19-1129-cv

United States Court of Appeals for the Second Circuit

Joseph Cracco,

Plaintiff-Appellee,

-against-

Cyrus R. Vance, Jr.,

Defendant-Appellant,

The City of New York, Police Officer Jonathan Correa, Shield 7869, Transit Division District 4, Police Officer John Doe,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLEE

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POINT I

THE COURT BELOW DID NOT GRANT "SUA SPONTE" SUMMARY JUDGMENT, BUT IF IT DID SO IT ACTED WITHIN ITS DISCRETION

In Point II of the District Attorney's Brief, the argument is made that the court below "*sua sponte*" granted summary judgment because Plaintiff-Appellant's Rule 56 cross-motion purportedly made . . .

> . . . no reference to a prospective as-applied challenge and [the decision], instead, was based exclusively on the events of Cracco's past prosecution.

Appellant's Brief at 34.

But it is wholly incorrect to say that Cracco's cross-motion did not contemplate prospective relief. The very relief sought in the Amended Complaint's Ninth Cause of Action (A78-79)—*declaratory judgment*—was and remains prospective in nature, and Cracco's summary judgment cross-motion sought no more and no less than such a declaration. Moreover, Appellant's bold but erroneous assertion before this Court that Cracco's summary judgment cross-motion did not seek prospective relief is belied by the following text from Cracco's Rule 56 brief below:

> Finally, a declaration such as that proposed here would go a long way toward ameliorating or even putting to an end a crisis that has for several years vexed the Courts and frustrated the other two branches of state government, i.e., the Legislature and the Executive.

A506.

But even assuming, *arguendo*, that the decision of the court below was in some respect or other "*sua sponte*," under the standards established in this Circuit for granting *sua sponte* summary judgment, the court below properly reached the issues that it decided.

Under certain circumstances, district courts possess the "inherent power" to grant summary judgment *sua sponte*. *See First Fin. Ins. Co. v. Allstate Interior Demolition Corp.*, 193 F.3d 109, 114, 119 (2d Cir.1999) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986)); *Kalderon v. Finkelstein*, No. 08 Civ. 9440, 2010 WL 3359473, at *5 (S.D.N.Y. Aug. 25, 2010). Where the record indicates that all of the evidentiary materials that a party might submit in response to a motion for summary judgment are before the court, "a *sua sponte* grant of summary judgment against that party may be appropriate if those materials show that no material dispute of fact exists and that the other party is entitled to judgment as a matter of law." *First Fin. Ins. Co.*, 193 F.3d at 115 (quotation and citation omitted). "The record must, therefore, reflect the losing party's inability to enhance the evidence supporting its position and the winning party's entitlement to judgment." *Id.*

While courts are generally advised to provide notice before granting summary judgment *sua sponte*, this Court has nonetheless observed that district courts may, under certain circumstances, grant summary judgment *against a*

moving party (and there were cross-motions for summary judgment below, so the District Attorney was a moving party) without notice or additional opportunity to defend. *Bridgeway Corp. v. Citibank*, 201 F.3d 134, 139 (2d Cir. 2000) (citing *Coach Leatherware Co., Inc. v. Ann Taylor, Inc.*, 933 F.2d 162, 167 (2d Cir. 1991) ("[The] court need not give notice of its intention to enter summary judgment against the moving party.")). In the absence of notice, the court need only determine whether the facts were fully developed such that the moving party would suffer no "procedural prejudice." *Bridgeway Corp.*, 201 F.3d at 139 (citing *Coach Leatherware Co., Inc.*, 933 F.2d at 167). A party is procedurally prejudiced if it is surprised by the court's action in a way that results in the party's failure to present evidence in support of its position. *Bridgeway Corp.*, 201 F.3d at 139. If, however, the party cannot claim to have been surprised, or if, "notwithstanding its surprise, the party had no additional evidence to bring, it cannot plausibly argue that it was prejudiced by the lack of notice." *Id.* at 140. Moreover, the threat of prejudice is "greatly diminished if the court's *sua sponte* determination is based on issues identical to those raised by the moving party." *Id.* (quotation and citation omitted). The likelihood of procedural prejudice is greatly reduced "if the moving party speaks to those issues in the course of the district court proceedings." *Id.*

In the District Attorney's own memorandum in support of *its* cross-motion for summary judgment, the following argument was made:

Finally, the relief Cracco seeks is divorced from the facts of his case.

