

CRIMINAL

FOURTH DEPARTMENT

***People v Garcia*, 3/19/21 – MISSING WITNESS / NEW TRIAL**

The defendant appealed from a Supreme Court judgment, convicting him of 1st degree rape. The Fourth Department reversed and granted a new trial. The trial court erred in denying a missing witness charge on cumulativeness grounds. The complainant testified that she immediately reported the rape to her boyfriend and, hours later, to her mother. The mother testified, the boyfriend did not. The People did not meet their burden of showing that his testimony would have been cumulative. Indeed, the testimony would have been highly relevant to whether the complainant reported the alleged rape at the first suitable opportunity and could have clarified factually disputed matters, including as to forcible compulsion. The error was not harmless. The Monroe County Conflict Defender (Kathleen Reardon, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2021/2021_01571.htm

***People v Brown*, 3/19/21 – RIGHT TO BE PRESENT / NEW TRIAL**

The defendant appealed from a Supreme Court judgment, convicting him of 2nd degree criminal possession of a forged instrument and other crimes. The Fourth Department reversed and granted a new trial. Before prospective jurors were brought in, the defendant shouted that the court called him by the wrong name and he could not wear clothes provided to him. The court had the defendant removed, and he was absent for the selection of the first 11 jurors and then returned to the courtroom. A defendant has a fundamental right to be present for material stages of trial. A disorderly and disruptive defendant must first be warned that he will be removed if his misconduct continues. There was no warning here, nor any emergency necessitating immediate removal. The Monroe County Conflict Defender (Kathleen Reardon, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2021/2021_01668.htm

***People v Rath*, 3/19/21 – ATTEMPTED RAPE / DISMISSED**

The defendant appealed from a County Court judgment, convicting him of predatory sexual assault against a child (three counts), attempted 1st degree rape (two counts), and another crime. The Fourth Department dismissed an attempted rape count as to which the bill of particulars alleged that the defendant attempted to have sexual intercourse with the victim after striking her in the face. No testimony supported those allegations. Legal Aid Bureau of Buffalo (Kristin Preve, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2021/2021_01667.htm

***People v Johnston*, 3/19/21 – CPW / DISMISSED**

The defendant appealed from a Monroe County Court judgment, convicting him of 2nd degree murder (two counts), 2nd degree CPW (seven counts), and other crimes. The Fourth Department modified. Four CPW counts (P.L. § 265.03[3]), were based on the defendant's uninterrupted possession of a single weapon at different times. But the possession of the weapon constituted a single continuing offense for which the defendant could be

prosecuted only once. Thus, three CPW counts were dismissed. David Abbatoy represented the appellant.

http://nycourts.gov/reporter/3dseries/2021/2021_01632.htm

***People v Lora*, 3/19/21 – CPW / DISMISSED**

The defendant appealed from a Supreme Court judgment, convicting him of 2nd degree kidnapping (two counts) and other crimes. The Fourth Department dismissed counts of 1st degree criminal use of a firearm and 3rd and 4th degree CPW. The evidence, showing only the defendant's presence in the house where a rifle was found, was legally insufficient to establish constructive possession. The Monroe County Public Defender (Drew DuBrin, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2021/2021_01597.htm

***People v Singleton*, 3/19/21 – *BATSON* / RESERVED**

The defendant appealed from a Supreme Court judgment, convicting him of 3rd degree criminal possession of a controlled substance (two counts) and other crimes. The Fourth Department reserved decision. The trial court erred in failing to conduct the *Batson v Kentucky* (476 US 79) three-step inquiry, following defense counsel's objection to the People's peremptory challenge of a Black prospective juror. After the defendant made a prima facie showing, the prosecutor offered a race-neutral explanation. Counsel attempted to respond, but the court did not give him the opportunity to argue pretext. The matter was remitted for further proceedings to satisfy *Batson* requirements. The Monroe County Public Defender (Bridget Field, of counsel) represented his appellant.

http://nycourts.gov/reporter/3dseries/2021/2021_01638.htm

***People v White*, 3/19/21 – SUPPRESSION / RESERVED**

The defendant appealed from a judgment of Monroe County Supreme Court, convicting him of 1st degree manslaughter, upon his plea of guilty. The Fourth Department reserved decision. The trial court erred in denying the defendant's request for a probable cause hearing. Specific allegations in the defendant's motion papers sufficiently raised a factual issue on a material point. The matter was remitted for a suppression hearing. Eftihia Bourtis represented the appellant.

http://nycourts.gov/reporter/3dseries/2021/2021_01639.htm

***People v Reed*, 3/19/21 – YO / RESERVED**

The defendant appealed from a County Court judgment, convicting him of 1st degree robbery, upon his plea of guilty. The Fourth Department reserved decision. County Court erred in failing to determine whether the defendant should receive youthful offender status. Because the defendant was convicted of an armed felony offense, the court first had to determine whether one of two mitigating factors was present. If so, the court then had to determine whether the defendant should be adjudicated a YO. The matter was remitted. The Monroe County Public Defender (James Hobbs, of counsel) represented his appellant.

