TOURO COLLEGE
JACOB D. FUCHSBERG LAW CENTER
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Touro Law Review

Volume 21
Number 1 *New York State Constitutional Decisions: 2004 Compilation*

Article 6

December 2014

Appellate Division, Third Department, Encarnacion v. Goord

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Cover Page Footnote

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SUPREME COURT OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT

Encarnacion v. Goord[1]
(decided June 17, 2004)

Jose Encarnacion was charged with violating prison disciplinary rules while incarcerated.[2] Following a hearing, he was found guilty and his visitation rights were suspended.

Encarnacion claimed that the penalty of suspending his visitation privileges violated his constitutional rights.[3] He claimed that his right to visitation was a liberty interest, protected by the federal and state constitutions.[4] The Appellate Division rejected this claim stating that "[i]nmate visitation is not a liberty interest entitled to the protection of either the federal or state constitutions."[5]

Encarnacion "was charged with violating prison disciplinary rules prohibiting possession of money, promoting prison contraband, smuggling, solicitation, and conspiring to introduce drugs into the correctional facility where he was incarcerated."[6] Prison officials conducted investigations and uncovered that Encarnacion and fourteen other inmates had been

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[1] 778 N.Y.S.2d 562 (N.Y. App. Div. 2004).
[2] *Id.* at 563.
[3] *Id.* at 564.
[4] U.S. CONST. amend. XIV provides in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . ." N.Y CONST. art. I, § 6 provides in pertinent part: "No person shall be deprived of life, liberty or property without due process of law."
[5] *Encarnacion*, 778 N.Y.S.2d at 564 (citing Kentucky Dep't. of Corrections v. Thompson, 490 U.S. 454, 461 (1989); Matter of Vasquez v. Coombe, 655 N.Y.S.2d 694, 695 (N.Y. App. Div. 1997)).
[6] *Id.*

sending money to his fiancée in exchange for quantities of heroin.[7] There were two misbehavior reports "detailing a number of suspicious transactions conducted between [Encarnicion], his fiancée, and other inmates."[8] The reports also contained information regarding Encarnacion's refusal to submit to a urinalysis test as well as positive drug test results of the other inmates.[9] These factors, coupled with Encarnacion's guilty plea to all but the drug offense, constituted substantial evidence of his guilt.[10]

The Appellate Division, in a short decision, stated that Encarnacion did not have a federal or state protected liberty interest in his rights to visitation. A liberty interest is an interest "protected by the due process clause [that is either] derived directly from the due process clause itself, or . . . from the laws of the state."[11] The court relied on the United States Supreme Court case, *Kentucky Department of Corrections v. Thompson*.[12] In that case, the Court stated that "the interest must rise to more than an 'abstract need or desire' and must be based on more than a 'unilateral hope.' "[13] "[A]n individual claiming a protected interest must have a legitimate claim of entitlement to it."[14] The Court held that "[t]he denial of prison access to a particular visitor is 'well

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[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Encarnacion*, 778 N.Y.S.2d. at 564.
[11] Marino v. Klages, 973 F. Supp. 275, 277 (N.D.N.Y. 1997).
[12] 490 U.S. 454 (1989).
[13] *Id.* at 460. (citing Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972); Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458, 465 (1981)).

within the terms of confinement ordinarily contemplated by a prison sentence' and therefore is not independently protected by the Due Process Clause."[15]

In *Thompson*, inmates at the Kentucky State penitentiary brought a class action suit challenging the actions of the state penitentiary in their denial of a constitutionally protected "liberty interest in receiving certain visitors."[16] The commonwealth-issued *Corrections Policies and Procedures* governing general visitations privileges included a non-exhaustive list of people who could be denied visitation with the inmates.[17] Litigation was brought about by two separate incidents in which applicants were denied the opportunity to visit an inmate.[18] One inmate's mother was denied future visitations because she brought with her a person who had been barred for smuggling contraband.[19] Another visitor was denied visitation because after she left, the inmate she was visiting was found to be in possession of contraband.[20]

The *Thompson* Court stated that "a State creates a protected liberty interest by placing substantive limitations on official discretion."[21] The Court noted that past decisions have suggested that the most common way for the state to create "a liberty interest is by establishing a 'substantive predicate' " to govern the decision

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[14] *Id.*
[15] *Id.* at 461 (citing Hewitt v. Helms, 459 U.S. 460, 468 (1983)).
[16] *Id.* at 455-56.
[17] *Thompson*, 490 U.S. at 456.
[18] *Id.* at 458.
[19] *Id.*
[20] *Id.*
[21] *Id.* at 462 (quoting Olim v. Wakinekona, 461 U.S. 238, 249 (1983)).

making process and by mandating the outcome to be reached when relevant criteria have been met.[22] The Seventh Circuit Federal Court has used the formula "if X (the substantive predicate), then Y (the specified outcome, from which the enforcement officials are not free to depart)" in order to clarify what the phrase "substantive predicate" meant.[23] To facilitate the decision-making process, "explicitly mandatory language" must be used.[24] Further refining what it meant, the Court in *Thompson* defined explicitly mandatory language as "specific directives to the decisionmaker that if the regulations' substantive predicates are present, a particular outcome must follow, in order to create a liberty interest."[25] Plainly stated, the Supreme Court in *Thompson* concluded that "the use of 'explicitly mandatory language,' in connection with the establishment of 'specified substantive predicates' to limit discretion, forces a conclusion that the State has created a liberty interest."[26]

