

Indigent Legal Services

Decisions of Interest

OCTOBER 15, 2021

CRIMINAL

COURT OF APPEALS

***People v Blandford* | Oct. 14, 2021**

SUPPRESSION | CANINE SEARCH

The Court of Appeals affirmed an Appellate Division order challenged by the defendant. The dispute concerned the denial of his motion to suppress marihuana found during a traffic stop. The defendant did not contest the legality of the stop, and he consented to a search of the backseat. Instead of conducting the search, a police officer walked his canine around the exterior of the vehicle, and the dog alerted police to the trunk. The defendant argued that, since police lacked a founded suspicion that criminal activity was afoot, the canine-sniff search was unlawful. In a memorandum decision, the COA found that there was record support for the determination that a founded suspicion existed, so the issue was beyond further review. Judge Wilson's dissent addressed the proper standard for canine searches. Judges Rivera and Fahey concurred in the dissent.

https://www.nycourts.gov/reporter/3dseries/2021/2021_05619.htm

***People v Ibarguen* | Oct. 14, 2021**

SUPPRESSION | HEARING

The Court of Appeals affirmed an Appellate Division order challenged by the defendant. CPL 710.60 required a motion to suppress physical evidence to state the grounds of the application and to contain sworn allegations of fact. The suppression court did not abuse its discretion in summarily denying the motion where the defendant failed to sufficiently allege standing to challenge the search of the premises. In a dissenting opinion, Judge Wilson explored the privacy interest of social guests. Judge Rivera joined the dissent.

https://www.nycourts.gov/reporter/3dseries/2021/2021_05617.htm

FIRST DEPARTMENT

***People v Grosso* | Oct. 14, 2021**

ATTEMPTED ASSAULT | DISMISSED

The defendant appealed from a judgment of New York County Supreme Court, convicting him of attempted 1st and 2nd degree robbery and other crimes. The First Department vacated the convictions of attempted 1st degree assault and 2nd degree assault. Such counts, charged under an acting-in-concert theory, were not supported by legally

sufficient evidence. The People failed to prove that, when the codefendant stabbed the victim, the defendant shared his intent to do so. There was no proof that the defendant knew that the codefendant had a knife or was planning to use it; or that, when the defendant became aware of the use of the knife, he continued to participate in the assault. The Center for Appellate Litigation (Carola Beeney, of counsel) represented the appellant.

https://nycourts.gov/reporter/3dseries/2021/2021_05640.htm

SECOND DEPARTMENT

***People v Brown* | Oct. 13, 2021**

SUPPRESSION | FOUNDED SUSPICION

The defendant appealed from a judgment of Kings County Supreme Court, convicting him of criminal possession of a firearm, upon his plea of guilty. The appeal brought up for review the denial of a motion to suppress physical evidence and certain statements. The Second Department reversed, suppressed, and remitted. The testifying officer failed to articulate any reason for approaching the defendant, other than that he seemed nervous and the officer wanted to see why the defendant went into the store. That did not provide an objective, credible reason for the officers to approach the defendant and request information. Further, police had no basis for immediately engaging the defendant in a pointed inquiry regarding a bag found inside the store. The People adduced no evidence that the defendant was ever observed in possession of the bag, and the officers never asked anyone else in the store if the bag belonged to them. The defendant's actions were too vague and generic to support a level-two inquiry. Two justices dissented. Appellate Advocates (Skip Laisure, of counsel) represented the appellant.

https://nycourts.gov/reporter/3dseries/2021/2021_05579.htm

***People v Anarbaev* | Oct. 13, 2021**

SENTENCES | CONCURRENT

The defendant appealed from a judgment of Richmond County Supreme Court, convicting him of multiple offenses. The Second Department modified. The sentences imposed for aggravated criminal contempt, and the count of 1st degree burglary premised on the infliction of physical injury to a non-participant to the crime, would run concurrently with the sentence for 2nd degree murder. The physical injury element of the contempt and burglary counts was subsumed in the act of causing death.

https://nycourts.gov/reporter/3dseries/2021/2021_05578.htm

***People v Wolfe* | Oct. 13, 2021**

ANDERS | NEW COUNSEL

The defendant appealed from a Dutchess County Court judgment, convicting him of 1st degree course of sexual conduct against a child, upon his plea of guilty. Assigned counsel submitted an *Anders* brief, and the Second Department appointed new appellate counsel. Potentially nonfrivolous issues existed, including whether the defendant's plea was knowing, voluntary, and intelligent, given that the lower court did not specify the period of post-release supervision to be imposed or the maximum potential duration.

https://nycourts.gov/reporter/3dseries/2021/2021_05597.htm

APPELLATE TERM

***People v Neris* | 2021 NY Slip Op 50952(U)**

MISSING WITNESS | NO CHARGE

The defendant appealed from a judgment of Queens County Criminal Court, convicting him of common law DWI, upon a jury verdict. Appellate Term, Second Department reversed and ordered a new trial. Criminal Court erred in granting the People's request for a missing witness charge as to the defendant's mother. The defendant testified that she was at her mother's house before driving the car. But her mother was not with the defendant then or when she operated the vehicle. So the People failed to show that the mother knew if the defendant had consumed alcohol prior to her arrest. The error was not harmless. Appellate Advocates (Hannah Kon, of counsel) represented the appellant.

