

The Nonhuman Rights Project
Tommy – Appellate Court Hearing – Oct. 8th 2014
Transcript

- 10:43 [Bangs gavel]
10:44 CLERK: All rise
10:46 Ladies and gentlemen, the justices of the court
10:53 Hear ye, Hear ye, Hear ye, all persons having business before this appellate division of the Supreme Court, [held in before] the third judicial department of the State of New York, let them draw near, give their attention and they shall be heard. Our first case 518336, matter of the Non-Human Rights Project Inc. vs. Lavery. Please be seated.
- 11:16 PRESIDING JUSTICE OF THE COURT KAREN K PETERS: Would you be seated for just a moment please?
11:18 STEVEN WISE: Yes, your honor
11:20 JUSTICE KAREN PETERS: Thank you so much.
Uh, welcome to the appellate division third department, for those of you who are new to the court, our calendar is posted, um, on our website far in advance of oral argument, so you can be apprised of your place on the calendar and the amount of time that is set aside for your presentation. We also occasionally change the cases set forth on the calendar as we did today to accommodate, um, a quite overflow crowd. If you are an appellate and you wish to reserve time for rebuttal, please make sure you advise me of the amount of time you'd like set aside before you begin your argument. If you are a respondent, we do not permit rebuttal. In addition if you have not looked at our website please be advised we do have an electronic policy in place here in the courtroom, that permits you to use your cellphones or iPads and any other electronic device you might choose to do so in order to keep up with your email, communicate with your office, check the newspaper if you choose to do so, however it must remain silent at all times. If you have any questions concerning the policy, please check our website, you can find it there.
- 12:43 First case is matter of Non Human Rights Project vs. Lavery, Mr. Wise I believe you're arguing.
12:49 STEVEN WISE: Thank you your honor. May it please the court, my name is Steven Wise and I first want to thank you for the privilege of appearing pro hac vice on behalf of the Non-Human Rights Project, which petition for a common law writ of habeas corpus under, uh, CPLR Article 70 on behalf of Tommy, who is a chimpanzee who is being kept in a cage in a room in a warehouse in a, uh, in a town called Johnstown, New York.
- 13:18 JUSTICE KAREN PETERS: Counselor, if we could just begin at the beginning here, uh, if you don't mind
13:24 STEVEN WISE: Not at all, your honor.
13:25 JUSTICE KAREN PETERS: Your verified petition contained in your record, asserts that you want us to grant, well you wanted Judge Sise but now you want us...

13:34 STEVEN WISE: Yes your honor
13:35 JUSTICE KAREN PETERS: ...to grant him immediate release from illegal detention is that correct?
13:39 STEVEN WISE: Yes your honor.
13:40 JUSTICE KAREN PETERS: However then you go on to say in your brief that you don't really want him released, you really want him placed in another facility, is that correct?
13:49 STEVEN WISE: Yes your honor.
13:50 JUSTICE KAREN PETERS: Well if in reality one were to grant the habeas corpus, and if in reality he has the right to his freedom, why wouldn't he just be released?
14:03 STEVEN WISE: Uh, Tommy in this circumstance is indeed a person who is entitled...
14:08 JUSTICE KAREN PETERS: You assert he's a person, we haven't decided that
14:11 STEVEN WISE: Yes your honor, I-I do, we do assert that, it is our position that he is indeed a person, uh, and he is entitled then to a common law writ of habeas corpus, which looks to-to the um, cause of the detention and then will discharge him if it's um, unlawful. Now usually writs of habeas corpus involve adult, adult human beings...
14:32 JUSTICE KAREN PETERS: Correct
14:33 STEVEN WISE: There are many cases that have involved children, that have involved, uh, and have even involved for example, slave children in Massachusetts and New York...
14:41 JUSTICE KAREN PETERS: But there are no writs of habeas corpus, at least in this state that have involved non-humans. Do you agree with that?
14:48 STEVEN WISE: I do agree with that, this is a novel case in that, in that way, however...
14:52 JUDGE ROBERT ROSE: And that's an exception to the legal person definition, or legal person analysis, that you uh, want us to engage in isn't it? I mean not every legal person is entitled to habeas corpus you can see that.
15:04 STEVEN WISE: Uh, the only person who is entitled to a writ of habeas corpus is a person that the, that the courts say is a person for the purposes of a common law writ of habeas corpus.
15:16 JUSTICE KAREN PETERS: So you agree with that, Counselor?
15:17 STEVEN WISE: I don't know whether I did or not
15:19 JUSTICE KAREN PETERS: I think you did
15:20 STEVEN WISE: Okay (LAUGHS)
15:22 JUSTICE KAREN PETERS: The other, the other uh statement...
15:23 STEVEN WISE: May I go back to the other uh...
15:24 JUSTICE KAREN PETERS: Just let me ask one more question...
15:25 STEVEN WISE: Yes
15:26 JUSTICE KAREN PETERS: ...concerning your petition, you also state in the same paragraph, number one of your petition, that New York statutory and common law has already conferred legal personhood status on non-

human domestic animals who are the beneficiaries of trusts. However, even though you have created a trust for Tommy, those trusts were created by New York State legislation and are trusts for the benefit of animals am I correct?

