

## CRIMINAL

### FIRST DEPARTMENT

***People v Rodriguez*, 4/20/21 – *MOLINEUX / INTENT / TOO EXTENSIVE***

The defendant appealed from a judgment of NY County Supreme Court, convicting him of attempted 2<sup>nd</sup> degree burglary. The First Department reversed and ordered a new trial. The defendant allegedly attempted to unlawfully enter a Manhattan apartment building with the intent to commit a crime therein. He testified that he was there to privately smoke marijuana while awaiting his girlfriend, who worked nearby. The People sought to introduce *Molineux* evidence relating to four residential burglaries committed by the defendant. The trial court ruled that, to prove intent and rebut the defendant's explanation for his presence, the People could introduce testimony regarding two burglaries in 2010 and 2011. The evidence was relevant. However, it was error to allow for three witnesses about the prior burglaries; still photographs of the burglarized apartment and building; and surveillance video from the latter incident. The prejudicial impact of the extensive evidence far exceeded the probative value. Limiting instructions were insufficient; and the error was not harmless. Legal Aid Society of NYC (David Crow and Jake Walter-Warner, of counsel) represented the appellant.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_02367.htm](http://nycourts.gov/reporter/3dseries/2021/2021_02367.htm)

### SECOND DEPARTMENT

***People v Davis*, 4/21/21 – *440 MOTION / INEFFECTIVE***

The defendant appealed from an order of Kings County Supreme Court, which denied his CPL 440.10 motion to vacate a judgment, convicting him of 2<sup>nd</sup> degree murder and 2<sup>nd</sup> degree CPW. The Second Department reversed, based on ineffective assistance, and remitted for a new trial. The defendant offered hearing evidence that defense counsel failed to contact and interview five witnesses who were present at the party where the shooting occurred. Even if certain witnesses' criminal records provided a strategic basis to not call them, it did not excuse the failure to investigate them as possible witnesses. Legal Aid Society, NYC represented the appellant.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_02408.htm](http://nycourts.gov/reporter/3dseries/2021/2021_02408.htm)

***People v Torres*, 4/21/21 – *PEQUE VIOLATION / REMITTAL***

The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 4<sup>th</sup> degree criminal possession of stolen property. The Second Department held the appeal in abeyance. The defendant contended that he was denied due process because he was not a U.S. citizen, and the plea court failed to address the possibility of deportation as a consequence of the guilty plea. *See People v Peque* (22 NY3d 168). Upon remittal, defendant would have the opportunity to vacate his plea and establish that there was a reasonable probability that he would not have pleaded guilty had the court advised him of the possibility of deportation. Legal Aid Society, NYC (Whitney Elliott, of counsel) represented the appellant.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_02424.htm](http://nycourts.gov/reporter/3dseries/2021/2021_02424.htm)

***People v Ahmad*, 4/21/21 – TRAFFIC STOP / NO REASONABLE SUSPICION**

The defendant appealed from a judgment of Nassau County Supreme Court, convicting him of 3<sup>rd</sup> degree CPW. The appeal brought up for review the denial of suppression. The Second Department reversed and dismissed. The officer lacked the requisite reasonable suspicion for the traffic stop. The defendant was not following anyone and was not trespassing. There was no indication that criminal activity was at hand. Nassau County Legal Aid Society (Tammy Feman and Argun Ulgen, of counsel) represented the appellant. [http://nycourts.gov/reporter/3dseries/2021/2021\\_02404.htm](http://nycourts.gov/reporter/3dseries/2021/2021_02404.htm)

***People v Hagen*, 4/21/21 – SORA / REVERSED**

The defendant from an order of Orange County Court, which designated him a level-three sex offender. The Second Department reversed. The defendant should have been assessed only 10 points under risk factor 12, since the People did not prove that he refused to participate in sex offender treatment. Further, the People did not establish that the defendant had an inappropriate living or employment situation so as to warrant 10 points under risk factor 15. The defendant was found to be a level-two offender. Benjamin Greenwald represented the appellant.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_02426.htm](http://nycourts.gov/reporter/3dseries/2021/2021_02426.htm)

***People v Long*, 4/21/21 – MODIFIED / CONSECUTIVE TERMS**

The defendant appealed from a judgment of Kings County Supreme Court, convicting him of attempted 1<sup>st</sup> degree sexual abuse (two counts), 3<sup>rd</sup> degree robbery, and 3<sup>rd</sup> degree CPW, upon his plea of guilty. The Second Department modified. The sentence imposed for the weapons charge must not run consecutively to the other terms. People did not establish that the defendant's possession of a weapon with an intent to use it unlawfully was separate and distinct from his intent to use it to commit the other crimes. Legal Aid Society, NYC (Simon Greenberg, of counsel) represented the appellant.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_02414.htm](http://nycourts.gov/reporter/3dseries/2021/2021_02414.htm)

