

# CRIMINAL

## FOURTH DEPARTMENT

***People v Wright*, 6/11/21 – SUPPRESSION / DISMISSAL**

The defendant appealed from an Onondaga County Court judgment, convicting him of 3<sup>rd</sup> degree CPW and other crimes, upon his plea of guilty. The Fourth Department reversed and dismissed. The appeal brought up for review an order denying suppression of physical evidence and statements. As the defendant and another man walked down the street, three officers descended upon them because the companion appeared to have an open container of an alcoholic beverage inside a paper bag. The defendant bladed his body while grabbing at his waistband. The officers may have possessed a level-one right to approach, but they immediately engaged in a level-two intrusion. That was improper, where the officers did not see either man drinking from whatever was in the paper bag, and no other circumstances indicated criminal behavior. Two justices dissented. Hiscock Legal Aid Society (Caitlyn Connelly, of counsel) represented the appellant.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_03675.htm](http://nycourts.gov/reporter/3dseries/2021/2021_03675.htm)

***People v Coleman*, 6/11/21 – PEREMPTORY CHALLENGE / NEW TRIAL**

The defendant's appealed from a County Court judgment, convicting him of 3<sup>rd</sup> degree criminal sale of a controlled substance. The Fourth Department granted a new trial. It was error to allow the prosecutor to exercise a peremptory challenge to exclude a black prospective juror. The court accepted the purported race-neutral reason for the challenge, even though it was based on the prosecutor's erroneous recollection/recounting of the juror's innocuous statements. Two justices dissented. The Monroe County Public Defender (Brian Shiffrin, of counsel) represented the appellant.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_03695.htm](http://nycourts.gov/reporter/3dseries/2021/2021_03695.htm)

***People v O'Donnell*, 6/11/21 – RAPE / NO FORCIBLE COMPULSION**

Upon the defendant's appeal from a Cattaraugus County Court judgment, the Fourth Department dismissed two counts of 1<sup>st</sup> degree coercion, two counts of 1<sup>st</sup> degree rape, and one count of attempted 1<sup>st</sup> degree sexual act count. There was no proof that the defendant's statements induced the victim into any conduct; and the physical abuse in the sexual relationship did not make the sex acts a product of forcible compulsion. The appellate court chastised the prosecutor for misstating proof in summation and reminded the People of their ethical duties. Given the defendant's advanced age and lack of a criminal record, the sentence was unduly severe. The terms for the remaining convictions—rape (two counts) and attempted sexual act—would run concurrently with each other. Legal Aid Bureau of Buffalo (Jane Yoon, of counsel) represented the appellant.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_03709.htm](http://nycourts.gov/reporter/3dseries/2021/2021_03709.htm)

***People v Swift*, 6/11/21 – STRANGULATION / NO INJURY**

The defendant appealed from a County Court judgment, convicting him of 1<sup>st</sup> degree burglary (two counts), 2<sup>nd</sup> degree strangulation, and other crimes. The Fourth Department granted a new trial on strangulation. County Court erred in denying a request to instruct the jury on attempted strangulation 2<sup>nd</sup>, where a reasonable view of the evidence would have supported a finding of no physical injury. The burglary terms were too harsh, given the defendant's lack of a record, his psychiatric hospitalizations, and the pretrial offer of five years. The reviewing court reduced the sentence to determinate terms of 10 years, plus post-release supervision. The Monroe County Conflict Defender (Carolyn Walther, of counsel) represented the appellant.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_03785.htm](http://nycourts.gov/reporter/3dseries/2021/2021_03785.htm)

***People v Santiago*, 6/11/21 – WEAPON / NOT LOADED**

The defendant appealed from a judgment of Onondaga County Supreme Court, convicting him of 2<sup>nd</sup> degree CPW and another crime. The Fourth Department modified. There was no proof that the weapon was loaded. Indeed, the victim testified that, on the date in question, the defendant put the firearm to her head and pulled the trigger twice, but the weapon did not fire. The conviction was reduced to criminal possession of a firearm. Hiscock Legal Aid Society (Thomas Leith, of counsel) represented the appellant.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_03756.htm](http://nycourts.gov/reporter/3dseries/2021/2021_03756.htm)

***People v Nelson*, 6/11/21 – RESENTENCE / TOO SEVERE**

Upon the defendant's appeal from a Supreme Court resentence, the Fourth Department modified. In a prior appeal, the defendant's conviction was reduced from 1<sup>st</sup> to 2<sup>nd</sup> degree gang assault. The defendant now contended that his resentence was harsh and excessive, because it was the same as the original punishment. The appellate court agreed and ordered a reduction to a determinate term of 12 years, plus post-release supervision. The Monroe County Public Defender (David Juergens, of counsel) represented the appellant.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_03728.htm](http://nycourts.gov/reporter/3dseries/2021/2021_03728.htm)

***People v Delles*, 6/11/21 – SORA / NO FINDINGS**

The defendant appealed from a Lewis County Court order, which adjudicated him a level-three risk. The Fourth Department reserved and remitted. The SORA court did not comply with the statutory requirement to set forth findings of fact and conclusions of law. The standardized-form order merely listed the risk-factor point assessments and, in conclusory fashion, identified factors supporting upward departure and denied a request for downward departure. Caitlin Connelly represented the appellant.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_03711.htm](http://nycourts.gov/reporter/3dseries/2021/2021_03711.htm)

***People v Bowen*, 6/11/21 – SUPPRESSION / DISSENT**

The defendant appealed from an Onondaga County Court judgment, convicting him of 2<sup>nd</sup> degree murder, 1<sup>st</sup> degree arson, and another crime, upon a jury verdict. The Fourth Department affirmed. One justice dissented, opining that three statements by the defendant after invocation of his right to counsel should have been suppressed. A fire engulfed a rooming house, and a tenant died in the blaze. The defendant, a former tenant, was a suspect. When the defendant asked how the decedent's wife was doing, a detective responded that she had lost the person she loved most in life. The defendant cried, and the

detective praised him for contrition. Then came the incriminating statements, punctuated by the detective's encouragement of expressions of remorse.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_03685.htm](http://nycourts.gov/reporter/3dseries/2021/2021_03685.htm)

## FAMILY

### FOURTH DEPARTMENT

*M/O Malachi S. (Michael W.)*, 6/11/21 – **DEFAULT / NO EXCUSE**

The father appealed from orders of Monroe County Family Court entered in a Social Services Law § 384-b proceeding. Upon the father's default, the court revoked a suspended judgment and terminated his parental rights. Another order denied the father's motion to vacate. The Fourth Department affirmed both orders. The father violated many terms of the suspended judgment, and it was in the child's best interests to end his parental rights. As to the vacatur application, the father failed to appear at the hearing; and his attorney, although present, did not participate. Thus, the father's unexplained failure to appear was a default. Denial of vacatur was proper since a reasonable excuse and meritorious defense were not shown. A parent's right to be heard on matters concerning his/her child should not be disregarded, absent a waiver. The right to be present for termination hearings is not absolute, and the child was entitled to a prompt adjudication. The father was notified of the hearing; willfully failed to appear; and forfeited any right to be present—regardless of whether he was warned that the hearing would proceed in his absence.

[http://nycourts.gov/reporter/3dseries/2021/2021\\_03732.htm](http://nycourts.gov/reporter/3dseries/2021/2021_03732.htm)