

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 Wednesday, November 17, 2021

No. 35 *People v William A. Wilkins*

William Wilkins and a codefendant, Kesean McKenzie-Smith, were charged with robbing or attempting to rob six people who were waiting in line for a Rochester store to open in August 2012. One of the victims, Montre Bradley, resisted and was fatally shot during the struggle. Both defendants were convicted at a joint trial of felony murder and of robbery and attempted robbery in the first degree. Wilkins is serving an aggregate prison term of 40 years to life.

On appeal, Wilkins argued he was entitled to a new trial because the trial court violated the rule in *People v Antommarchi* (80 NY2d 247 [1992]) by conducting sidebar conferences with prospective jurors in his absence. At one of the sidebars the trial judge excused the prospective juror for cause; and at another sidebar the defense counsel for McKenzie-Smith used a peremptory challenge to dismiss the prospective juror. Wilkins also contended the trial court erred by instructing the jury, without any request from him, that it was to draw no adverse inference from his failure to testify and that it was to draw no unfavorable inferences from the fact that Wilkins was in custody.

The Appellate Division, Fourth Department affirmed Wilkins's convictions in a 4-1 decision. Regarding the sidebar conferences, the majority said reversal is not required where "the defendant's presence could not have afforded him or her any meaningful opportunity to affect the outcome..." such as where a prospective juror is excused for cause" by the trial judge. It said the same held true for the other sidebar, where the codefendant's attorney used a peremptory challenge to the second prospective juror. It said "the record establishes that the court directed each defense counsel to independently exercise peremptory challenges, without input from the other defense counsel," and "that defense counsel for the codefendant exercised his peremptory challenges before defense counsel for [Wilkins]," demonstrating that the second juror was challenged "before [Wilkins's] defense counsel had any opportunity to consider whether to challenge that prospective juror. Thus..., under the circumstances of this case, [Wilkins] could not 'have provided valuable input...', or indeed any input, regarding the peremptory challenge of that prospective juror." The court said the trial judge's unrequested jury instructions to draw no adverse inferences were harmless errors because "the jury is presumed to have followed that instruction'...."

The dissenter said the judgment should be reversed due to the *Antommarchi* violation at the second sidebar, where Wilkins was not present when his codefendant's attorney struck a juror with a peremptory challenge. Citing CPL 270.25(3), which provides that multiple defendants in a joint trial share the defense allotment of peremptory challenges and a challenge is allowed only "if a majority of the defendants join in such challenge," he said "the record is wholly devoid of support for the majority's conclusion that the court directed defense counsel to proceed in disregard of the requirements of CPL 270.25(3)... [G]iven the 'presumption of regularity [that] attaches to judicial proceedings' ... and the lack of any evidence that the court deviated from the procedure set forth in CPL 270.25(3), I conclude that CPL 270.25(3) was being followed at the time of the relevant sidebar conference and that the assent of both [Wilkins] and the codefendant was therefore needed to use any of their joint peremptory strikes." Since Wilkins "could have provided his defense counsel with some 'valuable input' during the relevant sidebar conference from which he was absent," the *Antommarchi* violation requires reversal, he said.

For appellant Wilkins: Brian Shiffrin, Rochester (585) 423-8290

For respondent: Monroe County Assistant District Attorney Scott Myles (585) 753-4541

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No. 76 Estate of Kainer v UBS AG

This action stems from a dispute among purported heirs of Margaret Kainer over ownership rights to a Degas painting, "Danseuses," which the Nazis confiscated along with the rest of her art collection soon after they took power and sold at a forced auction in 1935. Kainer spent the war as a refugee in Switzerland and then moved to France, where she died in 1968 without children or a will. Supreme Court dismissed the suit on the ground of forum non conveniens without first determining whether it had personal jurisdiction over the defendants.

The identity of the rightful heirs to Kainer's estate has been extensively litigated in Europe in actions involving Norbert Stiftung ("Foundation"), a Swiss foundation claiming to be the heir pursuant to a German "certificate of partial inheritance" issued in 1972; two Swiss localities that base their claimed status as sole legal heirs on a Swiss certificate of inheritance issued in 2003; and the plaintiffs in this action – Kainer's estate and 11 purported heirs -- who claim the estate passed to them through intestacy, as confirmed by a French certificate of inheritance issued in 2012.

Christie's, a New York auction house, contacted the Foundation in 2009 to facilitate a sale of the painting by a Japanese gallery. Because the painting was listed as stolen, it could not be sold unless its heirs released any claims to it. The Foundation renounced its rights in a Restitution Settlement Agreement with the gallery in exchange for a share of the sale proceeds. Christie's sold the painting at public auction in New York for \$10.7 million in 2009.

