NEW YORK COURT OF APPEALS ROUNDUP

DECISION TO RESCIND LAW SCHOOL ADMISSION UPHELD

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May 20, 2015

This month we discuss cases in which the Court of Appeals affirmed the dismissal of an Article 78 proceeding challenging the decision of St. John's University School of Law to rescind the admission of one of its students, and where it upheld a police stop based on the officer's reasonable but mistaken understanding of the law. We also address an appeal of an Article 78 proceeding in which the court affirmed the dismissal of a challenge to New York's regulatory system for stormwater discharges.

Law School Admission

In *In the Matter of Powers v. St. John's University School of Law*, the court considered an appeal of an Article 78 proceeding brought against St. John's University School of Law by a student whose admission was rescinded after he had completed three semesters.

The student applied to St. John's in November 2005. The application specifically asked candidates if they had ever been charged with, pleaded guilty to, or been found guilty of any crime. If so, applicants were required to explain the nature of the offense, the dates and courts involved and any penalty imposed. The student answered the question affirmatively and explained that in July 1999 he had been pulled over by New Jersey police shortly after a drug deal, subsequently accepted a plea bargain and was convicted of "third-degree possession of a controlled dangerous substance."

The student's disclosure, however, was inaccurate. In fact, he was actually charged with distribution of LSD, possession of LSD with intent to distribute, possession of drug paraphernalia, possession of Ecstasy, possession of Ecstasy with intent to distribute, possession of LSD, and possession of a controlled dangerous substance in a motor vehicle. Moreover, although the student claimed that he had been convicted of third-degree possession of a controlled dangerous substance, he had in fact pleaded guilty to second-degree distribution of LSD and second-degree possession of LSD with intent to distribute. As part of his plea agreement, after completion of a drug treatment program, the student was allowed to withdraw his plea and enter a plea solely with respect to third-degree possession with intent to distribute.

In September 2008, after the student had completed three semesters as a part-time student, and while on a leave of absence, he requested a letter of support from the school in connection with a planned submission to the Committee on Character and Fitness for an advance ruling on his fitness to be admitted to the New York bar in light of his past criminal conduct. The student sent St. John's a draft of his letter to the committee in which he disclosed his arrest for "distribution of LSD to an undercover officer and possession of Ecstasy." St. John's responded that because this information had not been included in his application, the school would not provide a letter of support.

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In July 2010, the student requested a letter of good standing from St. John's so that he could apply for a semester abroad program. The school responded that it would not provide the letter and informed him that he must amend his application and include a full accounting of his criminal activity along with an explanation as to why he had not disclosed it initially. The student provided a copy of his pre-sentence report to the school which then informed him that he could submit a request to amend his application. The student responded that there was nothing factually incorrect in his original application.

In September 2010, St. John's notified the student that his application contained material omissions and misrepresentations regarding his criminal charges and that his admission was rescinded. The student filed an Article 78 petition in Supreme Court, Queens County challenging the decision. The trial court denied his petition and the Appellate Division, Second Department, affirmed in a 3-1 decision.

The court affirmed in a decision by Judge Sheila Abdus-Salaam joined by Chief Judge Jonathan Lippman and Judges Susan Phillips Read, Leslie Stein and Eugene Fahey. Judge Eugene Pigott dissented and Judge Jenny Rivera took no part in the decision. Abdus-Salaam noted that the decisions of colleges and universities will only be disturbed if the school "acts arbitrarily and not in the exercise of its honest discretion," fails to abide by its own rules or imposes a penalty "so excessive that it shocks one's sense of fairness."

The court credited St. John's explanation that instances where it grants requests from students to amend the criminal history section of their applications usually involve minor offenses, and that on at least two occasions the school rescinded admissions where the subsequently disclosed information would have prevented the applicant from consideration for admission.

St. John's further explained that it has an unwritten policy of not admitting applicants who have sold drugs (as opposed to applicants who have used drugs). Accordingly, the student would not have been admitted if he had apprised St. John's of the true facts, and the decision to rescind his admission once those true facts were known was neither arbitrary nor capricious.

The court also found that the penalty was not shockingly severe. The St. John's application made it clear that a failure to provide truthful information would have severe consequences and the school has an undeniable interest in ensuring the integrity of the future lawyers it graduates.

Accordingly, the court affirmed the Second Department and upheld the decision by St. John's to rescind admission.

Mistaken Belief in the Law

Writing for the majority in *People v. Guthrie*, Judge Leslie Stein upheld a police stop that was based on a police officer's reasonable, but mistaken, view of the law. Shortly after midnight on Sept. 27, 2009, a police officer saw defendant drive through a stop sign in a supermarket parking lot in the Village of Newark in Wayne County. The officer stopped defendant and smelled a strong odor of alcohol. Defendant failed field sobriety tests and a breath analysis revealed that her blood alcohol level was over the legal limit. She was arrested and charged with failing to stop at a stop sign in violation of Vehicle and Traffic Law Section 1172(a) and driving while intoxicated under Vehicle and Traffic Law Section 1192(2) and (3).

Defendant moved to suppress all evidence resulting from the traffic stop on the grounds that the police lacked probable cause. The stop sign at issue was not properly registered in the local village code, and the Vehicle and Traffic Law provides that drivers are only required to stop at parking lot stop signs if the local municipality has adopted a law or regulation ordering such signs. Vehicle and Traffic Law Section 1100(b). In other words, defendant was not actually legally required to stop at the stop sign at issue, and the Newark Village Court accordingly granted the suppression motion. The County Court of Wayne County affirmed, finding that the officer's good faith belief that defendant had violated the law was insufficient to support a finding of probable cause. The court granted the people leave to appeal.

