# NEW YORK COURT OF APPEALS ROUNDUP

## NOTEWORTHY CRIMINAL CASES; SOVEREIGN IMMUNITY ISSUE

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In this month's column, we discuss two unusual criminal cases. In one case, the Court of Appeals overturned an almost 40-year-old rule limiting its review of certain discretionary orders denying motions to vacate judgments. In another case, the court issued an unsigned memorandum decision determining whether an anonymous tip provided a sufficient basis to find reasonable suspicion for a police stop. The four judges supporting the memorandum decision agreed on the result but disagreed on the appropriate standard to be applied, and two of those judges have since left the court; there were three dissenters. Lastly, we discuss another case that divided the court and which addressed whether a corporate subsidiary of the Seneca Nation of Indians was protected by the Nation's sovereign immunity.

## Reviewability of Orders

In *People v. Jones*, the court overturned a rule dating back to its 1975 decision in *People v. Crimmins*, 38 NY2d 407 (1975) which limited the court's ability to review discretionary orders denying motions to vacate a judgment based on newly discovered evidence. In a decision by Judge Eugene F. Pigott Jr. and joined by Chief Judge Jonathan Lippman and Judges Susan Phillips Read, Robert Smith and Jenny Rivera, the court determined that the Crimmins rule needlessly restricted its power of review and that the Appellate Division had abused its discretion in summarily denying the defendant's motion for an evidentiary hearing.

Defendant was convicted of rape, murder and attempted robbery in 1981. The only witness who identified defendant as the perpetrator was the rape victim, an admitted heroin user, who selected defendant in a police line-up four months after the crime. Defendant was convicted and served 30 years in prison. In 2008, while still in prison, Defendant moved pursuant to CPL 440.30 (1-a) for an order directing DNA testing of physical evidence from his 1981 trial. Most of the evidence had been destroyed, but it was possible to conduct a DNA test on certain of the hairs found on a hat left by the perpetrator at the scene. That testing established that the hairs did not come from defendant.

Defendant accordingly moved to vacate his conviction and for a new trial pursuant to CPL 440.10 (1)(g) on the ground that the DNA results constituted newly discovered evidence or, in the alternative, for an evidentiary hearing pursuant to CPL 440.30(5). His motion was supported with the DNA test results and an accompanying expert affidavit. The People responded with an attorneys' affirmation that challenged the methodology of defendant's expert and summarized, in hearsay manner, the opinions of the People's experts. While the motion was pending, the Office of the Chief Medical Examiner was able to locate and conduct DNA testing on a fingernail scraping recovered from the murder victim. That DNA testing also excluded Defendant as the source of the scraping.

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The Supreme Court summarily denied defendant's motion, finding that the absence of defendant's DNA on the tested samples did not necessarily exclude defendant as the perpetrator and relying, in part, on the hearsay allegations of the People's experts. The Appellate Division affirmed in a 3-2 decision, finding that, particularly considering the strength of the rape victim's identification, there is no indication that introduction of the DNA evidence at trial would have resulted in a different verdict. The Appellate Division granted defendant leave to appeal to the Court of Appeals pursuant to CPL 460.20.

The court acknowledged that the rule articulated in the Crimmins case would prevent review of the Appellate Division's decision. The court has exercised its power to review denials of motions to vacate, however, in circumstances other than those involving newly discovered evidence such as when a defendant alleges that the evidence against him was false or that the judgment was procured by fraud. The court saw no reason to distinguish motions to vacate based on newly discovered evidence. Moreover, the court noted that while it was still prohibited from weighing facts and evidence in noncapital cases, this does not prevent it from determining whether a trial court or the Appellate Division committed an abuse of discretion as a matter of law. Accordingly, the court overturned its holding in Crimmins and proceeded to examine the merits of defendant's arguments.

The court then found that the Appellate Division abused its discretion in affirming the summary denial of defendant's CPL 440.10 (1)(g) motion. The court noted that the only evidence tying defendant to the crime was the witness identification testimony of the rape victim, but that she was a heroin addict who admitted that she had taken heroin the day of her police line-up identification. In contrast, defendant supported his CPL 440.10 motion with DNA evidence suggesting that he was not the perpetrator and the People responded only with an attorneys' affirmation containing hearsay opinions questioning the methodology of that DNA analysis.

In this instance, defendant was at least entitled to an evidentiary hearing, and the court accordingly reversed the Appellate Division's order and remitted the case to the Supreme Court for further proceedings. Judge Sheila Abdus-Salaam submitted a concurring opinion agreeing with the result reached by the majority but arguing that the Supreme Court, in fact, had no discretion to deny defendant a hearing and was required by CPL 440.30(5) to do so.