In 2013, after they became aware of the sale, Kainer's estate and its heirs brought this action for conversion and unjust enrichment against the Foundation and UBS AG, a Swiss bank that allegedly created the Foundation, among other defendants. The Foundation and UBS moved to dismiss the suit on the grounds of forum non conveniens and lack of personal jurisdiction.

Supreme Court declined to address the jurisdiction issue based on the U.S. Supreme Court's 2007 decision in Sinochem Int'l Co. v Malaysia Int'l Shipping Corp. (549 US 422), which ruled a district court "may dispose of an action by a forum non conveniens dismissal, bypassing questions of subject-matter and personal jurisdiction, when considerations of convenience, fairness, and judicial economy so warrant." The state court then found New York is an inconvenient forum, saying that "to determine the parties' status and rights as heirs ... would potentially require application of the laws of France, Switzerland, and Germany" and that the issue was already the subject of proceedings brought by the plaintiffs in Switzerland against the Foundation and the Swiss localities.

The Appellate Division, First Department affirmed, citing Sinochem and saying, "As it could not readily determine, without allowing significant discovery, that it had personal jurisdiction over all the defendants, the motion court properly considered the defendants' arguments that New York is an inconvenient forum." It also agreed the dismissal was proper, noting the "significant" burden on a New York court to choose between and apply foreign estate laws to determine the lawful heirs, "the very issue that is already being litigated abroad."

The plaintiffs argue the lower courts were required to first decide the question of jurisdiction under this Court's 1980 decision in Ehrlich-Bober & Co. v University of Houston (49 NY2d 574), which said the doctrine of forum non conveniens "has no application unless the court has obtained in personam jurisdiction of the parties." They say the lower courts also erred in finding New York is an inconvenient forum, including their failure to consider "the strong public interest in providing justice to victims of the Holocaust" under New York law and the federal Holocaust Expropriated Art Recovery Act of 2016.

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No. 77 **People v Michael Lamb**

Michael Lamb ran a prostitution ring in Manhattan and northern New Jersey from 2013 to 2015, recruiting sex workers and soliciting customers through internet advertisements. He was arrested in September 2015 after an investigation by the Manhattan District Attorney's Office, which found evidence that he attempted to coerce Jasmine C., an 18-year-old high school senior in East Orange, New Jersey, to work for him as a prostitute. She met Lamb in his apartment in Newark to discuss what she thought was a catering job. She refused to work for him, but submitted to his demand that she pose for nude photos when he threatened that he had a gun. Lamb emailed Jasmine over the next three days, threatening to release the photos and to cause her physical harm if she did not agree to work for him, which she continued to refuse. All of Lamb's coercive conduct toward her occurred in New Jersey, not in New York.

In addition to promoting prostitution, Lamb was charged with sex trafficking under Penal Law § 230.34, a class B felony that applies to a defendant who "intentionally advances or profits from prostitution by: ... 5. using force or engaging in any scheme, plan or pattern to compel or induce the person being patronized to engage in ... prostitution activity by means of" threatening to "cause physical injury" or to "expose a secret" that would subject the victim "to hatred, contempt or ridicule," among other things.

Supreme Court concluded that Penal Law § 230.34 created separate elements for sex trafficking, the first requiring proof that the defendant advanced or profited from prostitution and the second requiring proof that he engaged in coercive or threatening conduct toward a trafficking victim. It instructed the jury that it could find New York had geographical jurisdiction over the charges if it found the prosecution proved Lamb "advanced or profited from prostitution" in New York, establishing the first element. Answering a jury question, the court said the first element "is not specific to anyone," unlike the element involving coercive conduct. The jury found New York had jurisdiction and convicted Lamb of two counts of sex trafficking and one of promoting prostitution. He was sentenced to 6 to 18 years in prison.

The Appellate Division, First Department affirmed. "The court correctly concluded that jurisdiction was established because the People had proven that defendant advanced or profited from prostitution in New York..., notwithstanding that the threatening conduct against a particular person occurred in New Jersey, because the statute does not require that a defendant advance or profit from the prostitution of the specific victim who was threatened," it said, citing *People v Giordano* (87 NY2d 441). It said, "At a minimum, defendant advanced prostitution in New York by advertising prostitution services online, while engaging in threatening conduct, albeit in New Jersey, involving the particular victim."

Lamb argues that, "because the core criminal conduct of sex trafficking is coercive conduct directed against the person trafficked, and all such conduct here occurred in New Jersey, New York lacked jurisdiction to prosecute him for sex trafficking." He also argues the trial court erred "when it instructed the jury that it could find Lamb committed sex trafficking in New York, if he advanced or profited from prostitution in New York, even if those actions were unrelated to the women he allegedly trafficked."

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