



SUPREME COURT OF CALIFORNIA

ORAL ARGUMENT CALENDAR SPECIAL SESSION — SANTA ROSA OCTOBER 2 & 3, 2007

The following synopses are provided for the cases placed upon the calendar of the Supreme Court for hearing at its Special Session at the Sonoma Country Day School, 4400 Day School Place, Santa Rosa, California on October 2 and 3, 2007:

TUESDAY, OCTOBER 2, 2006 — 9:00 A.M.

Opening Remarks: Historic Special Session

1. *Fashion Valley Mall, LLC v. National Labor Relations Board et al.* (S144753)

A federal appeals court asked the California Supreme Court to answer the following question to help it decide this case: May a shopping mall prohibit persons on its property from urging customers to boycott a store in the mall?

A union that represents employees at a newspaper handed out leaflets in front of the Robinson-May department store at the Fashion Valley Mall in San Diego. The leaflets said that the newspaper treated its employees unfairly and noted that the department store advertised in the newspaper; it asked the customers to call the newspaper. The mall generally allows such protests on mall property, but only if the protesters apply for a permit and agree to abide by the mall's rules, which include promising not to urge customers to boycott any of the stores in the mall. The mall forced the protesters to leave because they did not have a permit.

The union complained to the National Labor Relations Board (NLRB) that the mall had violated its right to conduct union activity. The NLRB ruled that the union had a right to hand out leaflets on mall property and did not have to apply for a permit, because California law did not allow the mall to make the union promise not to urge customers to boycott any of the stores in the mall as a condition to permitting free speech activities on mall property. The federal appeals court asked the California Supreme Court whether it is correct that California law does not allow the mall to enforce a rule prohibiting persons on mall property from urging customers to boycott a store in the mall.

The United States Supreme Court has interpreted the First Amendment to the United States Constitution as not extending free speech rights to private property such as the shopping mall in this case. The California Constitution, however, contains its own free speech provision, which is worded differently than that of the United States Constitution. In *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899 (*Pruneyard*), the California Supreme Court applied what is sometimes called “independent state grounds” and interpreted the California Constitution as extending free speech rights to shopping malls like Fashion Valley Mall. The court noted that large shopping centers to which the public is invited can provide an essential and invaluable forum for exercising free speech rights. Specifically, the court held that persons could gather signatures on a political petition on the mall’s property and explain their views to customers inside the mall.

The issue in this case concerns how far *Pruneyard’s* free speech rights extend and to what extent, if any, a mall may limit free speech activities on its private property. The union argues that it should be permitted to urge customers to boycott stores within the mall just as *Pruneyard* permitted persons to gather signatures and express their views on mall property. It argues that urging a boycott would be less effective if it were forced to do so outside the shopping center, which might be far away from the store being boycotted. The mall argues that at least it may forbid persons on its own private property from urging a boycott of its own tenants, because a boycott would interfere with the intended purpose of the mall.

2. *Rico et al. v. Mitsubishi Motors Corp. et al.* (\$123808)

Defendants were sued by plaintiffs after a sport utility vehicle rolled over on a southern California freeway. The issue here, however, involves whether plaintiffs properly made use of the opposing lawyer’s notes, after plaintiffs’ lawyers discovered those notes.

Both sides hired experts to help determine the cause of the accident. Defendants held a strategy meeting with their experts and attorneys to discuss the case. During the meeting, defendants’ counsel, Yukevich, instructed a Mitsubishi employee to take notes of the meeting on Yukevich’s computer. At the end of the meeting, Yukevich printed a copy of the notes and later edited them, and also wrote on them by hand. He planned to use the notes in his case preparation and never intended anyone else to see them.

Plaintiffs’ attorney, Johnson, came into possession of these notes. The two sides dispute how that happened. Although Johnson knew that the notes related to the defendants’ case, Johnson did not tell defendants he had them. Instead he made a copy, reviewed the notes, and decided that they would be a valuable tool to discredit

defendants' experts. He also gave copies to co-counsel and his experts, each of whom studied the notes.

