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.

To be argued Thursday, September 15, 2016

No. 146 Matter of Jamal S. *(papers sealed)*

In August 2012, police stopped Jamal S. and a companion for riding bicycles in the wrong direction on a one-way street in the Bronx and weaving between moving cars. The officers said they intended to issue them summonses for disorderly conduct. Jamal, who told them he was 16 years old, could not be given a summons because he had no identification, so they handcuffed and searched him and took him to the precinct, where he was searched again. No contraband was found. When Jamal admitted he was only 15, one officer called his mother and told her to pick him up in the morning while a second officer took him to the juvenile room and frisked him again. The officer, who later testified he had no reason to expect Jamal "had anything on him," told Jamal to remove his belt, shoelaces and shoes. The officer found a revolver inside his right shoe. The corporation counsel's office filed a juvenile delinquency petition against him for possession of the weapon.

Family Court denied Jamal's motion to suppress the gun after a hearing, at which the officers testified that removal of his shoes was required under the precinct's standard procedure to make sure Jamal had nothing hidden that could be used to harm himself or others. The court said they acted properly in "following standard procedures in place to ensure [his] protection." Jamal was adjudicated a juvenile delinquent and placed on probation for 18 months.

The Appellate Division, First Department reversed on a 3-2 vote, ruling the search of the shoe "was unreasonable as a matter of law." It said, "Considerations of safety provide no justification in this case where Jamal was continuously in police custody and had been searched twice before being directed to remove his shoes. It is of no moment that Jamal was directed to remove his shoes pursuant to an alleged standard procedure.... The standard of reasonableness still applies.... The dissent's suggestion that the search ... was necessary to prevent Jamal from shooting himself or a police officer is inflammatory, and unsupported by the record of events in this case, which began with the detention of a juvenile who did nothing more than ride a bicycle in the wrong direction on a roadway. The dissent's position, if taken to its logical extreme, would call for a full search of any juvenile even temporarily detained in a precinct for any reason. This position finds no support in the Fourth Amendment."

The dissenters said "the State has a significant interest in preserving life and preventing suicidal acts of its detainees..., and the legitimate ends of a detainee safety search are broader than a search incident to a lawful arrest.... [I]t was reasonable, both in scope and manner of execution, for the second officer, who had not participated in [Jamal's] arrest or the prior pat down searches, to ask [him] to remove his shoes as a protective measure before [he] was left by himself in the juvenile room.... [N]either the interest of the juvenile detainee nor the interest of law enforcement ... will be promoted by the establishment of a rule that prohibits the search of a juvenile's shoes in a police station.... Indeed, had the police failed to properly search [Jamal]..., one can only imagine the public outcry had [he] shot himself or harmed an officer with the gun secreted in his shoe."

For appellant City: Assistant Corporation Counsel Tahirih M. Sadrieh (212) 356-0847
For respondent Jamal S.: Raymond E. Rogers, Manhattan (212) 577-3544

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To be argued Thursday, September 15, 2016

No. 159 People v Lyxon Chery

In April 2012, while making an arrest on Amsterdam Avenue in Manhattan, two police officers heard a commotion about a block away and went to the scene in front of a deli. They found Lyxon Chery and the clerk of the deli in an altercation and handcuffed both men until they could determine what was going on. Two witnesses identified the clerk as an employee of the deli, and the clerk said Chery had robbed him of $215, which the officers found in Chery's pocket. When the officers uncuffed the clerk, Chery exclaimed, "[W]hy isn't he going to jail, he kicked my bike, he should be going to jail, too." The officers then arrested Chery and advised him of his Miranda rights.

At trial, the clerk testified that Chery and another man stole his wallet and cash after striking him with a wooden board, choking him, and threatening him with a thin metal object. Chery took the stand and testified that the clerk attacked him with the board after he rebuked the clerk for verbally abusing two female customers. Supreme Court allowed the prosecutor to impeach Chery with the omissions in his pre-Miranda statement that "he kicked my bike, he should be going to jail, too," which made no mention of the clerk harassing women or striking him with a board. The court relied on People v Savage (50 NY2d 673), which held that, when a defendant chooses to make a statement after receiving Miranda warnings, and "when given circumstances make it most unnatural to omit certain information from a statement, the fact of the omission is itself admissible for the purposes of impeachment." Chery was convicted of first- and second-degree robbery and sentenced to five years in prison.