- 15:54 STEVEN WISE: Yes pets or domestic animals
- 15:57 JUSTICE KAREN PETERS: So in reality, while you might want to call the creation of such a trust personhood, it's really a legislative construct to allow for the support of animals correct?
- 16:08 STEVEN WISE: Not exactly, uh what it is, it has created person and although, if I may say, that is tangential to our argument, because...
- 16:18 JUSTICE KAREN PETERS: But it's in the first paragraph of your petition so I had to ask the question
- 16:20 STEVEN WISE: But it is, yes, and the reason we put that in is because of-of the fact that the legislature stated that a non-human animal who is a beneficiary of the trust is indeed a true trust beneficiary, its not an honorary trust. In fact, in 2010...
- 16:38 JUSTICE KAREN PETERS: Correct I agree, but they didn't call it a person.
- 16:40 STEVEN WISE: No they called him a trust beneficiary, but under New York law a trust beneficiary is indeed a person.
- 16:47 JUSTICE KAREN PETERS: Legally, but that a legal person not a person for the purposes of the matter before us today correct?
- 16:53 STEVEN WISE: The only, the only uh, category that we are arguing that Tommy fits into is a legal person, but there are many different kinds of legal persons, and we are not arguing that if this court finds that Tommy is a legal person within the meaning of Article 70, that he's a legal person for any other reason.
- 17:13 JUSTICE KAREN PETERS: Okay
- 17:14 STEVEN WISE: And if I may just go back to what the uh,
- 17:16 JUSTICE KAREN PETERS: Please go ahead
- 17:17 STEVEN WISE: ...court asked, when, when you had children, and indeed there are cases involving slave children [Common Vals vs. Ades] for example in the 1830s, Lemon vs. People, you had children who were five, six, seven, eight, nine years old, who would come into a northern state and they would be then freed when, when a writ of, when a common law writ of habeas corpus was brought in their, in their favor. What would happen...
- 17:42 JUSTICE KAREN PETERS: Is Tommy 26?
- 17:43 STEVEN WISE: Tommy is 26 years old, yes, but we're not saying he's the equivalent of a human 26. He's the equivalent of a, of a human child, he's a – cognitively he's an extraordinarily complex being, who is autonomous and self-determining being, as our 100 pages of affidavits show.
- 18:00 JUSTICE KAREN PETERS: I-I understand from your brief and your record that, that these primates have cognitive abilities beyond that of many other animals. But you haven't really assessed Tommy have you?
- 18:12 STEVEN WISE: We have not assessed Tommy, uh but we are saying that chimpanzees, chimpanzees are...
- 18:18 JUSTICE KAREN PETERS: Okay, in general, not Tommy in particular.

18:21 STEVEN WISE: Yes, there is no reason to think that Tommy is not that way and indeed if this court feels that that could be an important issue, it should then um, reverse the Supreme Court and-and uh, order the Supreme Court to issue the order to show cause, and let the respondent who chose not, not to appear today. . .

18:40 JUSTICE KAREN PETERS: The respondent wasn't served was he?

18:42 STEVEN WISE: He was not served in the Supreme Court but he certainly was a party to the appeal and chose not to file a brief. Uh, or appear for oral argument. So a child, whether human child or whether a non-slave child, a slave child, an apprentice would then be taken from the illegal detention and then placed uh in, in the custody of someone who could take care of him. That's what were trying to do, is have this court move him from a place where he's in a cage. . .

19:14 JUSTICE KAREN PETERS: Did you, did you ask the owners whether they would just agree to allow you to take custody of Tommy and place him in a preserve? And if preserve is the wrong word I apologize.

19:24 STEVEN WISE: Repeatedly, we, we have offered twice to the respondent, we even said we would drop this case if the respondent agreed to move him to a sanctuary that is a member of the North, North American Primate Sanctuary Alliance or Save the Chimps in Florida. And only when we learned he didn't do that, and he was going to move him to some place that was just about as bad as where he is now, then we sought the preliminary injunction, which this court allowed.

19:51 JUDGE ELIZABETH GARRY: And, so, we safely assume that the goal of this proceeding is to promote the well being of the chimpanzee?

19:59 STEVEN WISE: No, there's only one goal for the proceeding, cause it's a common law habeas corpus proceeding, and it's to inquire into the cause of the detention and to discharge the chimpanzee if its not unlawful.

20:12 JUDGE ELIZABETH GARRY: So you're not, are you saying that you're not interested in promoting the chimpanzee's well being?