Approximately one week after he received the notes, Johnson used them to question a defense expert at a deposition (a pre-trial hearing at which one side can question the other side's witnesses). When defendants learned Johnson had their notes, defendants asked the trial court to have Johnson, his co-counsel and plaintiffs' experts disqualified (removed) from the case. The trial court held a hearing on the motion to disqualify.

Defendants claimed that Johnson must have gained access to Yukevich's file when Yukevich left it in a conference room and went to the restroom. They said Johnson improperly took the notes from the file during Yukevich's absence. Plaintiffs strongly disagreed. They provided testimony supporting their claim that a court reporter gave the notes to Johnson after the deposition.

The trial court, after considering all of the evidence, concluded that defendants failed to meet their burden of showing that Johnson stole the notes. The court determined that Johnson inadvertently obtained possession of the notes.

The next question that the trial court decided was what action, if any, Johnson was required to take upon his inadvertent receipt of the notes. Johnson argued that because he did nothing wrong to get the notes, he was duty-bound to use them to his clients' advantage. Defendants claimed once it was clear that Johnson was not entitled to the notes, he was supposed to stop reading them and return them to Yukevich.

The trial court agreed with the defendants and granted their motion to disqualify Johnson and plaintiffs' other attorneys. The Court of Appeal affirmed that decision.

The Supreme Court granted review to determine what action must be taken by an attorney who inadvertently receives privileged documents and whether disqualification of counsel and experts is an appropriate remedy under the circumstances of this case.

1:30 P.M.

3. People v. Douglas Oliver Kelly (S049973)

The defendant in this case is appealing his death penalty conviction. Unlike most appeals, death penalty appeals go directly to the Supreme Court, bypassing the Court of Appeal. A death penalty trial is divided into a guilt phase and a penalty phase. At the guilt phase in this case, the jury convicted the defendant of the first degree murder of 19-year old Sara Weir while he was in the course of raping and robbing her. After the

penalty phase, the jury recommended the death sentence and the court imposed that sentence.

The evidence showed that defendant stabbed Sara to death with a pair of scissors in his girlfriend's apartment. Several days after the killing, defendant's girlfriend's ten-year-old son discovered the body, nude and wrapped in a blanket, under his bed. A few days before he killed Sara, defendant raped another woman in the same apartment, using the same scissors to threaten her. Later he assaulted his girlfriend in the same apartment. The prosecution also presented evidence that defendant raped three other women in previous years, some of whom he also robbed.

Defendant has raised many issues in this case. Among those likely to be discussed at oral argument are these:

A. The court permitted the prosecution, over objection by defendant, to admit evidence of some of defendant's previous rapes, including the one in the apartment with the scissors, the assault on his girl friend, and other criminal behavior shortly before the crimes. Defendant contends this evidence of other crimes was inadmissible because its only purpose was to make him look bad and was not relevant to his guilt of the charged crime. The prosecution argues the evidence was admissible to help the jury understand what happened to Sara and to show that defendant intended to rape and rob her just like he raped and robbed others.

B. At the penalty phase, the prosecution is generally allowed to present evidence regarding the victim and the impact her death had on her friends and family, so long as the evidence is not too emotional. Over defense objection, the court permitted the prosecution to show the jury a videotape that Sara's mother prepared and narrated about Sara's life. Defendant contends the videotape was too emotional to show the jury, and it would cause the jury to reach a verdict based on emotion rather than reason. The prosecution contends it was not unduly emotional and was admissible for the jury to understand who Sara was and thus to understand the seriousness of the crime.

