

CRIMINAL

FIRST DEPARTMENT

DECISION OF THE WEEK

Matter of Faustino, 2/11/21 – FOIL / ATTORNEY’S FEES

The petitioner appealed from an order of NY County Supreme Court, which denied her petition to compel the respondents to disclose body camera videos from an NYPD deadly force incident. The order also denied a request for attorney’s fees and costs and dismissed her Article 78 proceeding. The First Department reversed, granted fees and costs, and remanded. Given voluntary disclosure during the proceeding, the merits were moot, but not the claim for fees/costs. The FOIL court must order fees/costs reasonably incurred by a petitioner who substantially prevailed where there was no reasonable basis for denying access. The petitioner prevailed—no matter that compliance was voluntary. The respondents had no good reason to deny access. An agency must articulate a factual basis to invoke the law enforcement exemption, but the NYPD offered only conclusory assertions that disclosing the video would interfere with an ongoing internal investigation. Cory Morris represented the appellant. *[Morris co-authored a NYLJ column about the decision (3/1/21), which explained that police made a warrantless entry and shot the decedent, whose widow sought the video. Morris opined that counsel fees are necessary to deter systemic intransigence of police departments and other agencies in improperly resisting valid FOIL requests.]*

http://nycourts.gov/reporter/3dseries/2021/2021_00907.htm

<https://www.law.com/newyorklawjournal/2021/03/01/first-dept-forces-nypd-to-pay-fees-for-failure-to-timely-release-bodycam-footage/>

People v Brown, 3/4/21 – BURGLARY / RESISTING ARREST

The defendant appealed from a judgment of NY County Supreme Court, convicting him, after a jury trial, of 2nd degree burglary. The First Department affirmed. The element of intent was satisfied by evidence that the defendant unlawfully entered an apartment with the intent to commit the crime of resisting arrest. Responding to a 911 call about a dispute, the officers arrived at the defendant’s apartment to investigate. In connection with an unrelated crime, the defendant had previously told a detective that he would surrender himself, and he thought police had come about that matter. To avoid arrest, he lowered himself to his neighbor’s balcony and unlawfully entered the apartment. The defendant’s mistaken belief about the circumstances did not negate the culpable mental state required for burglary.

http://nycourts.gov/reporter/3dseries/2021/2021_01339.htm

SECOND DEPARTMENT

***People v Fellows*, 3/3/21 – ADVERSE POSITION / IAC**

The defendant appealed from a Dutchess County Court judgment, convicting him of 1st degree assault. The Second Department remitted and held the appeal in abeyance. At sentencing, when the defendant said he wished to withdraw his guilty plea, the court assigned new counsel, who thereafter advised the court that the proposed application would be frivolous. County Court granted adjournments so that the defendant could retain private counsel, but he failed to do so. The court sentenced the defendant while the second assigned attorney still represented him. On a motion to withdraw a guilty plea, a defendant has a right to effective assistance of counsel. This defendant received ineffective assistance, when counsel took a position adverse to his. The lower court should have appointed new counsel to represent the defendant with respect to the motion. Vincent Gelardi represented the appellant.

http://nycourts.gov/reporter/3dseries/2021/2021_01269.htm

***People v Tapia*, 3/3/21 – PEQUE / REMITTAL**

The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 5th degree criminal possession of a controlled substance. The Second Department remitted and held the appeal in abeyance. *People v Peque* (22 NY3d 68) declared that due process requires a court to apprise a noncitizen pleading guilty to a felony of the possibility of deportation as a consequence of the plea. To vacate a plea based on a *Peque* violation, a defendant must demonstrate a reasonable probability that he would have gone to trial, if properly warned. This defendant's argument that a *Peque* violation occurred was unpreserved for appellate review, since he failed to raise the issue before Supreme Court or move to withdraw his plea. The argument was reached in the interest of justice. At a joint plea proceeding, Supreme Court advised the codefendant of the possibility that he could be deported as a consequence of his plea. But in addressing the defendant, the court asked, "Mr. Tapia; do you understand *that*?" In light of the defendant's limited education and need for a Spanish interpreter, the cryptic inquiry did not ensure his comprehension that he could be deported due to his plea—as opposed to perceiving that the codefendant faced deportation consequences. Appellate Advocates (Lisa Napoli, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2021/2021_01274.htm

THIRD DEPARTMENT

***People v Ackley*, 3/4/21 – ENHANCED SENTENCE / VACATED**

The defendant appealed from a Warren County Court judgment, convicting him of attempted 2nd degree burglary and attempted 2nd degree sexual act. The Third Department vacated the sentence and remitted. At the plea proceedings, the defendant was advised that his failure to cooperate with the Probation Department could result in an enhanced sentence. County Court noted, at sentencing, that the defendant had stated to Probation that he did not remember the burglary; found that such statement conflicted with the plea allocution; and advised the defendant that an increased term would be imposed based on such failure to cooperate. Defense counsel's motion to withdraw the plea was denied, and

the new sentence was imposed. That was error, and the issue survived the unchallenged appeal waiver. The cooperation provision did not specify that the defendant must not make statements to Probation that were inconsistent with the plea colloquy. The sentencing court did not make a sufficient inquiry. Upon remittal, County Court must impose the agreed-upon sentence or give the defendant an opportunity to withdraw his plea. Joseph Brennan represented the appellant.

http://nycourts.gov/reporter/3dseries/2021/2021_01293.htm

***People v Katoom*, 3/4/21 – *ANDERS*/NEW COUNSEL ASSIGNED**

The defendant appealed from a Schenectady County Court judgment, convicting him of attempted 2nd degree burglary, upon his plea of guilty. Assigned counsel submitted an *Anders* brief. The Third Department assigned new appellate counsel and withheld decision. There was at least one issue of arguable merit, regarding the validity of the appeal waiver, which might impact other issues that could be raised.

http://nycourts.gov/reporter/3dseries/2021/2021_01288.htm

FAMILY

SECOND DEPARTMENT

***C.C. v A.R.*, 3/3/21 – DIVORCE / SPYWARE AND SPOILIATION**

In a divorce action, the husband appealed from a Kings County Supreme Court order granting the wife’s motion to preclude him from introducing any evidence regarding spousal support, equitable distribution, and counsel fees. The Second Department affirmed. The husband had installed spyware on the wife’s phone, invoked Fifth Amendment protections, and destroyed evidence. The wife claimed that he had listened to a session with her psychiatrist and a meeting with her attorney. A referee determined that the plaintiff did indeed intercept confidential communications, and then he installed and executed data-wiping programs, which made it impossible to tell what data was deleted. The trial court properly inferred that the husband violated the wife’s attorney-client privilege. The drastic sanction imposed was proper under the doctrine of spoliation, given the intentional destruction of key evidence, greatly compromising the wife’s ability to defend herself in the action.

http://nycourts.gov/reporter/3dseries/2021/2021_01243.htm

THIRD DEPARTMENT

***M/O Xavier XX. v Godfrey YY.*, 3/4/21 – TPR / REVERSED**

The father appealed from an order of Albany County Family Court, which adjudicated the subject child to be abandoned and terminated the father’s parental rights. The Third Department reversed in the interest of justice. The permanency plan goal for the mother was the return of the child, which could not be reconciled with the concurrent abandonment proceeding against the father. The statutory purpose of an abandonment proceeding—to free the child for adoption by terminating the parents’ rights to the child—could not be served where a permanency plan sought to reunite mother and child. Thus, dismissal was required. Monique McBride represented the father.

http://nycourts.gov/reporter/3dseries/2021/2021_01295.htm

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