

CRIMINAL

COURT OF APPEALS

***People v Scheider*, 6/3/21 – DISSENT/ “WIRETAP-HAPPY”**

The central issue was whether CPL 700.05 authorized a NY court to issue a warrant commanding the diversion into NY of a cell phone call between a California resident who had never been to NY and persons not in NY, so that NY officers could listen to the call in NY. The majority said yes. Dissenters Wilson and Rivera said no. The NY Const. Art. I, § 12 provided explicit protections against unreasonable interception of telephone communication. CPL Art. 700 did not authorize an eavesdropping warrant to listen in on any calls between anyone in the U.S. The phone company executed the warrant when it diverted the out-of-jurisdiction call. That was not authorized. At the time of the law’s enactment, wiretaps were carried out by officers physically tapping lines near the target. The legislature could not have imagined the instant scenario. In 2019, NY’s courts accounted for 28% of wiretap applications granted by all state courts. Our prosecutors and courts are “wiretap-happy.”

http://www.nycourts.gov/reporter/3dseries/2021/2021_03486.htm

FIRST DEPARTMENT

***People v Lewis*, 6/1/21 – CLOSED CONTAINER / NO EXIGENCY**

The defendant appealed from a judgment of NY County Supreme Court, convicting him of 1st degree criminal possession of a forged instrument (17 counts), upon a jury verdict. The First Department reversed, suppressed, and dismissed. During a search incident to arrest, the officer removed a small envelope from the defendant’s pocket and peeked inside. That constituted a search of a closed container. To the extent that the envelope was partly open, its contents were not in plain view or visible until the officer opened the envelope. Absent exigent circumstances, the officer’s actions were improper. The Office of the Appellate Defender (Katrina Myers) represented the appellant.

http://nycourts.gov/reporter/3dseries/2021/2021_03422.htm

***People v Gumbs*, 6/1/21 – DEFENDANT / OPENING DOOR WIDE**

The defendant appealed from a judgment of Bronx County Supreme Court, convicting him of 2nd degree CPW (two counts). The First Department affirmed, finding challenged rulings proper based on the defendant having opened the door to damaging testimony. First, the defendant elicited that the arrests of two cohorts were voided after the search. That opened the door to the defendant’s suppressed statement as to the location of the weapons he illegally possessed. Second, the defendant’s testimony that he supported himself by legal means allowed proof that he sold marijuana. Third, his claim that there were three bags of pot in his apartment led to proof of 136 bags. Fourth, the defendant’s testimony about his relationship with a woman present during the search opened the door to proof of his violent conduct against her. Ineffective assistance claims were unreviewable on direct appeal.

SECOND DEPARTMENT

***People v Grimes*, 6/2/21 – ORDERS OF PROTECTION / VACATED**

The defendant appealed from a judgment of Suffolk County Supreme Court, convicting him of 2nd degree CPW and other crimes, upon a jury verdict. The appeal brought up for review orders of protection for the defendant's children. The Second Department modified, vacating the orders. The children, both under age three, were in the back seat of the vehicle at the time of the stop. The trial court lacked authority to issue the orders where the children were not witnesses or victims of the crimes. Arza Feldman represented the appellant.

http://nycourts.gov/reporter/3dseries/2021/2021_03471.htm

***People v Rodriguez*, 6/2/21 – SORA ERROR / AFFIRMED**

The defendant appealed from an order of Westchester County Supreme Court, designating him a level-three risk under SORA. The Second Department affirmed but overruled prior precedent. Without more, a familial relationship between the defendant and victim was not a basis for an upward departure. Abuse of trust in a relationship was not key to assessing points under risk factor 7. *People v Cook*, 29 NY3d 121. The Guidelines required enhanced community notifications where abuse occurred in distant relationships, which indicated an increased risk. But the departure here was warranted by other aggravating factors.

http://nycourts.gov/reporter/3dseries/2021/2021_03475.htm

***People v Rivera*, 6/2/21 – BRADY / DISCLOSURE DURING TRIAL**

The defendant appealed from a judgment of Nassau County Supreme Court, convicting him of 2nd degree murder and other crimes. The Second Department affirmed. The trial court properly denied a mistrial motion that was based on a *Brady* violation. An allegedly exculpatory statement was turned over to the defense during the People's case-in-chief and admitted into evidence during the defense case. Further, defense counsel did not seek to recall any prosecution witnesses to further cross-examine them regarding the statement. Thus, the defendant was given a meaningful opportunity use the *Brady* material, and there was no indication that earlier disclosure might have changed the outcome.

http://nycourts.gov/reporter/3dseries/2021/2021_03473.htm

FAMILY

FIRST DEPARTMENT

***Nicolas Jude B. (Rosetta B.)*, 6/1/21 – KINSHIP GUARDIAN / AFFIRMED**

The biological mother (mother) appealed from an order of NY County Family Court, which granted the foster mother's petition for kinship guardianship. The First Department affirmed. In 2008, the mother was found to have neglected the child, who had been in the foster mother's care for a decade. The prolonged separation of mother and child constituted extraordinary circumstances. The mother gained no insight into her shortcomings, had limited contact with the child, and made minimal progress with her service plan. The child's best interests would be served by guardianship in the foster mother, who had provided a stable home. The teenager wanted to stay with the foster mother but not be adopted by her.

http://nycourts.gov/reporter/3dseries/2021/2021_03400.htm

THIRD DEPARTMENT

***M/O Nicole L. v David M.*, 6/3/21 – FATHER / MIA / VISITS**

The father appealed from an order of Columbia County Family Court, awarding guardianship to the maternal aunt, following the death of the mother and abandonment of the child by the father. The Third Department modified. Family Court erred in failing to address the father's request for visitation. The matter had to be remitted to Family Court for a "best interests" hearing, since the record was not sufficiently developed, and nearly three years had elapsed since the order. Maria Clark represented the appellant.

http://nycourts.gov/reporter/3dseries/2021/2021_03487.htm

***Montgomery County DSS v Trini G.*, 6/3/21 – FATHER / EQUITABLE ESTOPPEL / ERROR**

The respondent appealed from an order of Montgomery County Family Court, which adjudicated him the father of a child. The Third Department reversed. Family Court erred in equitably estopping the respondent from denying paternity and rejecting his request for a genetic marker test. The mother and her boyfriend co-parented the child, and the respondent had only sporadic contact. There was no proof of an operative parent-child relationship validating equitable estoppel. Desiree Claudio represented the appellant.

http://nycourts.gov/reporter/3dseries/2021/2021_03489.htm