4. *Hebrew Academy of San Francisco et al. v. Goldman et al.* (George, C.J. and Werdegar, J., not participating; Mallano and Manella, JJ., assigned justices pro tempore) (S134873)

Rabbi Pinchas Lipner and the Hebrew Academy of San Francisco sued Richard Goldman and others for damages caused by statements Goldman made about Rabbi Lipner in an interview conducted more than 15 years ago. The Supreme Court must decide whether the lawsuit was filed too late.

In 1992, Goldman was interviewed as part of an oral history project and made several insulting comments about Rabbi Lipner, including that he is not “an honorable man” and that on “a couple of occasions” when Lipner entered a classroom, “the children would stand at attention as if it were the Fuhrer walking in.” Fewer than 10 copies of the transcripts of this interview were printed. One was placed in the Bancroft Library at U.C. Berkeley and another in the Charles E. Young Research Library at UCLA. Copies were made available to other libraries. The transcript may be located using publicly available online catalogs.

Rabbi Lipner was not aware of the interview until 2001 when a colleague who was writing a book about Rabbi Lipner found the interview in the library at U.C. Berkeley and told Rabbi Lipner about it. The Superior Court (the trial court) held that it was too late for Rabbi Lipner to sue Goldman, because the lawsuit was barred by the statute of limitations, which requires that a suit for defamation be brought within one year.

The California Supreme Court must consider whether two rules apply in this case: the single-publication rule and the discovery rule. The single publication rule creates an exception to the usual rule that someone who is defamed may sue anytime the defamatory statement is published again. But the single-publication rule provides “that, for any single edition of a newspaper or book, there was but a single potential action for a defamatory statement contained in the newspaper or book, no matter how many copies of the newspaper or the book were distributed.” The court must decide whether this rule applies in this case in which only a few copies of the transcript were printed.

The discovery rule may delay the running of the statute of limitations until the plaintiff discovered (or reasonably should have discovered or suspected) that he or she has a reason to sue. Some cases have applied the discovery rule when the defamatory statement was hidden from the plaintiff. The California Supreme Court in *Shively v. Bozanich* (2003) 31 Cal.4th 1230, held that the discovery rule did not apply when the defamatory statement was published in a book that was generally distributed to the public. The Supreme Court must decide whether the discovery rule applies in this case in which the interview was not hidden, but also was not generally distributed to the public like the book in *Shively*.

5. *People v. Mendoza (Martin)* (S067678)

The defendant in this case is appealing his death penalty conviction. Unlike most appeals, death penalty appeals go directly to the Supreme Court, bypassing the Court of Appeal. A death penalty trial is divided into a guilt phase and a penalty phase.

During the penalty phase, the jury must decide whether the defendant should be sentenced to life imprisonment without possibility of parole or to death. The jury arrives at that decision by weighing evidence of various aggravating and mitigating

circumstances presented by the prosecutor and the defense attorney. The fact that defendant was convicted of killing three children in front of their parents is an example of an aggravating factor. Defendant's allegations that he was under duress at the time he committed the murders and has limited intellectual functioning are examples of mitigating factors.

During the trial, the District Attorney of San Bernardino County presented evidence of the details of the murder. Defendant's stepdaughter told her mother (defendant's wife) that defendant sexually molested her. His wife left him, taking their five children with her. When defendant called his wife to find out why she had left, she confronted him with the accusations. He denied abusing his daughter and tried to get his wife to return. When reconciliation ultimately failed, defendant drove to his wife's brother's house, where defendant's wife and children were staying. After arguing with his wife, his brother-in-law, and his wife's nephew, defendant pulled out a gun and forced four children to get into a car. Defendant, hearing the sirens of police officers responding to the scene, shot the children, killing three and wounding the fourth.

The prosecutor also presented testimony of members of the victims' family regarding the impact their death had on them. Defense counsel put on evidence of defendant's limited intellectual functioning and that the murder was an impulsive reaction to losing his family and to the stress of the situation. Defense counsel also presented testimony of members of defendant's family regarding defendant's good qualities and his difficult childhood.