The Appellate Division, First Department affirmed. "The court properly permitted the prosecution to impeach defendant with omissions from the spontaneous statement he made to the police at the time of his arrest," it said, citing Savage. "Under the circumstances, defendant's failure to make the serious accusations against the victim that defendant made at trial, while only informing the officer of relatively trivial alleged misconduct, was an unnatural omission...."

Chery argues his pre-Miranda statement was improperly used to impeach him at trial because, under Savage, "a defendant may only be impeached with omissions after he receives his Miranda warnings and has an opportunity to narrate the essential facts of the case. Indeed, this Court's most recent decision in People v Williams [25 NY3d 185] reaffirmed this principle and explained that 'absent unusual circumstances, the People may not use a defendant's silence to impeach his or her trial testimony.' Since Mr. Chery's omissions were made to the responding officers at the time of his arrest and before he received his Miranda warnings, there was no time for deliberate calculation that would indicate Mr. Chery's exculpatory testimony at trial was recently fabricated to warrant impeachment." He also argues that the trial court improperly denied his request for a missing witness charge based on the prosecutor's failure to call the arresting officer's partner and that there was insufficient evidence the clerk suffered physical injury.

For appellant Chery: Marisa K. Cabrera, Manhattan (212) 577-2523
For respondent: Manhattan Assistant District Attorney Patricia Curran (212) 335-9000

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To be argued Thursday, September 15, 2016

No. 160 People v Herman Bank
No. 161 People v Herman H. Bank

While under the influence of cocaine in May 2007, Herman Bank drove the wrong way on Interstate 590 in Monroe County and collided with another vehicle, killing two people and injuring a third. He was indicted on manslaughter and related charges. His defense attorney told him incorrectly that he would face consecutive sentencing and that he could expect a sentence of no less than 6 to 18 years in a plea bargain. Bank said he would accept no more than 4 to 12 years. His attorney told the prosecutor Bank was not interested in plea negotiations and no offer was made. At trial, defense counsel pursued a defense of not guilty by reason of mental disease or defect and presented, as his only expert witness, a pharmacist who opined that Bank was unable to appreciate the risks of driving while using cocaine due to his bipolar disorder and a possible reaction to a prescription drug that could induce mania in some people with the disorder. The pharmacist said she relied on diagnoses of bipolar disorder in Bank's medical records but, because she was not a psychologist, she could not determine whether he was suffering from the disorder at the time of the accident. Bank was convicted of second-degree manslaughter, first-degree vehicular manslaughter and related charges, and was sentenced to the maximum term of 5 to 15 years.

Bank filed a CPL 440.10 motion to vacate the judgment for ineffective assistance of counsel, arguing his attorney's mistaken advice about consecutive sentencing deprived him of the opportunity to obtain a lesser sentence by plea bargaining. He presented testimony of a veteran public defender who said, even when a prosecutor refused to offer a plea, Monroe County judges were often willing to consider a deal. Bank's prosecutor testified that, due to his history and the strength of the case, she never considered offering a plea. County Court denied the motion.

The Appellate Division, Fourth Department affirmed, saying "The court properly concluded that, based on the circumstances of the crime and the strength of the People's case, the prosecutor would not have offered a plea bargain acceptable to defendant, and that County Court ... would not have agreed to such a plea bargain in any event. Although defendant established at the hearing that defense counsel incorrectly advised him during plea negotiations that he was facing consecutive sentences after conviction," he failed to show this caused him "any prejudice."