## **APPELLATE TERM, SECOND DEPT.**

***People v Scottborgh*, 2021 NY Slip Op 50316 (U) – TRAFFIC STOP / INVALID**

The defendant appealed from a Nassau County District Court judgment, convicting him, upon a jury verdict, of DWI (common law). At a hearing, the arresting officer testified that he received a radio assignment for a well check or unknown problem, based on an anonymous 911 tip that a male was slumped over a steering wheel in a dark Jeep at a stated location. The responding officers did not see a parked vehicle in the vicinity described, but observed a dark Jeep being driven in a nearby mall parking lot. They made a traffic stop and then saw the defendant alone in the driver's seat showing signs of intoxication. The initial traffic stop was invalid. The minimal information relayed did not provide probable cause that the defendant committed a traffic infraction or reasonable suspicion that he committed a criminal act. Moreover, there was no reasonable basis to believe he was the person in distress described in the tip. Nassau County Legal Aid Society (Tammy Feman and Marquetta Christy, of counsel), represented appellant.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_50316.htm](http://nycourts.gov/reporter/3dseries/2021/2021_50316.htm)

## THIRD DEPARTMENT

### ***People v Sposito*, 4/22/21 – 440 MOTION / IAC / DISSENT**

The defendant appealed from an order of Albany County Supreme Court, which denied his CPL 440.10 motion seeking to vacate a judgment, convicting him of 1<sup>st</sup> degree rape and another crime, after a hearing. The Third Department affirmed. One justice dissented, opining that defense counsel rendered ineffective assistance in waiving a *Huntley* hearing. The defendant was questioned extensively before arguably defective *Miranda* warnings were given. He then made incriminating statements which might have been subject to suppression. Counsel's rationale for consenting to admission of the video recording of the interrogation (it was "more good than bad") was questionable, given the defendant's statements undermining the defense of conscious consent. Further, the defendant was denied meaningful representation as a result of counsel's failure to consult with or call experts. Counsel did not address and counter the People's proof regarding whether the victim was physically helpless, and was unprepared to effectively cross-examine a prosecution medical expert.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_02441.htm](http://nycourts.gov/reporter/3dseries/2021/2021_02441.htm)

## FAMILY

## FIRST DEPARTMENT

### ***M/O Hook v Snyder*, 4/22/21 – UCCJEA / NO NY JURISDICTION**

The respondent mother appealed from an order of NY County Family Court, which denied her motion to dismiss the custody modification petition on the ground of lack of subject matter jurisdiction. The First Department reversed. The petitioner—who did not deny that he continued to live in Connecticut—failed to demonstrate that the CT court which made the initial custody determination had determined that it no longer had exclusive, continuing jurisdiction or that NY would be a more convenient forum. The fact that the child lived in NY for several years did not change the result—NY courts lacked jurisdiction to entertain the petition. As to the petitioner's arguments, a defect in subject matter jurisdiction may be raised at any time by any party or the court, and such jurisdiction cannot be created through waiver, estoppel, laches or consent. Manhattan Legal Services (Lenina Trinidad, of counsel) represented the mother.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_02458.htm](http://nycourts.gov/reporter/3dseries/2021/2021_02458.htm)

## SECOND DEPARTMENT

### ***M/O Zamir F. (Richardo B.)*, 4/21/21 – NEGLECT / BATTLE OF EXPERTS**

The petitioner agency appealed from an order of Kings County Family Court, which dismissed petitions charging the father with neglect of Zamir F. and derivative neglect of other children. The Second Department reversed. Family Court should not have credited the opinion of the father's expert, who speculated that the petitioner's expert tainted her interviews by engaging in play and friendly discussion and that family members may have

influenced Zamir to fabricate his claims. The five-year-old child had age-inappropriate sexual knowledge and displayed other characteristics of a sexual abuse victim.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_02391.htm](http://nycourts.gov/reporter/3dseries/2021/2021_02391.htm)

***M/O Coleman v Lymus*, 4/21/21 – IN CAMERA WITH CHILD / REMITTAL**

The father appealed from an order of Kings County Family Court, which denied his custody modification petition. The Second Department reversed. Family Court should not have determined the petition without conducting an in camera interview with the child. Children’s wishes are entitled to great weight, particularly where their age and maturity would make their input very meaningful. Upon remittal, there must be a new hearing, including an interview with the child. Warren Hecht represented the appellant.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_02389.htm](http://nycourts.gov/reporter/3dseries/2021/2021_02389.htm)

***M/O Vazquez v Bahr*, 4/21/21 – CUSTODY / HEARING NEEDED**

The father appealed from an order of Kings County Supreme Court order, directing modest parental access, without a hearing. The Second Department reversed. Since there were disputed factual issues regarding the children’s best interests, the matter was remitted for a hearing and new determination. Further, the challenged decision failed to comply with CPLR 4213 (b) in that it did not set forth findings of fact. The new determination should rectify that flaw. Mark Brandys represented the appellant.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_02397.htm](http://nycourts.gov/reporter/3dseries/2021/2021_02397.htm)

**Cynthia Feathers, Esq.**

**ILS | NYS Office of Indigent Legal Services**

Director, Quality Enhancement for Appellate

And Post-Conviction Representation

80 S. Swan St., Suite 1147, Albany, NY 12210

(518) 949-6131 | [Cynthia.Feathers@ils.ny.gov](mailto:Cynthia.Feathers@ils.ny.gov)