20:19 STEVEN WISE: That is not the purpose of, of our suit, our purpose of it is that he is, he is detained against his will because no chimpanzee, uh according to our affidavits would possibly wish to live in the conditions in which he is living. In fact we had one of our experts [Matias Osvat] say that the chimpanzee is of such extraordinary cognitive ability that uh, that he can understand the past, he can anticipate the future, and that he suffers as much in solitary confinement as would a human being.

20:52 JUSTICE KAREN PETERS: Why isn't the ASPCA involved in this case? We didn't have any amicus briefs from the ASPCA or PETA or any other non-profit charities, corporations concerned with cruelty to animals. Do you know why?

21:04 STEVEN WISE: We have asked that question ourselves, we have no idea, uh we have no, no idea. The only idea that I might venture is the fact that uh, this is not a welfare issue, and that's what I want to push again, or uh repeat myself, it is not a welfare issue. And that's what I want to push again, or repeat myself, it's not a welfare issue. It's the only issue that can

be brought before the court on a common law writ of habeas corpus. The question of whether there is an unlawful detention here, and it's not a welfare issue.

21:31 JUSTICE KAREN PETERS: What's unlawful about the detention? I know he might not be in, in a preserve that meets what you and, I think it was the NIH, find to be acceptable circumstances, but what about the detention makes it unlawful?

21:47 STEVEN WISE: Well, he is a legal person, which we would like someone, either this court or the Supreme Court to indeed find that he is a legal person. Then, then keeping a legal person, you know, in solitary confinement, in a cage, is prime [efface] and unlawful detention. And that's if the person who's being kept in the cage has the autonomy and self-determination, these extraordinary cognitive abilities that would allow him to suffer the same way that a human being who also has these kinds of facilities...

22:21 JUSTICE KAREN PETERS: Well, well then we get to the problem that I think we started with, is that if in reality we grant him personhood status and he shouldn't be kept in a cage, then why should he be kept in a preserve? I mean how does one define cage?

22:35 STEVEN WISE: Well the...

22:36 JUSTICE KAREN PETERS: What was it Maya Angelou, I Know Why the Caged Bird Sings? I mean how do we define cage?

22:40 STEVEN WISE: Well, the question is whether or not where he's being kept now is an unlawful detention, it kind of circles back to the first thing that we were talking about, is that when, when a child, especially when a slave child was made free, the court would then uh, appoint a guardian or appoint someone else who would then look into, into um, what's for the benefit of-of that child. And so we asked in our pleadings that the North American Primate Sanctuary Alliance, who is the gold standard for ape alliance, you know for ape sanctuaries, to be able to evaluate him and put Tommy in one of the many sanctuaries that they have. Now, for example, Save-Save the Chimps is a place that has a um, large artificial lake and on it are 13 three acre islands where 20-25 chimpanzees live, in the condition that's as close to the wild as possible in North America.

23:44 JUDGE MICHAEL C LYNCH: Mr. Wise if I may?

23:46 STEVEN WISE: Yes your honor.

23:47 JUDGE MICHAEL LYNCH: You've indicated that the goal is to place Tommy in a sanctuary and when I look at Article 11 of the Environmental Conservation law there's actually a remedy there. Even if someone is exempt from the law they still have to have a license and they still have to maintain proper conditions, if the conditions are not proper, there's the ability to get injunctive relief. Why haven't you pursued that remedy?

24:15 STEVEN WISE: Well our-this, this is, this seeks a writ of habeas corpus, if Tommy is a legal person we argue that he is under the meaning of a common law writ of habeas corpus, then he is indeed entitled to a writ of habeas corpus.

24:30 JUDGE MICHAEL LYNCH: That's, that's a novel question as you've indicated but it appears if conditions are inappropriate, there's action and injunction remedy that's available.

24:39 STEVEN WISE: Well we have not argued that the respondent who is keeping Tommy is violating any federal or state statute, we argue that they are in compliance with federal and state statutes, but the federal and state statutes that would involve a chimpanzee uh, are not, not appropriate.

24:59 JUSTICE KAREN PETERS: Well then maybe the key here is a legislative lobbying activity to ensure that the statutes are changed, since its my understanding historically, any laws to protect animals from cruelty by humans, are legislative.

25:15 STEVEN WISE: That, that is one option, but the courts and the legislatures are co-equal branches here...

25:25 JUSTICE KAREN PETERS: Yes we're well aware of that.

25:26 STEVEN WISE: I'm sure you are. This reminds me, for example, of the arguments that were brought up in the famous Somerset vs. Stewart case, which is part of New York common law. Where Lord Mansfield, indeed, suggested that the respondent slave owner go to the legislature, go to Parliament, and what happened was that they decided they were going to Parliament but Lord Mansfield understood that, that he had a judicial duty, as this court does have a judicial duty to change the common law and then they went to Parliament.