https://nycourts.gov/reporter/3dseries/2021/2021_50952.htm

***People v Desz* | 2021 NY Slip Op 50949(U)**

PLEA | INVALID

The defendant appealed from a judgment of Suffolk County District Court, convicting him of leaving the scene of an incident with property damage without reporting, upon his plea of guilty. Appellate Term, Second Department reversed and remitted. The defendant contended that his guilty plea was not knowing, intelligent, and voluntary. Such issue did not require preservation. The defendant pleaded guilty and was sentenced at the same proceeding and thus had no opportunity to move to withdraw his plea. There was virtually no allocution of the unrepresented, inexperienced defendant. The plea court did not ask him whether he had been driving, what incident occurred, or what damage resulted. Further, the defendant did not waive his constitutional rights. Scott Lockwood represented the appellant.

https://nycourts.gov/reporter/3dseries/2021/2021_50949.htm

***People v Soodoo* | 2021 WL 4736621**

MARIHUANA | IMMIGRATION IMPACT

The defendant appealed from Nassau County District Court orders denying two CPL 440.10 (1) (k) motions to vacate judgments convicting him of unlawful possession of marihuana. Appellate Term, Second Department reversed and dismissed. Immigration consequences the defendant faced due to his guilty pleas were meticulously set forth by counsel. While CPL 160.50 (a) provided for vacatur of the defendant's convictions, subdivision (c) did not preclude the CPL 440.10 motions. Nassau County Legal Aid Society (Tammy Feman and Marquette Christy, of counsel) represented the appellant.

https://nycourts.gov/reporter/3dseries/2021/2021_21269.htm

***People v Arana* | 2021 NY Slip Op 50951 (U)**

SENTENCE SERVED | IMMIGRATION IMPACT

The defendant appealed from a sentence of Queens County Criminal Court, imposed for his conviction of 2nd degree menacing, upon his guilty plea. Appellate Term, Second Department affirmed. The defendant argued that the sentence was excessive in rendering him ineligible for relief from immigration consequences. A challenge to a fully served sentence on the ground of excessiveness was not academic where the sentence had potential immigration repercussions. Even if the instant sentence presented such consequences, the reviewing court declined to reduce it.

https://nycourts.gov/reporter/3dseries/2021/2021_50951.htm

FAMILY

FIRST DEPARTMENT

Matter of Adonis H. | Oct. 14, 2021

NEGLECT | BUSINESS RECORDS

The father appealed from an order of disposition of Bronx County Family Court, which brought up for review an order finding neglect. The First Department affirmed. Investigative progress notes of the Administration for Children's Services (ACS) were properly received as business records. The supervisor's testimony established that the notes were made in the ordinary course of business and that the ACS had a statutory duty to maintain a comprehensive case record. Her testimony established that she was an ACS employee and was familiar with the agency's record-keeping practices. Entries based on the ACS caseworker's firsthand observations were admissible because they were recorded shortly after the occurrences.

https://nycourts.gov/reporter/3dseries/2021/2021_05627.htm

SECOND DEPARTMENT

Nina M.T. v DeSabato | Oct. 13, 2021

CUSTODY | SUA SPONTE

The father appealed from an order of Nassau County Family Court, which sua sponte awarded sole custody to the mother and supervised therapeutic parental access for the father, following a hearing. The Second Department reversed. The AFC requested an award of temporary custody to the mother and a temporary suspension of the father's parental access. Family Court responded by issuing the final custody order. The father was not on notice that a final order would be issued. John Zenir represented the appellant.

https://nycourts.gov/reporter/3dseries/2021/2021_05574.htm

Merchant v Caldwell | Oct. 13, 2021

CUSTODY | STIP MODIFIED

The father appealed from an order of Kings County Family Court, granting the mother's motion to dismiss his custody modification petition, without a hearing. The Second Department reversed. To alter the stipulation of settlement, the father had to show a sufficient change in circumstances so that modification was required to protect the best interests of the child. Since allegations in the petition were controverted, the appellate court remitted for a hearing, to be preceded by forensic evaluations of the parties and the child. Judith Richman and Brad Serlen represented the appellant.

https://nycourts.gov/reporter/3dseries/2021/2021_05570.htm

Castelli v Maiuri-Caselli | Oct. 13, 2021

SUPPORT REDUCTION | HEARING

The father appealed from a Nassau County Family Court order, which denied his objections regarding a downward modification of his basic child support obligation. The

Second Department reversed and remitted. The father's evidence demonstrated that the mother's income had increased by more than 15% since the entry of the judgment of divorce. That warranted a new determination of support obligations, regardless of whether any decrease in the father's income could be considered, given the Support Magistrate's finding that the father's loss of income resulted from his own voluntary actions.

https://nycourts.gov/reporter/3dseries/2021/2021_05558.htm