In any event, it is now clear that the court has the ability to review the denial of motions to vacate based on newly discovered evidence, despite decades of jurisprudence to the contrary.

## Seneca Indian Nation

In an opinion for the court by Judge Pigott in *Sue/Perior Concrete & Paving v. Lewiston Golf Course Corporation*, the court, by a four-judge majority, held that Lewiston Golf Course Corporation, a wholly owned subsidiary of the Seneca Nation of Indians, was not protected from suit by the Nation's sovereign immunity. The legal status of the parties is important to an understanding of the opinion and the challenging dissent by Judge Jenny Rivera joined in by Chief Judge Lippman and Judge Read.

The Nation is a federally recognized Native American tribe. In 2002 it granted under the Nation's laws a corporate charter to Seneca Gaming Corporation (Seneca Gaming) to operate a gaming facility. In the same year, the Nation granted a corporate charter to Seneca Niagara Falls Gaming Corporation (Seneca Niagara) which was created as a wholly owned subsidiary of Seneca Gaming to conduct the business of the Nation's gaming operations in Niagara County.

Finally, in 2007 Lewiston Golf was incorporated under the Nation's laws, as a wholly owned subsidiary of Seneca Niagara, to operate an 18-hole golf course on land it acquired from Seneca Niagara which was not part of any Nation lands. Its charter broadly provided that Lewiston Golf would not encumber the Nation's assets or render the Nation or Seneca Gaming liable for its debts. The Board of Directors of Lewiston Golf was

identical to the boards of Seneca Gaming and Seneca Niagara, and significant expenditures and other corporate action by Lewiston Golf required approval of the Nation.

A dispute arose under a 2007 contract in which plaintiff Sue/Perior Concrete & Paving, Inc. agreed to build for Lewiston Golf a golf course for $12.7 million. Sue/Perior filed a mechanic's lien in the amount of $4,130,538 and then commenced an action in the Supreme Court to foreclose the lien against Lewiston Golf and others. Lewiston Golf filed counterclaims and Sue/Perior filed an amended complaint adding Seneca Niagara and Seneca Gaming and certain of their officers and directors as defendants and added several causes of action including breach of contract and fraud.

Seneca Niagara, Seneca Gaming and Lewiston Golf all moved to dismiss the complaint pursuant to CPLR 3211 on the grounds that they enjoyed sovereign immunity. Supreme Court denied the motion as to Lewiston Golf on the grounds that it did not qualify as an "arm" of the Nation. Lewiston Golf appealed, and Sue/Perior withdrew its claims against all defendants except Lewiston Golf. The Appellate Division affirmed and granted leave to Lewiston Golf to appeal.

In affirming the Appellate Division's order, the court placed great reliance upon its earlier decision in *Matter of Ransom v. St. Regis Mohawk Educ. & Community Fund*, 86 N.Y.2d 553 (1995). While the court in *Ransom* acknowledged there was no set formula dispositive of whether a Native American organization was an arm of the tribe and entitled to share its immunity from suit, there were nine specific factors that a court should consider—three of which were singled out as most the important. They relate to whether the organization generates its own revenue and more generally to whether claims or suits against the organization could impact the tribe's financial resources and whether the organization had the ability to bind the funds of the tribe. The court observed that these three factors did not favor immunity for Lewiston Golf and concluded that Lewiston Golf lacks sovereign immunity.

The court was also persuaded by the fact that the Nation did not have legal title to or ownership of the golf course, and that the record indicated a clear intention to ensure that a lawsuit against Lewiston Golf would not impact the Nation's fiscal resources. The Nation argued that there is, in fact, an economic impact in that the revenues of Lewiston Golf otherwise available to the Nation will be lost, but the majority concluded that this is only a potential indirect effect and that no financial obligations were actually assumed by the Nation.

In essence, the court's opinion is that if a judgment against a corporation created by a Native American tribe will not reach the tribe's assets because the corporation lacks the power to obligate the tribe, the corporation is not an arm of the tribe and not entitled to sovereign immunity.

