday, October 24, 2019

No. 92 Rivera v State of New York

Jose Rivera was an inmate at the Mid-State Correctional Facility in January 2010, when he was seriously injured in an unprovoked assault by Correction Officer Michael Wehby. Rivera was going through the mess hall line for breakfast when Wheby taunted him about a protective helmet he wore for a seizure disorder, then ordered him out of line and began punching him in the head. Rivera fell to the floor and another officer handcuffed him while Wehby removed his helmet and continued to punch, stomp and kick him in the head. Two other officers who were present were fired for lying about the incident. Wehby was indicted in Oneida County on felony assault charges, but his trial ended in a jury deadlock. He later pled guilty to official misconduct, a misdemeanor, and was required to retire.

Rivera filed this suit against the State in the Court of Claims in 2011, alleging that it was liable for the assault and battery committed by its employee. In 2015, the court granted the State's motion to amend its answer to raise an affirmative defense that the correction officers involved were acting outside the scope of their official duties. The court rejected Rivera's argument that he would be prejudiced by the late amendment.

In 2017, the Court of Claims granted summary judgment to the State and dismissed Rivera's claim. It ruled that, under Riviello v Waldron (47 NY2d 297), Wehby was not acting within the scope of his official duties when he committed his "unprovoked assault" on Rivera. Noting that regulations of the Department of Corrections and Community Supervision (DOCCS) provide that use of physical force by prison staff "shall be reasonable under the circumstances," the court said, "Wehby's abhorrent actions are not within the normal and customary duties regularly performed by correction officers, and [DOCCS] could not reasonably anticipate that he would act in such a heinous way.... Wehby's actions were personal, unrelated to [the State's] interests, and a complete departure from performing the requisite duties of a correction officer in a reasonable manner. Consequently, although a harsh result, there is no viable basis upon which the State ... may be held liable as Wehby's actions fall outside the scope of his employment." The Appellate Division, Fourth Department affirmed without opinion.

Rivera argues that Wehby and his two fellow officers were acting within the scope of their employment, in part because they "were on duty, in uniform, on post, supervising other inmates, and exercising control over [Rivera]." He says the State "admits that it is within the scope of a correction officer's duties to use force against prisoners. Regulations allow for the individual officer to use his own discretion as to when and how much force is to be used against a prisoner," making incidents of excessive force foreseeable. "These officers were discharging their duties even though they were discharging their duties irregularly and in disregard of appropriate rules and regulations.... These officers intended to show all the inmates that they were supervising that if you do not immediately respond to an officer when spoken to you will be subjected to discipline ... that is immediate, physical and violent." Under the lower courts' view that an unprovoked assault is necessarily outside the scope of an officer's duties, he said, "Only inmates who instigate violence with an officer would be entitled to compensation. This cannot be the intent of the governing laws which waive sovereign immunity."

For appellant Rivera: Stacey Van Malden, Manhattan (212) 431-9380
For respondent State: Assistant Solicitor General Patrick A. Woods (518) 776-2020

State of New York
Court of Appeals

To be argued Thursday, October 24, 2019

No. 93 People v Clarence Rouse

In August 2013, a civilian sitting on his porch in the Bronx called 911 to report that he had just seen a bald man in his "early to mid twenties" holding a handgun on the street. At about the same time, Officer Steven Lopez and his partner arrived at the scene and saw a bald man fire one shot toward a group of fleeing teenagers. They ordered him to drop the gun, which he did and then fled. The officers recovered the gun and gave chase, but lost sight of the shooter in the Webster Houses residential complex. After about five to eight minutes of searching, they spotted Clarence Rouse, who they identified as the shooter, walking along 168th Street. Rouse was bald and 39 years old. The officers said he ran away as soon as he made eye contact with one of them. They chased him down and arrested him, injuring his head and shoulder in the process.

At trial, the civilian who made the 911 call was unable to identify Rouse as the gunman he had seen, and the prosecutor produced no physical evidence linking Rouse to the gun. Both officers identified Rouse as the shooter. Rouse sought to impeach the officers' credibility by cross-examining Lopez about his participation in a 2010 ticket fixing scandal. He also sought to question Lopez about findings by two federal judges in unrelated criminal cases in 2011 that his testimony was not credible, one of whom also rejected his partner's testimony as not credible, and about Lopez's false statements to a federal prosecutor in which he denied his involvement in ticket fixing. Supreme Court allowed cross-examination of Lopez about his ticket fixing, but precluded questioning about his false statements to the federal prosecutor and the adverse findings by federal courts regarding the officers' credibility. The court also precluded Rouse from introducing two anonymous 911 calls in which he said the callers gave details that contradicted the officers' account. Rouse moved for a mistrial based on the trial judge's criticisms of defense counsel, including a comment the judge made to the jury – during cross-examination of one of the officers – that "attorneys are never satisfied with just asking questions, sometimes they want to give them the answer too, that's all I can say."

Rouse was convicted of second-degree attempted murder, criminal use of a firearm and weapon possession. He was sentenced to 18 years in prison.

The Appellate Division, First Department affirmed, saying, "The evidentiary rulings challenged by defendant were provident exercises of discretion that did not deprive defendant of a fair trial.... Defendant received a full opportunity to cross-examine a police witness about his involvement in a ticket-fixing scandal, and the additional areas that counsel wished to explore were remote from the officer's credibility. Anonymous 911 calls proffered by defendant had minimal relevance or probative value on the issue of whether an officer correctly identified defendant as the person who fired the shot." It said the trial court's comments about defense counsel did not prevent the jury from reaching an impartial judgment on the merits.

Rouse argues that, under People v Smith (27 NY3d 652 [2016]), he was entitled to cross-examine Lopez about his false statements to a federal prosecutor and, under United States v White (692 F3d 235 [2d Cir 2012]), he was entitled to cross-examine the officers about prior federal court findings that their testimony was not credible. He says the trial court's refusal violated his right to confrontation. He contends that preclusion of the two anonymous 911 calls violated his rights to due process and to present a defense, and that the court's comments to the jury about defense counsel deprived him of a fair trial.

For appellant Rouse: John Vang, Manhattan (212) 577-2523
For respondent: Bronx Assistant District Attorney Robert McIver (718) 838-6144