

CRIMINAL

FIRST DEPARTMENT

DECISION OF THE WEEK

***People v Fernandez*, 7/30/20 – CPL 440.10 / IAC / REVERSAL**

Previously, the defendant appealed from a NY County Supreme Court judgment, convicting him after a jury trial of certain drug possession crimes and other offenses and sentencing him to an aggregate term of 8 to 21 years. In the prior appeal, the defendant contended that defense counsel rendered ineffective assistance with regard to suppression proceedings. The First Department affirmed the judgment of conviction (158 AD3d 462), finding the IAC claim unreviewable because the record on direct appeal did not establish that counsel's alleged deficiencies flowed from a misunderstanding of the law. Thereafter, the defendant filed the instant CPL 440.10 motion, which was supported by motion counsel's affirmation detailing many unsuccessful attempts to obtain a statement from trial counsel as to his actions/inactions regarding suppression. The motion court summarily denied the 440 motion. That was error. The First Department reversed and remanded for a hearing, for which trial counsel could be subpoenaed to present evidence as to whether there were strategic reasons for his decisions regarding suppression. The Center for Appellate Litigation (John Vang, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2020/2020_04368.htm

(NOTE: The February–March 2018 issue of CAL's ISSUES TO DEVELOP AT TRIAL addresses the topic, "[What Are Your Ethical Obligations when Post-Conviction Counsel Calls about a Possible IAC Claim?](#)")

https://www.appellate-litigation.org/siteFiles/SiteManager/Issues%20to%20Develop%20at%20Trial_February-March%202018.pdf

THIRD DEPARTMENT

***People v Gravell*, 7/30/20 – RESTITUTION / VACATED**

The defendant appealed from a judgment of Schenectady County Supreme Court, convicting him of 2nd degree burglary. The Third Department modified by vacating the restitution order. Under the plea deal, the defendant was to pay restitution in an amount not to exceed \$100. However, at sentencing, the lower court directed restitution of \$169. The defendant failed to preserve his claim by requesting a hearing or objecting at sentencing to the restitution amount; but the appellate court took corrective action in the interest of justice. The matter was remitted to give the defendant the opportunity to accept the sentence with the enhanced restitution award or to withdraw his guilty plea. Supreme Court failed to set forth the time and manner of the payment of restitution, and that omission also had to be addressed. Mitchell Kessler represented the appellant.

http://nycourts.gov/reporter/3dseries/2020/2020_04344.htm

***People v Tomko*, 7/30/20 – WAIVER OF APPEAL / FIRST FELONY**

The defendant appealed from a Warren County Court judgment, convicting him of 1st degree robbery and 2nd degree burglary. The Third Department affirmed, but found that the waiver of the right to appeal was not knowing, intelligent, and voluntary. The plea court's brief colloquy with the defendant—a first-time offender—failed to ensure that she understood the terms and/or consequences of the appeal waiver.

http://nycourts.gov/reporter/3dseries/2020/2020_04346.htm

SECOND CIRCUIT

***United States v Smith*, 7/28/20 –**

UNREASONABLE DELAY / NO EXCLUSIONARY RULE

In an appeal from a District Court–NDNY judgment, the defendant urged that the failure to suppress the fruits of a search of his tablet was error. The Second Circuit affirmed, but found that the police did not act with diligence to seek a search warrant. Based on probable cause, police often temporarily seized a suspect's personal property, with the intent to apply for a warrant to search the property for evidence of a crime. The Fourth Amendment required diligence in seeking a warrant. In the instant case, on the defendant's tablet screen, a NY State Trooper glimpsed an image that appeared to be child pornography. After the tablet was seized, police waited 31 days before applying for a warrant to search the device. In the absence of extenuating reasons, such delay was unreasonably long. However, the exclusionary rule did not apply because, under the law at the relevant time, a reasonable officer would not have known that the delay was unconstitutional. Another salient factor in the analysis was the importance of the seized property to the defendant. District Court failed to consider the special privacy and possessory concerns that applied to personal electronic devices and the broader constitutional protection accorded to such items, compared to ordinary personal effects.

[https://www.ca2.uscourts.gov/decisions/isysquery/5df211e7-071b-4d85-aa76-637b26e6e72a/4/doc/17-](https://www.ca2.uscourts.gov/decisions/isysquery/5df211e7-071b-4d85-aa76-637b26e6e72a/4/doc/17-2446_complete_opn.pdf#xml=https://www.ca2.uscourts.gov/decisions/isysquery/5df211e7-071b-4d85-aa76-637b26e6e72a/4/hilite/)

[2446_complete_opn.pdf#xml=https://www.ca2.uscourts.gov/decisions/isysquery/5df211e7-071b-4d85-aa76-637b26e6e72a/4/hilite/](https://www.ca2.uscourts.gov/decisions/isysquery/5df211e7-071b-4d85-aa76-637b26e6e72a/4/hilite/)

FAMILY

SECOND DEPARTMENT

***Silverman v Silverman*, 7/29/20 – AFC KNOWS BEST / REVERSAL**

The mother appealed from an award of residential custody to the father. The Second Department reversed. The AFC improperly substituted her judgment for her clients' wishes for custody to remain with the mother; failed to advocate on their behalf; and in fact vigorously opposed their position. In addition, the AFC did not take an active role by presenting evidence on behalf of her clients, which was particularly troubling in light of allegations of serious domestic violence by the father against the mother. At oral argument, the AFC stated that the children were not doing well, but she hoped they would improve. Nevertheless, she continued to argue in support of residential custody to the father, in opposition to the wishes of her clients, who were 15 and almost 13 at the time. The AFC utterly failed to fulfill her duty to zealously advocate the children's position. *See* 22 NYCRR 7.2 (d). Exceptions to that rule did not apply here. *See* Rule 7.2 (d) (3) (AFC may advocate position contrary to child's wishes when convinced that child lacks capacity for knowing, voluntary, considered judgment; or that following child's wishes was likely to result in substantial risk of imminent, serious harm to child). Thus, it was improper for the AFC to substitute her judgment, and the children did not receive meaningful assistance. Further, Supreme Court failed to consider the preferences of the children, despite their age, and to order an updated forensic evaluation. The matter was remitted for appointment of a new AFC and a de novo hearing. Eyal Talassazan represented the appellant.

http://nycourts.gov/reporter/3dseries/2020/2020_04338.htm

***Matter of Ednie v Haniquet*, 7/29/20 – ANTI-VAXXER / NO DECISION POWER**

The child appealed from a Kings County Family Court custody order. The Second Department modified, providing that the father, not the mother, would have medical decision-making authority. The mother opposed vaccinating the child. Because the father supported vaccinations and that stance was safer for the child, the forensic evaluator recommended that he be awarded the medical-decision power. The Children's Law Center (Janet Neustaetter, of counsel) represented the child.

http://nycourts.gov/reporter/3dseries/2020/2020_04305.htm

***Amira v Amira*, 7/29/20 – VISITATION / SUPERVISION**

The children appealed from a Kings County Supreme Court order, which awarded the mother alternate weekend parental access, to be supervised by the maternal grandparents. The Second Department reversed and remitted. Supreme Court did not ascertain whether the grandparents were able and willing to supervise the mother's expanded access and could ensure that the children would receive appropriate care during visits. The Children's Law Center represented the children.

http://nycourts.gov/reporter/3dseries/2020/2020_04287.htm