http://nycourts.gov/reporter/3dseries/2021/2021_01590.htm

***People v Alligood*, 3/19/21 – SENTENCE / CONCURRENT**

The defendant appealed from a County Court judgment, convicting him of 2nd degree murder and 2nd degree CPW. The Fourth Department modified. The trial court erred in imposing consecutive sentences, where the People did not present proof that the defendant's acts of possessing the loaded firearm, and shooting the victim, were separate and distinct. Thus, the sentences must run concurrently. The Monroe County Public Defender (Bradley Keem, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2021/2021_01628.htm

***People v Zdatny*, 3/19/21 – SENTENCE / REDUCED**

The defendant appealed from a Supreme Court judgment, convicting him of attempted 1st degree assault, attempted 1st degree robbery, 2nd degree assault, and attempted 2nd degree robbery, and sentencing him to 12 years for the attempted 1st degree crimes and 8 years for the other crimes, to run concurrently. The Fourth Department modified, finding the punishment unduly severe. The defendant was age 41 at the time of the crimes, had only one previous crime (a misdemeanor in 2001), and had no prior incidents of violence. Further, he had a history of mental illness and had demonstrated extreme remorse for his actions. Thus, the 12-year terms were reduced to 8 years, followed by five years' post-release supervision. The Monroe County Public Defender (Linda Campbell, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2021/2021_01659.htm

***People v Colon*, 3/19/21 – SENTENCE / REDUCED**

The defendant appealed from a 2018 Monroe County Supreme Court judgment, convicting her of 2nd degree murder (two counts), 1st degree kidnapping, 1st degree burglary, 1st and 2nd degree robbery, and other crimes. The Fourth Department modified, finding harsh and excessive the punishment, which included concurrent terms of 25 years to life for kidnapping and murder; and determinate terms of 15 years for burglary and robbery counts related to the crimes committed at the victim's residence, to run concurrently to each other, but consecutively to the other terms. The appellate court directed that all the above terms would run concurrently. At the time of the crime, the defendant was age 22, gainfully employed, and had no criminal history. Although the defendant was an accessory to crimes committed at the victim's residence, she was one block away during that incident and did not physically participate in those crimes. There was also evidence suggesting that the defendant was the victim of repeated acts of domestic abuse perpetrated by one of the codefendants. Brian Shiffrin represented the appellant.

http://nycourts.gov/reporter/3dseries/2021/2021_01652.htm

NOTE: Regarding alternative sentencing for domestic violence survivors, see Domestic Violence Survivors Justice Act, Penal Law § 60.12 and CPL 440.47, and these links:

<https://www.ils.ny.gov/node/201/domestic-violence-survivors-justice-act>

<https://www.nysda.org/page/DVSJA>

FAMILY

FOURTH DEPARTMENT

***M/O Kirk M.B. v Rachel S.*, 3/19/21 – PATERNITY / BEST INTERESTS**

In a paternity proceeding, the mother appealed by permission (Family Ct Act § 1112 [a]) from an order of Onondaga County Family Court, directing that genetic marker testing be conducted as to the husband. The Fourth Department reversed. Family Court should have held a hearing to determine if testing was in the best interests of the child. When the child was born, the respondents were married to each other; and they had access to each other at the relevant time. Therefore, the presumption of legitimacy would apply. David Zukher represented the mother.

http://nycourts.gov/reporter/3dseries/2021/2021_01602.htm

***M/O Michael J.M. v Lisa M.H.*, 3/19/21 – CUSTODY / FATHER v AUNT**

The father appealed from a custody order of Genesee County Family Court. The Fourth Department reversed. A joint hearing was held regarding a neglect petition against the mother and the father's custody modification petition (FCA §1055-b [a-1] – procedure as to custody petition of non-respondent parent). The trial court placed the children with the maternal aunt for the pendency of the Article 10 proceeding (§ 1017 – placement of removed child with relatives), over the father's objection, and dismissed his petition. Such dismissal, without deciding the merits, was error. The matter was remitted for a determination on the father's petition and reconsideration of the Article 10 disposition. David Pajak represented the appellant.

http://nycourts.gov/reporter/3dseries/2021/2021_01573.htm

***Rennert v Rennert*, 3/19/21 – CONTEMPT / WARNING**

In post-divorce proceedings, the father appealed from an order of Monroe County Supreme Court, which held him in civil contempt for violating custody orders and imposed a fine, costs, and counsel fees. The Fourth Department reversed. Judiciary Law § 756 required that a contempt application contain, on its face, a specific notice about the purpose of the hearing and a verbatim statutory warning about possible consequences of not appearing in court. The wife's failure to include the required language constituted a jurisdictional defect. Nathan Vanloon represented the appellant.

http://nycourts.gov/reporter/3dseries/2021/2021_01630.htm

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