

NEW YORK COURT OF APPEALS

The People v. Kenneth Nealon

26 N.Y.3d 152 (2015) · No. No. 133 · Decided October 27, 2015

SUMMARY

The New York Court of Appeals held that a trial court's failure to discuss a substantive jury note and its intended response with counsel outside the jury's presence, while reading the note verbatim in open court before responding, was not a mode of proceedings error. Because defense counsel had meaningful notice of the note's contents, an objection was required to preserve the claim for appellate review. The court reversed the Appellate Division's order and remitted the case for consideration of unresolved issues.

CASE DETAILS

COURT	New York Court of Appeals
WRITING FOR THE COURT	Fahey, J.; Lippman, Chief Judge; Pigott, J.; Abdus-Salaam, J.; Stein, J.; Rivera, J.
JURISDICTION	New York
DECIDED	October 27, 2015
DOCKET	No. 133
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	The People appealed, by leave of a Judge of the Court of Appeals, from an Appellate Division order unanimously reversing defendant's judgment of conviction based on the trial court's handling of substantive jury notes.
STANDARD OF REVIEW	The Court reviewed whether the alleged departure from the O'Rama jury-note procedure constituted a mode of proceedings error exempt from ordinary preservation requirements. Unpreserved claims generally were not reviewable.
PRECEDENTIAL VALUE	Published precedential opinion of the New York Court of Appeals
PARTIES	The People v. Kenneth Nealon

TOPICS

- jury instructions
- criminal procedure
- preservation of error
- appellate procedure
- standard of review

PRACTICE AREAS

criminal procedure

appellate procedure

jury instructions

QUESTIONS PRESENTED

1. Whether a trial court's failure to discuss a substantive jury note and its intended response with counsel outside the jury's presence constitutes a mode of proceedings error when the court reads the note verbatim into the record in the presence of counsel, the defendant, and the jury before responding.
2. Whether defense counsel's failure to object preserved the alleged O'Rama procedural error for appellate review.

HOLDINGS

1. When a trial court reads the precise contents of a substantive jury note verbatim into the record in open court in the presence of counsel, the defendant, and the jury before responding, the court's failure to discuss the note and intended response with counsel beforehand is not a mode of proceedings error, even though it departs from the preferred O'Rama procedure.
2. Because the trial court read the jury notes verbatim in the presence of counsel and counsel did not object to either the procedure or the responses, the claim was unpreserved for appellate review.

KEY QUOTATIONS

"Where, as here, defense counsel had notice of a jury note and 'failed to object . . . when the error could have been cured,' lack of preservation bars the claim" (at 161)

"Where, as here, counsel has meaningful notice of a substantive jury note because the court has read the precise content of the note into the record in the presence of counsel, defendant, and the jury, the court's failure to discuss the note with counsel before recalling the jury is not a mode of proceedings error." (at 162)

FACTUAL BACKGROUND

In September 2007, Kenneth Nealon and an accomplice severely beat another man and stole his cell phones, cash, and other personal property. Nealon was charged with first- and second-degree robbery, second-degree assault, and fifth-degree criminal possession of stolen property, and was convicted by a jury in Queens County. During deliberations, the jury sent substantive notes requesting instructions concerning the differences between the robbery degrees, reinstruction on all charges, and clarification concerning assault and the degree of injury.

PROCEDURAL HISTORY

Defendant was convicted as charged in Supreme Court, Queens County. The Appellate Division, Second Department, reversed, holding that the trial court violated the O'Rama procedure and committed a mode of proceedings error notwithstanding defense counsel's failure to object. The Court of Appeals reversed the Appellate Division and remitted for consideration of the facts and issues raised but not determined on appeal.

DISPOSITION

REMAND INSTRUCTIONS

Remanded to the Appellate Division, Second Department, for consideration of the facts and issues raised but not determined on the appeal to that court.

CASES CITED

- People v. O'Rama, 78 N.Y.2d 270, 277-280 (1991)
- United States v. Ronder, 639 F.2d 931, 934 (2d Cir. 1981)
- People v. Walston, 23 N.Y.3d 986, 989-990 (2014)
- People v. Tabb, 13 N.Y.3d 852, 853 (2009)
- People v. Kisoon, 8 N.Y.3d 129, 135 (2007)
- People v. Silva, 24 N.Y.3d 294, 299 (2014)
- People v. Alcide, 21 N.Y.3d 687, 692-696 (2013)
- People v. Starling, 85 N.Y.2d 509, 513-516 (1995)
- People v. Ramirez, 15 N.Y.3d 824, 825-826 (2010)
- People v. Williams, 21 N.Y.3d 932, 934-935 (2013)
- People v. Kadarko, 14 N.Y.3d 426, 429-430 (2010)
- People v. Ippolito, 20 N.Y.3d 615 (2013)
- People v. Mays, 20 N.Y.3d 969, 971 (2012)
- People v. Ochoa, 14 N.Y.3d 180, 188 (2010)
- People v. Kelly, 5 N.Y.3d 116, 119-120 (2005)
- People v. Cook, 85 N.Y.2d 928, 930-931 (1995)
- People v. Ciaccio, 47 N.Y.2d 431, 436 (1979)