The full dissent by Judge Rivera disagrees with the court's reliance on the financial factors of *Ransom* and suggests instead that the focus should have been on the purpose and structure of Lewiston Golf and how it is in fact an entity not unlike Seneca Gaming and Seneca Niagara Falls created to enhance the gaming operations of the Nation solely for the benefit of its tribal community and should therefore receive sovereign immunity. It also urged that the Nation, as a sovereign, has the power to determine how best to structure its business ventures to achieve its own economic development goals, subject only to congressional limitation. Finally, the dissent asserted that under *Kiowa Tribe of Okla. v. Manufacturing Technologies*, 523 U.S. 751 (1998), sovereign immunity is a federal matter and "not subject to diminution by the states" and that the court was "without authority" to deny sovereign immunity to Lewiston Golf.

The case is likely to be worthy of review by the Supreme Court.

## Hearsay Tips, a Thorny Issue

*People v. Argyris*, *People v. DiSalvo* and *People v. Johnson* involved appeals seeking to suppress evidence obtained during vehicle stops that resulted from anonymous telephone tips to law enforcement. In deciding the appeals, the court issued a brief, unsigned Memorandum by four judges affirming as to *Argyris* and *DiSalvo* and reversing as to *Johnson*, separate concurrences in the Memorandum by two of those four judges and two dissents—one of which was joined in by the chief judge. It is worth noting that Judges Graffeo and Smith, two of the judges supporting the court's Memorandum, have since left the court, and we await action by the Legislature on their replacements.

The legal issue before the court in each of the cases was whether law enforcement had reasonable suspicion for the vehicle stop based upon an anonymous telephone tip. As the various concurring and dissenting opinions show, the legal issue is deeply intertwined in all aspects of the facts surrounding the stoppage. We briefly review these facts which are taken from Judge Abdus-Salaam's 43-page concurrence that she filed "to suggest further guidance."

Argyris and DiSalvo were arrested in Queens County following an anonymous 911 call reporting that the caller had seen four "tall big bully white guys" get into a new black Mustang at a specific intersection. The caller said that one of the men put a "big gun" in the back of the Mustang. The caller provided a license plate number of the Mustang and said that a grey van was travelling with the Mustang. A short time later, a police officer stopped the Mustang and arrested the men in the car at gunpoint. DiSalvo had a revolver in his waistband and Argyris was wearing a bulletproof vest and had a blackjack and switchblade in his pockets. The police found a .38 caliber gun under the driver's seat and a box of 9-millimeter ammunition on the back seat.

In *Johnson*, defendant was arrested for driving while intoxicated in Ontario County in 2011. A tipster to 911 reported that a "sick or intoxicated" driver was driving a blue BMW at a specific location. The tipster also reported the car's license plate number. After following Johnson in his BMW, a law enforcement officer stopped Johnson for an alleged traffic violation.

As appears from the concurring opinion of Judge Smith, there was a disagreement among the four Judges supporting the court's Memorandum as to the standard to be applied "to the determination of the legality of investigatory stops precipitated by anonymous hearsay tips." The Memorandum resolved the difference by concluding that regardless of whether the court applied a totality of the circumstances test or the standard laid out in *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969), (the Aguilar-Spinelli standard), the record supported the finding below that the police had reasonable suspicion to stop the vehicles in *Argyris* and *DiSalvo*; but Johnson's stop was not found to be based on reasonable suspicion, and the order denying Johnson's suppression motion was reversed.

Importantly, the court's Memorandum also held that, under the circumstances presented, the absence of predictive information (e.g., information suggestive of criminal behavior) as part of the tip that precipitated the stop of Argyris and DiSalvo was not fatal to its reliability.

Judge Abdus-Salaam in her detailed review of the legality of investigatory stops resulting from anonymous tips concluded in her concurrence that New York should continue to follow the Aguilar-Spinelli standard and decline to follow the Supreme Court's decision in *Illinois v. Gates*, 460 U.S. 213 (1983)—which held that the totality-of-the-circumstances analysis should govern. She also rejected as dicta the holding in *People v.*

*Moore*, 6 NY2d 496 (2006), that an anonymous tip must contain predictive information so that police can test its reliability before relying on it to engage in a vehicle stop.

In another challenging dissent, Judge Rivera strongly disagreed with the court's rejection of its own decision in *People v. Moore*. This issue is also the basis of Judge Read's short dissent. Judge Rivera broadly criticized the willingness of the court to accept the statements of an unknown anonymous tipster to support an intrusion on the rights of individuals to be left alone. She indicated that in affirming *Argyris* and *DiSalvo* the court has accepted a standard "below any constitutional floor [the] Court has ever recognized."

The next opportunity the court has to review the implications of an anonymous tip upon the validity of a police stop will be interesting.

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