Indigent Legal Services
Decisions of Interest
OCTOBER 25, 2021

CRIMINAL

FIRST DEPARTMENT

People v Lantigua | Oct. 19, 2021

DOUBLE JEOPARDY | DISMISSAL

The defendants appealed from a judgment of Bronx County Supreme Court, convicting them of certain robbery charges. The First Department reversed and dismissed the indictments. Double jeopardy barred a retrial, except where a defendant requested or consented to the mistrial. Initially these defendants made general motions for a mistrial, but the next day they limited the requests to a mistrial *with prejudice*. So the trial court should have obtained their unequivocal consent before discharging the first jury or should have continued the trial with that jury. The retrial violated constitutional prohibitions against double jeopardy. The claim did not require preservation. The Office of the Appellate Defender (Victorien Wu, of counsel) represented Anderson Lantigua, and the Center for Appellate Litigation (Mark Zeno, of counsel) represented Carlos Alvarez.
https://nycourts.gov/reporter/3dseries/2021/2021_05671.htm

People v Johnson | Oct. 21, 2021

RUDOLPH | RESENTENCING

The defendant appealed from judgments of New York County Supreme Court, convicting him of 2nd degree conspiracy and 1st degree assault (two counts), upon his pleas of guilty. The First Department vacated the sentence and remanded. The defendant was entitled to be resentenced with an express youthful offender determination. *See People v Rudolph*, 21 NY3d 497. The Office of the Appellate Defender (Tabitha Cohen, of counsel) represented the appellant.
https://nycourts.gov/reporter/3dseries/2021/2021_05787.htm

People v Maltes | Oct. 21, 2021

DESTROYED TAPES| ADVERSE INFERENCE

The defendant appealed from a judgment of New York County Supreme Court, convicting him of 1st degree robbery and other crimes, upon a jury verdict. The First Department affirmed, but found error as to the admission of 911 tapes. Because the tapes were inadvertently destroyed, the court advised that the jury could infer that they would have been favorable to the defense. The court should not have conditioned such charge on the admission of Intergraph Computer Aided Dispatch reports summarizing 911 calls made by the two victims from separate incidents. The ICAD report relating to the robbery

included hearsay statements by the 911 caller that the defendant committed a robbery with a knife. Defense counsel said that he would not argue that there was no evidence that the complainant ever mentioned a knife on the calls. So the defendant did not open the door. Further, the ICAD report was not necessary to correct a misleading impression. However, the error was harmless.
https://nycourts.gov/reporter/3dseries/2021/2021_05781.htm

People v Minaya-Rodriguez | Oct. 19, 2021

PLEA | VOLUNTARY

The defendant appealed from a judgment of New York County Supreme Court, convicting him of 3rd degree CPCS. The First Department affirmed. The defendant's challenge to the voluntariness of his plea was unpreserved. At a calendar call, the defendant indicated that he did not know that the package he was carrying when arrested contained a controlled substance. However, he did not reiterate such statements at his plea allocution when he admitted his guilt as to all elements of the crime.
https://nycourts.gov/reporter/3dseries/2021/2021_05673.htm

Zhang v City of New York | Oct. 14, 2021

COP MISCONDUCT | CIVIL ACTION

The New York City defendants appealed from a Supreme Court order directing them to produce certain police personnel and disciplinary records. The First Department affirmed. Supreme Court explained that its initial determination denying disclosure of the records was made when Civil Rights Law § 50-a conferred confidentiality. That statute was repealed shortly after the order. In reconsidering the matter upon the plaintiff's motion to renew and reargue, the lower court properly ruled pursuant to the liberal discovery standards in CPLR 3101. The plaintiff police officer sought relevant records in a negligence case involving a fellow officer who shot him when a pit bull charged at them. The NYC defendants allegedly hired and retained the shooter officer despite his record of improper firearm use.
https://nycourts.gov/reporter/3dseries/2021/2021_05659.htm
https://www.law.com/newyorklawjournal/2021/10/19/citing-repeal-of-civil-rights-law-section-50-a-appeals-court-rules-police-officer-records-discoverable