> Cracco claims that Officer Correa required five attempts of the wrist flick test to open his knife, yet he seeks a declaration enjoining prosecutions where the knife does not open on the first attempt. Cracco thus asks the Court to render a constitutional ruling that is both broader than the record and in further conflict with state and federal decisions finding that a knife need not open on every attempt to fall within the statute.

A447-48.

Thus, the "determination [of the court below was] based on issues identical to those raised [or at least framed] by the [cross-]moving party," *Bridgeway Corp.*, *supra*, and the District Attorney "cannot claim to have been surprised." *Id.*

POINT II

THE CASE HAS NOT BEEN RENDERED MOOT, BECAUSE THE STATUTORY DEFINITION SURVIVED THE REPEAL, AND THE "WRIST-FLICK" TEST IS BASED ON THE STATUTORY DEFINITION

Appellant admits that the statutory repeal of the gravity-knife prohibition left the definition in place:

> The second component, Penal Law §265.00(5), defined a gravity knife as "any knife which has a blade which is released from the handle or sheath thereof by the force of gravity or the application of centrifugal force which, when released, is locked in place by means of a button, spring, lever or other device." While this section remains part of the Penal Law, no operative section exists through which it could be invoked to charge a criminal offense.

Appellant's Brief at 34.

As the court below recognized—with the District Attorney's guidance—the statutory definition is precisely what gave rise to the "wrist-flick" test that was used by police and prosecutors in New York City to determine whether a given folding knife could give rise to a criminal prosecution under the the District Attorney's interpretation of the statute. As the court below put it:

> In evaluating whether to pursue a gravity knife charge, an Assistant District Attorney considers first whether the knife meets the statutory definition i.e., can the knife be opened to a locked position by application of the wrist flick test and second, whether the prosecution will be able to meet its burden of proof beyond a reasonable doubt at trial.

Cracco v. Vance, 376 F. Supp. 3d 304, 310 (2019); SA10 (citing Declarations of

Assistant District Attorneys Dan M. Rather at ¶ 28 (A269) and Leah Branch at ¶ 5 (A323), *q.v.*); *see also Copeland v. Vance*, 893 F.3d 101, 107-08 (2018) (explaining that the "wrist-flick" test is a functional one deriving from the statutory definition).

Given that (a) the scope of applicability of the "wrist-flick" test was what was decided below, (b) the "wrist-flick" test is derived from the statutory definition at Penal Law §265.00(5), and (c) the statutory definition has not been repealed, it follows that the decision below has not been rendered moot by the action of the State Legislature in having removed the "gravity knife" from the list of prohibited weapons found at Penal Law §265.01.

As noted above, Appellant comments that, "While this section [the definition of "gravity knife"at Penal Law §265.00(5)] remains part of the Penal Law, no operative section exists through which it could be invoked to charge a criminal offense." Appellant's Brief at 34.

That may be true today,[1] but there *was* an "operative section" at the time that the decision below was rendered, so the declaratory judgment was proper and

[1] But see A729, A734 (New York City Police Department taking the position *after* the repeal of the gravity-knife statute that "[t]he public should also be aware that the possession of gravity knives in the New York City subway system remains illegal."); A723-25 (brief in *Copeland* before United State Supreme Court citing Metropolitan Transportation Authority rules in showing that the "gravity knife" prohibition could still be enforced in the New York City subway system notwithstanding its removal from the list of prohibited weapons found at Penal Law §265.01).

the issue justiciable. See, e.g., *Public Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 241-42 (1952) (noting that judicial power does not extend to abstract questions and that claims based merely upon assumed potential invasions of rights are not enough to warrant judicial intervention). Thus, the court below did not err by having rendered an advisory opinion. Although the same action today would not likely be justiciable because there is no live case or controversy (and thus would amount to an advisory opinion), that is not the same as the decision below—properly rendered under the circumstances then present—being rendered moot following the post-decision repeal of the "operative section" of the statute.

POINT III

THE COURT BELOW CORRECTLY FOUND THE STATUTE TO BE VAGUE AS APPLIED TO KNIVES REQUIRING MULTIPLE ATTEMPTS TO OPEN

The scope of applicability of the "wrist-flick" test (i.e., how many tries are permissible if the knife is to be the basis for a prosecution) is the crux of what was decided below:

> Under the gravity knife statute and the procedures used to enforce it, there is indeterminacy regarding what a gravity knife statute actually is. Is it a folding knife that opens and locks into place on the first try? The second? Any number of tries? The gravity knife statute and the wrist flick test do not allow Cracco to discern whether his intended conduct will be criminally prohibited. Criminal culpability here is tied to a vague definition and functional test that could have different outcomes depending on who is performing it and when. The gravity knife statute presents a high risk of arbitrary and discriminatory enforcement in the context of Cracco's challenge.