On direct appeal, the Fourth Department rejected Bank's claim that he was deprived of effective assistance of counsel by his attorney's pursuit of the mental disease defense and his failure to call a psychiatric expert to establish the defense, saying he "failed to establish 'the absence of strategic or other legitimate explanations.'" Regarding the decision to rely solely on a pharmacist for expert testimony, it said there was no showing "that an additional expert" was likely to disagree with the prosecution's experts, "all of whom opined that defendant was acting under the influence of a cocaine binge rather than a phase of his bipolar disorder."

Bank argues his attorney's advice about consecutive sentencing was entirely wrong -- "Not only were consecutive sentences not mandatory, they were not even an option" -- and caused prejudice by preventing him from engaging in plea negotiations. He argues his attorney was also ineffective in trying to establish a psychiatric defense with expert testimony of a pharmacist, who was "professionally incapable of meeting the defense's burden of proof," thus presenting a defense "which materially aided the prosecution and which had no hope of success."

For appellant Herman Bank: Robert N. Isseks, Middletown (845) 344-4322
For appellant Herman H. Bank: James Eckert, Rochester (585) 753-4431
For respondent: Monroe County Assistant District Attorney Leah R. Mervine (585) 753-4354

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To be argued Thursday, September 15, 2016

No. 163 Killon v Parrotta

A feud between Stacy Killon and Robert Parrotta came to a head late at night in October 2008 when Killon, apparently intoxicated, made two threatening phone calls to Parrotta at his home in Bolton Landing, and Parrotta drove his pickup 20 miles to Killon's home in Olmstedville to "end the situation," as he later testified. When he arrived, Killon retrieved the handle of a splitting maul from his house and stood on his porch. Parrotta said he pulled a baseball bat from his truck to "level the playing field," and the two men stood at a distance of 30 or 40 feet shouting obscenities at each other while Killon repeatedly pounded the maul handle on the porch deck. Parrotta said he walked toward the house as the men continued shouting and, when he reached the porch, he challenged Killon to drop the maul handle and come down for a fist fight. Killon raised the handle over his head and swung it at Parrotta, who said he believed he was in "jeopardy" and swung his bat at Killon "as hard as I could," striking him in the jaw.

Killon filed this personal injury action against Parrotta, who raised a justification defense. The jury found Parrotta was not the initial aggressor and acted in self-defense. Supreme Court denied Killon's motion to set aside the verdict as against the weight of the evidence.

The Appellate Division, Third Department reversed on a 3-2 vote, set aside the verdict and remitted for a new trial, finding Parrotta was the initial aggressor. "Despite plaintiff's prior threatening phone calls and the evidence that plaintiff was the first of the two to swing his club, there is no dispute that defendant drove to plaintiff's home and then advanced on plaintiff's front porch with a bat in his hand while demanding a fist fight," it said. "Given these circumstances, the jury's conclusion that defendant was not the first to threaten the immediate use of physical force is unreachable on any fair interpretation of the evidence.... Inasmuch as defendant chose to force this encounter, he could have -- and should have -- withdrawn from it long before he reached plaintiff's porch steps."

The dissenters said, "[W]hen we accord due deference to the jury's credibility determinations, [Parrotta's testimony] constitutes viable evidence to support its conclusion that, at the moment that plaintiff raised his arm, defendant actually believed that plaintiff was about to cause him serious physical injury and that a reasonable person in defendant's circumstances could have so believed.... In our view, the fact that defendant went to plaintiff's home, approached the porch holding a bat and invited plaintiff to fist fight with him does not require a finding that defendant was the initial aggressor. The jury was entitled to consider, as it apparently did, that defendant -- in an effort to verbally resolve a problem with plaintiff -- went to plaintiff's home in response to repeated belligerent phone calls..., that plaintiff retrieved the maul handle from inside the house when defendant had no weapon in hand and that plaintiff was the first to actually attempt to use force immediately preceding defendant's use thereof."

At the second trial, Parrotta was found liable. Killon was awarded $525,000 in damages. In this appeal, Parrotta challenges the Appellate Division's ruling that he was the initial aggressor and therefore not entitled to raise a justification defense.

For appellant Parrotta: Gregory V. Canale, Queensbury (518) 338-3404
For respondent Killon: Joseph R. Brennan, Queensbury (518) 793-3424