The fundamental issue before the court was whether there can be probable cause to stop a suspect when the police officer's objectively reasonable belief that a violation or crime has been committed is based on a mistake of law rather than fact. Stein's majority opinion, joined by Lippman, Read, Pigott, Abdus-Salaam and Fahey, cited *Heien v. North Carolina*,_US_, 135 S.Ct. 530 (2014), as support for its determination that objectively reasonable mistakes of law can support probable cause. The court also pointed to *People v. Estrella*, 10 NY3d 945 (2008), where it upheld a police stop based on over-tinted car windows that, while prohibited in New York State, were permissible in the state where the car was registered and therefore exempt from the New York Vehicle and Traffic Law tinting regulations. The court in *Estrella* found that it would be unreasonable to require police officers to be familiar with the vehicle equipment laws of every state and affirmed the denial of a suppression motion even though the officer's probable cause was based on a mistake of law.

In this case, the majority found that it would be similarly unreasonable to charge the police officer with knowledge of every stop sign that was registered under the local village code. The court distinguished *People v. Gonzalez*, 88 NY2d 289 (1996), in which it found that, unlike mistakes of fact, a mistaken belief as to the law does not establish a constitutionally valid search and seizure. The court noted that its holding in *Gonzalez* is limited to the issue of the apparent authority of a third person to consent to a search of a suspect's personal effects and declined to expand the Gonzalez distinction between mistake of fact and mistake of law to situations involving probable cause for traffic stops.

The court has now clarified, in a 6-1 decision, that a police officer's objectively reasonable belief in the legality of a traffic stop will support a finding of probable cause regardless of whether that belief is based on a mistake of fact or law.

Discharges of Stormwater

In *Matter of Natural Resources Defense Council (NRDC) v. New York State Department of Environmental Conservation* (DEC), the court, in a thorough majority opinion by Read, joined in by Pigott, Abdus-Salaam and Stein, and an equally thorough dissent by Rivera, joined by Lippman and Fahey, dealt with issues involving New York's regulatory system for discharges of stormwater in urbanized areas.

The urbanized areas are referred to as "MS4s" and are prohibited by federal and state law from discharging from their stormwater systems without an individual state pollutant discharge elimination system (SPDES) permit. Municipal stormwater systems that serve a population under 100,000 ("small MS4s"), on the other hand, may seek to discharge their stormwater under a "general permit" that covers multiple small systems sharing common features.

Under the terms of the general permit issued in 2010, the 559 small MS4s in the state are required to document and implement a stormwater management program (SWMP) in accordance with protocols developed by the DEC to limit the introduction of pollutants into stormwater "to the maximum extent practicable." To comply with the 2010 general permit and start discharging stormwater, a small MS4 only has to submit to the DEC a complete and accurate notice of intention (NOI). No prior review is required of the terms of the NOI or the SWMP in order to comply with the federal Clean Water Act (CWA).

This hybrid "CPLR Article 78 proceeding/declaratory judgment action" was commenced by NRDC and several other environmental advocacy groups after the 2010 general permit took effect. NRDC claimed that permitting small MS4s to discharge under the 2010 general permit based only upon their submission of an NOI, which is reviewed only for completeness and not subject to further review and a public hearing, created an impermissible self-regulatory system that fails to compel small MS4s to reduce their discharge of pollutants to the "maximum extent practicable"—the statutory standard—and therefore violates federal and state law.

Supreme Court granted NRDC partial relief, and the Appellate Division, Second Department, reversed and unanimously rejected NRDC's challenge to the 2010 general permit. The court granted NRDC leave to appeal.

The court held, first, that DEC's limited review for completeness of the NOIs filed by small MS4s is sufficient to satisfy the requirements of the Clean Water Act, and, second, that the public notice requirement was satisfied by a notice published in the Environmental Notice Bulletin stating that a small MS4 has submitted its NOI to the DEC, notifying the public where the NOI and the SWMP of the MS4 are located and may be inspected and, finally, providing for a 28-day public comment period before discharges can begin under the NOI.

The dissent concluded first that the state is in violation of the CWA in permitting small MS4s to be covered by a general permit without ensuring that there was consistency between the small MS4s' SWMPs and the DEC protocols, including the presence of controls to reduce the discharge of pollutants to the maximum extent practicable. The dissent next concluded that the existing public notice period and procedure were inadequate and that the CWA and the Environmental Conservation Law required more pre-coverage public participation.

The majority affirmed based in part on the precedent that the court "treads gently in second guessing" the expertise of state agencies which are given the authority to administer the statutes and regulations they oversee and that the construction given by such agencies should be upheld as long as it is not irrational or unreasonable. The majority indicated that the system in place rationally gives the SPDES permits, which pertain to those discharges presenting the greatest risk to the environment, earlier and more detailed review (in contrast with NOIs submitted by MS4s).

To the minority, all of this appeared to beg the question of whether the CWA has been violated where under a general permit small MS4s can begin discharging stormwater when the only review received is for completeness of the NOI without any analysis of whether the MS4s are actually in compliance "to the maximum extent practicable" as the statute requires.