In *Vasquez v. Coomb*[27] an inmate was denied visitation time with a person who "was not to be admitted [into] the [correctional] facility because she was believed to be engaged in activities that posed a threat to the security of the facility." [28] New York's Appellate Division, following the decision in *Thompson*, affirmed that inmate visitation is not an interest protected by the state or

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[22] *Thompson,* 490 U.S. at 462 (citing *Hewitt*, 459 U.S. at 472).
[23] Smith v. Shettle, 946 F.2d 1250, 1253 (7th Cir. 1991).
[24] *Thompson,* at 463 (citing *Hewitt*, 459 U.S. at 471-72).
[25] *Id.*
[26] *Id.*
[27] 655 N.Y.S.2d 694 (N.Y. App. Div. 1997).

federal government.[29] Under New York law, "a superintendent may deny, limit, suspend or revoke the visitation privileges of any inmate or visitor to visit each other if the superintendent has reasonable cause to believe that such action is necessary to maintain the safety, security, and good order of the facility."[30]

The *Vasquez* court also relied on the decision in *Victory v. Coughlin*.[31] Victory, while outside the correctional facility for dental treatment, persuaded guards to remove his shackles so that he could enter a hotel room and spend some "private time" with his wife. [32] Victory and his wife then escaped and remained at large for about three years.[33] When Victory was apprehended and incarcerated, his wife pleaded guilty to obstructing governmental administration and was sentenced to a term of five years' probation.[34] Victory was denied further visitation with his wife whom the superintendent of the correctional facility felt posed a security risk to the facility.[35] The crux of Victory's argument was that he had a "fundamental right to visitation protected by the State Constitution."[36] He relied principally on *Cooper v. Morin*, which held that "a policy of noncontact visitation with respect to pretrial detainees is unreasonable unless supported by a strong showing of

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[28] *Id* at 695.
[29] *Id.* (citing *Thompson*, 490 U.S. at 468 (1989); Victory v. Coughlin, 568 N.Y.S.2d 186, 187 (N.Y. App. Div. 1991)).
[30] N.Y. COMP. CODES R. & REGS tit.7, § 200.5(a) (2004).
[31] 568 N.Y.S.2d. 186 (N.Y. App. Div. 1991).
[32] *Victory*, 568 N.Y.S.2d at 186-87.
[33] *Id.* at 187.
[34] *Id.*
[35] *Id.*
[36] *Id.*

necessity."[37] In *Cooper*, over ninety percent of the women in the facility were pretrial detainees.[38] The court had to decide "whether a pretrial detainee has a right to contact visitation with her family."[39] The pretrial detainee in *Cooper*, unlike the defendants Victory, Vasquez, Thompson and Encarnacion, all of whom were convicted of a crime and serving out their respective sentences, enjoyed the presumption of innocence. Presumption of innocence is "the fundamental principal that an individual cannot be punished under our American system of criminal jurisprudence unless the State comes forward with evidence sufficient to convince the trier of fact."[40] The *Victory* court distinguished the reasoning of *Cooper*, claiming that there is a "clear distinction between the rights of pretrial detainees and those of inmates involuntarily incarcerated for having been convicted of a crime."[41] The *Victory* court held that visitation privileges, although "generally permitted within the State's correctional facilities," do not rise "to the level of a 'protected interest' under the State Constitution."[42] The court also stated that "[w]hen access to a program is based upon objective criteria and enjoyment of participation is contingent upon

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[37] *Victory*, 568 N.Y.S.2d at 187 (citing *Cooper*, 399 N.E.2d. 1188, 1195 (N.Y. 1979)).

[38] *Cooper*, 399 N.E.2d at 1191.

[39] *Id.* at 1190.

[40] *Id.* at 1197 (Gabrielli, J., dissenting).

[41] *Victory*, 568 N.Y.S.2d at 187.

[42] *Id.* (citing Russo v. New York State Bd. of Parole, 405 N.E.2d. 225, 226-27 (N.Y. 1980)).

subjective factors, a 'legitimate expectation' is not warranted and no constitutional right arises."[43]

Both the federal and state courts have held that the suspension of visitation privileges does not violate an inmate's constitutional rights. The New York courts reasoned that an inmate may be denied particular visitation privileges because a prison sentence contemplates a term of confinement[44] whereas the United States Supreme Court in *Thompson* recognized the discretion of the official in charge, focusing more on the language of the statute or regulation rather than the actual deprivation.[45] This does not mean that state law will never create an enforceable liberty interest. The federal case law suggests that states can create a liberty interest by establishing substantive predicates guiding the discretion of the superintendent.[46] "If substantive predicates are present, a particular outcome must follow in order to create a liberty interest."[47]

In summation, prison officials have the right to deny, limit, suspend or revoke visitation privileges if there is reason to believe that such action is necessary to maintain the safety, security and, welfare of the facility.[48] Neither the federal nor the New York State constitutions protect an inmate who is deprived of his or her

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[43] *Id.* (citing Doe v. Coughlin, 518 N.E.2d. 536, 540 (N.Y. 1987)).
[44] *Vasquez*, 655 N.Y.S.2d at 694.
[45] *Martinez v. Coombe*, No. 95-CV-1147, 1996 WL 596553, at *2 (N.D.N.Y. Aug. 22, 1996).
[46] *Thompson*, 490 U.S. at 463.
[47] *Id.*
[48] N.Y. COMP. CODES R. & REGS tit.7, § 200.5(a) (2004).

visitation rights because inmate visitation is not a protected liberty interest.

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