25:54 JUSTICE KAREN PETERS: I-I understand that, I have to tell you I keep having a difficult time with your using slavery as an analogy to this situation, I just have to tell you that...

26:05 STEVEN WISE: And I understand that...

26:06 JUSTICE KAREN PETERS: ...a very difficult time, so you might want to pursue a, another argument in the two minutes you have left.

26:12 STEVEN WISE: Let me suggest this, that by referring to human slavery we are in no way comparing Tommy to any human slaves.

26:20 JUSTICE KAREN PETERS: I understand but my suggestion is you move in a different direction for the next two minutes.

26:23 STEVEN WISE: Okay Tommy, uh uh, we argue, as a matter of liberty because his autonomy and the uncontroverted facts are he is autonomous, he can self-determine and these...

26:38 JUSTICE KAREN PETERS: A chimpanzee can, you don't know if he can.

26:41 STEVEN WISE: There's no evidence that he cannot.

26:42 JUSTICE KAREN PETERS: I understand that.

26:44 STEVEN WISE: And that the um, abilities of self-determination and autonomy are supreme values within the common law and that they are so supreme that you looked at, that the court of appeals in Rivers vs. Katz allows an autonomous, self-determining human being, you and I, when we are in that state to be able to, to choose to die, we don't have to choose to get a blood transfusion for example, we can die.

27:11 JUSTICE KAREN PETERS: Well but even you in your brief when you talk about individual rights, you talk about the fact that along with those

individual rights come responsibilities, and we're not, and you don't want us to foist any responsibilities on this chimpanzee...

27:25 STEVEN WISE: No

27:25 JUSTICE KAREN PETERS: ...you just want us to determine that he has the opportunity to be free of this confinement.

27:30 STEVEN WISE: The, the better way to view Tommy, would be similar to a human child who has, who has rights, you can't put a little child in a cage, but doesn't have correlative responsibilities. So Tommy has the autonomy and self-determination that is sufficient for him to be a legal person, and he can understand that he does not want to be imprisoned, for his life in a cage, which he has been. But he's not going to be the um, defendant in a criminal action or a civil plaintiff, at least not, not by himself, they may have someone like the Non-Human Rights Project to come in using Article 70, to um, to argue on his behalf.

28:14 JUDGE MICHAEL LYNCH: Mr. Wise, if I may?

28:16 STEVEN WISE: Yes, your honor.

28:17 JUDGE MICHAEL LYNCH: You've used several examples of what constitutes a legal person, and for example one example is corporations have been treated as legal persons in different contexts, Citizens United for example is one case. We're talking about habeas corpus and the word 'person' in the concept of a habeas corpus application in the common law understanding of the word 'person'. I look at Black's Law Dictionary, and it defines 'person' to begin this way "In general usage, a human being. That is, a natural person." Can you give any example anywhere, where in a habeas corpus context, the word 'person' has been attributed to a non-human being?

29:04 STEVEN WISE: This is a novel case, um however I can talk about the court of appeals' decision in [Burn], where they were dealing with a, a fetus at that point, but it had to do whether, with whether a statute was constitutional. But they cited to um, to John Chipman Gray and they cited to other secondary sources, The Nature and Sources of the Law for the discussion that, that a person is not synonymous with a human being. A person means, it's someone that the civil law now says counts; they're no longer invisible to the civil law. So we cited other common law countries, our sister countries. An Indian court in 2000 who cites the exact same, or some of the same secondary sources as does the court of appeals in [Burn], and finds that the holy books of the Sikh religion are persons. That pre-independence cases they had a mosque and a Hindu idol and in 2012, there was a treaty between the indigenous peoples of New Zealand and the crown that designated a river as a, as a legal person. A legal person is a legal concept; it is not a biological concept, which was the teaching of the court of appeals in [Burn].

30:22 JUSTICE KAREN PETERS: We know that from your brief, you have gone over your time. You want to take one minute to sum up please?

30:26 STEVEN WISE: Thank you your honor, I would. Let me make sure I don't miss anything. So the uncontroverted facts demonstrate that chimpanzees

do indeed possess the autonomy and self-determination that our supreme common law values and importantly these are also the same values that the writ of habeas corpus was constructed over the centuries to protect. That both common law liberty and equality entitle a chimpanzee to a common law habeas corpus personhood within the meaning of Article 70. And we ask this court to, uh reverse the order of the Supreme Court, uh not necessarily finding that Tommy is a person but assuming as Lord Mansfield did without deciding, that Tommy um, could be a person or thinking that Tommy could be a person, remanding to the Supreme Court with an order to issue an order to show cause and then proceed in accordance with Article 70.

31:22 JUSTICE KAREN PETERS: Thank you, Counsel.

31:23 STEVEN WISE: Thank you, your honors.