

## CRIMINAL

### SECOND DEPARTMENT

***People v Colsen*, 3/4/20 – ID SUPPRESSION DENIAL / REVERSED**

The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 2<sup>nd</sup> degree robbery, upon a jury verdict. The appeal brought up for review the denial of a defense motion to suppress identification testimony. The Second Department reversed, granted suppression, and ordered a new trial. The hearing court erred in finding the lineup not unduly suggestive. The defendant was the only person with dreadlocks, which featured prominently in the complainant's description of one assailant. In the lineup, the dreadlocks were distinctive and visible, even though the defendant and fillers wore hats. The error was not harmless. Appellate Advocates (Sam Feldman, of counsel) represented the appellant.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_01514.htm](http://nycourts.gov/reporter/3dseries/2020/2020_01514.htm)

### THIRD DEPARTMENT

***People v Banks*, 3/5/20 – SAME GUN? / CONCURRENT TERMS**

The defendant appealed from a judgment of Chemung County Court, convicting him of attempted 2<sup>nd</sup> degree murder, 2<sup>nd</sup> degree CPW, and multiple assault counts. The perpetrator shot the apparent target and four bystanders. The defendant argued that the trial court erred in admitting a revolver, containing five spent rounds, which was recovered from a nearby rooftop days after the shooting and could not be excluded as the weapon used. County Court's instruction to the jury, to give the revolver whatever weight it deemed appropriate, arguably fell short, the Third Department observed. Given the overwhelming testimony identifying the defendant as the assailant, though, any error was harmless. The imposition of consecutive terms for the assault convictions was error. Eyewitnesses heard five shots. Four bullets were recovered from the victims and one from the bar where the incident occurred. The intended victim was shot three times, and one bullet lodged in his body. Another victim had several through-and-through wounds. No proof showed that any victim was struck by a bullet that did not first pass through another victim. Given the absence of evidence that any of the assault convictions arose from a separate and distinct pull of the trigger by the defendant, concurrent sentences were required. Paul Connolly represented the appellant.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_01525.htm](http://nycourts.gov/reporter/3dseries/2020/2020_01525.htm)

***People v Horton*, 3/5/20 – “VICTIM” / NOT PROPER LABEL**

The defendant appealed from a judgment of Tompkins County Supreme Court, convicting him of 1<sup>st</sup> degree burglary, first degree rape, and related crimes. The Third Department affirmed. The defense moved to preclude references to the complainant as the “victim,” arguing that such label would dilute the presumption of innocence. The appellate court noted that NY courts have found it improper to refer to a complainant as the “victim” in a jury charge; and other jurisdictions have expanded that concern to other contexts, if the complainant's credibility is in issue. Here the trial court urged the People to use caution; and the complainant was generally referred to by name or as the “alleged victim.” As to a second defense argument, the People's amendment of the bill of particulars, regarding how the

defendant entered the dwelling, did not impermissibly alter the theory of the prosecution. The method of entry was not a material element of 1<sup>st</sup> degree burglary. Finally, Supreme Court did not abuse its discretion in denying an adjournment to permit the defendant to call a witness, after doing its own research about the witness. The lower court should not have assumed the role of counsel in conducting an investigation; and to the extent that the court took judicial notice of what it found, the parties should have had an opportunity to be heard. However, the defendant did not establish that the testimony would have been material or relevant.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_01530.htm](http://nycourts.gov/reporter/3dseries/2020/2020_01530.htm)

## FAMILY

### THIRD DEPARTMENT

***Matter of LeVar P. v Sherry Q.*, 3/5/20 – CONFIDENTIALITY / BREACHED**

The mother appealed from an order of Broome County Family Court, which modified custody and visitation. The Third Department affirmed but noted that Family Court should not have disclosed information provided by the child during the *Lincoln* hearing. Protecting the child's right to confidentiality is a paramount judicial obligation. However, the improper disclosure did not adversely affect the determination or the conclusions reached upon review.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_01533.htm](http://nycourts.gov/reporter/3dseries/2020/2020_01533.htm)

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