Although defendant has raised numerous issues in his appeal, defense counsel has indicated in a letter to the court that she will be focusing on one issue at oral argument, the alleged violation of defendant's rights under the Vienna Convention on Consular Relations.

The Convention is an international treaty that sets forth the basic legal rights and duties of those countries that have agreed to be bound by the treaty, of which the United States is one. When a foreign national, such as defendant in this case, is under arrest in a country that is a party to the Convention, Article 36 requires authorities to notify the detained national of his right to request assistance from the consular officials of his home country. The consular officials must be permitted to render various forms of assistance, including arranging for legal representation. Defendant is a Mexican national, but the parties concede he was not informed of his rights under the Convention.

On January 9, 2003, the Government of Mexico initiated proceedings in the International Court of Justice against the United States, alleging violations of the Convention in the cases of defendant and 53 other Mexican nationals who had been sentenced to death in state criminal proceedings in the United States. On March 31, 2004, the International Court issued its decision, concluding the United States had

violated Article 36 and requiring United States courts to review and reconsider the convictions and sentences. On February 28, 2005, President George W. Bush issued a Memorandum to the United States Attorney General stating that the United States would comply with its obligations by having state courts “give effect” to the International Court’s decision.

Defendant contends that his rights under the Convention were violated, requiring the California Supreme Court to set aside his death sentence. The Attorney General argues that this court is not bound by the International Court’s decision. The Attorney General also argues that the law enforcement officers had no way of knowing defendant was a Mexican national and thus entitled to certain rights under the Convention. Finally, the Attorney General contends that even if defendant’s rights were violated, defendant has not established that he was prejudiced by the violation. For the violation to be prejudicial, it must be serious enough to make the court doubt that the jury would have come to the same result without the violation.

WEDNESDAY, OCTOBER 3, 2007 — 9:00 A.M.

6. *In re Ronald Lee Bell on Habeas Corpus* (S105569)

Ronald Lee Bell was convicted and sentenced to death for the murder of Raymond Murphy during a robbery of Wolff’s Jewelry Store in Richmond in 1978. Bell shot Murphy, the store manager, and another employee and fled with more than \$30,000 worth of jewelry. Bell was identified as the killer by Dorothy Dorton, then aged 13, and by Dorton’s 14-year-old aunt, Ruby Judge, both of whom had been in the store at the time of the robbery-murder. Judge’s adult sister and Dorton’s aunt, Ernestine Jackson, was waiting in her car outside the store and also identified Bell.

Bell’s defense at trial and in post-trial proceedings was that the eyewitnesses erred in their identifications and that his brother, *Larry Bell*, was the real culprit. Almost ten years earlier, Ronnie Bell had killed eyewitness Dorothy Dorton’s father, Alcus Dorton, and had been convicted of manslaughter. Bell contended that Ernestine Jackson told the police (falsely) that she saw him (instead of Larry Bell) commit the crimes in retaliation for his having killed Alcus Dorton, and that Jackson convinced her sister and niece to corroborate her false account.

After Bell’s conviction was affirmed on appeal by the Supreme Court of California, Bell petitioned the court for a writ of habeas corpus (one procedure for overturning a criminal conviction), claiming that he was actually innocent of the robbery-murder, that his brother Larry Bell had actually committed the crime, and that the eyewitnesses — Dorton, Judge, and Jackson — had testified falsely at trial. These allegations were supported by (1) declarations from two longtime acquaintances of Ernestine Jackson, stating that Jackson had subsequently recanted her trial testimony; (2)

a declaration from Leroy Kelly, who knew both the Jackson family and the Bell family and who said Jackson wanted to punish Bell for having killed Alcus Dorton; and (3) a declaration from Dorothy Dorton, who recanted her trial testimony identifying Bell. The Supreme Court asked a lower court judge (a “referee”) to hear witnesses and answer a number of questions relating to the truthfulness of the eyewitnesses’ trial testimony and the truthfulness of the declarations Bell had submitted. During the course of that hearing, Bell withdrew all of the declarations except the one from Leroy Kelly. After the hearing, the referee found that Jackson had not recanted her trial testimony, that Kelly’s contrary testimony was not credible, that Jackson had not instructed Dorton or Judge to falsely identify Ronnie Bell, and that Dorton and Judge had not recanted their trial testimony identifying Ronald Bell.