Cracco v. Vance, 376 F. Supp. 3d 304, 317 (2019); SA22-23.

Earlier in its opinion, the court below framed the relief requested as follows:

> Cracco's requested relief is a declaration that the law is void for vagueness when applied to criminal prosecutions for the possession of any folding knife that has a bias toward closure, a lockable blade, and the inability to be readily be opened by gravity or centrifugal force, *with a specific finding that a knife is not readily opened unless it opens by means of a wrist flick test on the first or second attempt*.

Cracco, 376 F. Supp. 3d at 314; SA17 (emphasis added).

The disjunctive between "first" and "second" merits discussion here. Although Cracco initially sought to limit the specific finding that a knife is not

readily opened (and therefore a basis for a criminal charge) unless it opens by means of a wrist flick test on the *first* attempt, it became apparent upon briefing the cross-motions for summary judgment that the District Attorney did not appear to dispute the proposition that a knife should open within fewer than three (that is, *two*) tries in order to give rise to a criminal charge. *See* Declaration of Assistant District Attorney Dan M. Rather at ¶ 30 (A269).[2] Accordingly, in his final brief on the cross-motion for summary judgment, Cracco conceded that two tries might be permissible (the main thing being that some limit must be imposed), writing:

> [G]iven that the Rather Declaration appears to concede that two attempts would be the maximum permissible, it would seem to be of no encumbrance to the Defendant's ability to prosecute were this court to declare . . . that the remedy for the vagueness inherent in the statute is that the sworn accusatory instrument must state that the knife must open by means of the wrist-flick test after no more than two attempts. Put another way, this would be declaration that "any knife that does not open by means of a wrist-flick test on the first or second attempt to do so cannot be readily opened by gravity or centrifugal force and therefore cannot be the basis for a criminal prosecution for mere possession under §§ 265.00(5) and 265.01(1) of the Penal Law of the State of New York."

A570-71.

Finally, and relatedly, Appellant repeatedly—and wrongly—attempts to

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[2] Appellant's Brief highlights this statement. *See id.* at 12-13 ("He [Rather] is not aware of any prosecution going forward where, at the time of trial, the officer could not open the defendant's knife to a locked position by application of the wrist flick test in fewer than three attempts.") (citing A269 (Declaration of Assistant District Attorney Dan M. Rather)).

portray the procedural posture of the criminal matter at the time of disposition as being one in which a dispute existed between the arresting officer (Correa) and the criminal defendant (Cracco) as to the number of tries it took Officer Correa to open the knife using the "wrist-flick" test. Appellant's Brief at 1 ("As reflected in the record of the prosecution, a factual dispute existed between Cracco and the officer as to what happened when the officer applied the test."), 22 ("[T]he district court found, without record support, that this office would pursue a charge even if it was 'undisputed' that an officer required 'four or five tries to effectively apply the wrist-flick test.'" (citing SA22)).

But all of this ignores the undeniable fact that, in the criminal matter, the accusatory instrument itself (the arresting officer's only testimony by the time the matter was disposed) completely failed to indicate how many attempts it had taken him to open the knife. *See* A476. There was no "dispute," simply because there was no testimony for the arresting officer on that point at all. Cracco brought this to the attention of the court below, writing:

> [T]hat "dispute" did not in fact arise until well after this current motion practice began in this federal case, for in the underlying state criminal matter the charge was brought without the accusatory instrument or any other source ever having stated how many tries were required.

A569.

CONCLUSION

In sum, Appellant seeks to vacate a decision that did nothing more than limit prosecutions to those in which a putative "gravity knife" opened by means of the "wrist-flick" test opened on the first or second try, the very same standard that the District Attorney, through the Rather Declaration, purported to apply. Appellant claims that the decision below is moot because of the partial repeal that removes the "gravity knife" from the list of prohibited weapons, but the fact that the statutory definition, which is the basis for the "wrist-flick" test, remains part of the Penal Law of the State of New York, urges that the decision remain in place.

For all of the foregoing reasons, the decisions of the court below should be determined NOT to have been rendered moot by the subsequent legislative action and should be AFFIRMED.

Dated: May 22, 2020
Port Washington, New York

Respectfully submitted,

/s

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the foregoing brief is in 14-point Times New Roman proportional font and contains 2,789 words, and is thus in compliance with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure.

Dated: May 22, 2020
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