The Supreme Court must decide whether the prosecution presented false testimony at Bell’s trial and whether Bell is actually innocent of the robbery-murder. The court ordinarily gives great weight to a referee’s findings but does not have to accept them. The court’s decision will determine whether Bell’s conviction and death sentence should be overturned.

7. City of Stockton v. Superior Court (Civic Partners Stockton, LLC, Real Party in Interest) (S139237)

A developer sued the City of Stockton, claiming the city had breached contracts for the redevelopment of a hotel and the construction of a movie theater next door to the hotel. The city “demurred” to the complaint (that is a way of asking the court to dismiss a lawsuit because it cannot succeed). The city argued that it could not be sued because the developer had neglected to present a claim to the city.

Under a state law that has long been informally known as the “Tort Claims Act,” anyone who seeks “money or damages” from a governmental defendant must first notify the government of the claim, so that it can investigate it and decide whether to pay the claimant without going through a trial. The claim must be presented within a certain period of time, or else the claimant loses the right to sue the government.

Tort claims are not based on contract; they are brought for personal injuries or property damage. The developer in this case argued that the “Tort Claims Act” did not apply to its contract claims. The trial court agreed, and refused to dismiss the developer’s complaint. The Court of Appeal, however, decided that the claims act does apply to contract cases. The Court of Appeal then considered, and rejected, a series of excuses the developer offered for not presenting a claim. It ordered the trial court to rule in the city’s favor.

Some earlier Court of Appeal cases conclude that the claims act does not cover contract claims. The Supreme Court granted review of this case to settle the question of whether a contract claim must be presented to the government before a lawsuit is filed.

8. *People v. Watson (Joey R.)* (S131052)

While serving a prison sentence, Joey Reuben Watson was transferred from state prison to Atascadero State Hospital pursuant to section 2684, which allows for such transfers when a state prison inmate is in need of acute mental health treatment. While Watson was being admitted to the hospital, he lunged at and hit a nurse, a crime the law refers to as a battery. Watson was charged with battery under Penal Code section 4501.5, which makes it a *felony* for any person confined in a state prison to commit a battery against a non-confined person, such as a guard or other employee. Section 4501.5 provides that a battery committed by a prisoner against a non-prisoner is a felony punishable by two, three, or four years in state prison. By contrast, a battery is normally charged as a *misdemeanor* under Penal Code section 243, subdivision (a), and the maximum punishment for that crime is a six-month county jail sentence and a \$2,000 fine.

Watson has petitioned the Supreme Court to reverse his conviction, arguing that because he had been transferred to Atascadero State Hospital at the time he hit the nurse, he was no longer “confined in a state prison” for purposes of section 4501.1, and therefore should not have been charged with a felony offense. Penal Code section 6082 states that the word “prison” refers to “hospitals and institutions for the confinement, treatment, employment, training and discipline of persons in the legal custody of the Department of Corrections.” Penal Code section 4504 provides that a prisoner is considered to be confined in a state prison if he is serving a prison sentence in one of the prisons specified in Penal Code section 5003, or if he is “temporarily” outside the walls or bounds of the prison for any purpose. Atascadero State Hospital is not one of the prisons listed in section 5003.

The Supreme Court will have to decide whether Atascadero State Hospital is a prison as that term is defined by section 6082, or alternatively, if a prisoner transferred to Atascadero for mental health treatment is “temporarily” outside the walls or bounds of the prison, such that a battery committed by such a prisoner may be punished as a felony under section 4501.5.

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