SECOND DEPARTMENT

People v Carillo | Oct. 20, 2021

O'RAMA VIOLATION | NEW TRIAL

The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 2nd degree murder. The Second Department reversed and ordered a new trial. A jury note stated, "We would like the DNA results in regards to the blood smear on the banister." Although the note was marked as a court exhibit, the trial transcript did not reflect that the court showed it to counsel or read it verbatim. Thus, the lower court failed to provide notice of the actual content of a substantive jury inquiry. The mode-of- proceedings error required reversal. *See People v O'Rama*, 78 NY2d 270. Appellate Advocates (Anna Kou, of counsel) represented the appellant.

https://nycourts.gov/reporter/3dseries/2021/2021_05710.htm

People v Warren | Oct. 20, 2021

SEXUAL ABUSE | INSUFFICIENT PROOF

The defendant appealed from a judgment of Queens County Supreme Court, convicting him of multiple offenses. The Second Department modified. The appellate court held that the conviction of 1st degree sexual abuse under count 3 of the indictment was based upon legally insufficient evidence, since no force separate from the contact itself was used to compel the contact alleged. The appellate court reached the unpreserved issue in the interest of justice. Since the proof did establish 3rd degree sexual abuse, the conviction was reduced accordingly. Counts of 1st degree sexual abuse, as charged in counts 9 and 10, were multiplicitous. While such counts involved sexual contact to two distinct parts of the body, there was a single uninterrupted occurrence of forcible compulsion. Appellate Advocates (Ronald Zapata, of counsel) represented the appellant.
https://nycourts.gov/reporter/3dseries/2021/2021_05736.htm

People v Ortiz | Oct. 20, 2021

SENTENCES | CONCURRENT

The defendant appealed from a judgment of Richmond County Supreme Court, convicting him of 2nd degree murder and 2nd degree CPW (two counts). The Second Department modified. Supreme Court erred in directing that the sentence imposed upon one weapon possession conviction would run consecutively to the murder term. The evidence did not establish that the defendant possessed the gun for an unlawful purpose unrelated to shooting at the intended victim, resulting in the victim's death, or that his possession of the gun was separate and distinct from his shooting. Appellate Advocates (Joshua Levine, of counsel) represented the appellant.
https://nycourts.gov/reporter/3dseries/2021/2021_05726.htm

People v Terrero | Oct. 20, 2021

PADILLA | INADMISSIBILITY

The defendant appealed from a Dutchess County Court order, which summarily denied his CPL 440.10 motion to vacate a judgment convicting him of 3rd degree CPCS. The Second Department affirmed. The defendant alleged that he was deprived of effective assistance because counsel did not advise him that, due to his guilty plea, he would be excluded from re-entry to the United States under 8 USC § 1182 (regarding ineligibility to receive visas and to be admitted to the U.S.). Defense counsel did inform the defendant that his guilty plea would result in deportation. *See Padilla v Kentucky*, 559 US 356. Exclusion or inadmissibility was not a direct or deportation consequence of pleading guilty. *See People v Lovell*, 188 AD3d 1255. Notably, the defendant did not allege that counsel made any affirmative misrepresentations regarding inadmissibility.
https://nycourts.gov/reporter/3dseries/2021/2021_05733.htm

THIRD DEPARTMENT

People v Abdullah | Oct. 21, 2021

CHARGE | RESUBMITTED

The defendant appealed from a judgment of Albany County Supreme Court, convicting him of 2nd degree burglary (two counts). Supreme Court erred in granting the People's ex parte application for leave to resubmit one burglary charge. Under CPL 190.75(3), where

a grand jury has no-billed or dismissed a charge, the charge may not again be submitted unless the court authorizes or directs the People to resubmit it to the same or another grand jury. The People sought to resubmit a burglary 2nd charge, purportedly because the first grand jury acted in an irregular manner. But Supreme Court did not make any finding in that regard. Instead, the application was granted because the People had purportedly presented a new theory of the case—which was not true. Indeed, the People had relied on the same facts and conduct previously found insufficient to warrant prosecution. Thus, dismissal of the subject charge was required. Pamela Bleiwas represented the appellant.
https://nycourts.gov/reporter/3dseries/2021/2021_05742.htm

FAMILY COURT

FIRST DEPARTMENT

Matter of Tsoede L., Jr. | Oct. 19, 2021

NEGLECT | NO VACATUR

The mother appealed from an order of New York County Family Court, which denied vacatur of a neglect order. The First Department affirmed. Family Court entered the challenged order—on consent of the mother without admission—based on findings that she severely beat the child, 8, resulting in the child's PTSD and ongoing need for therapy. Given the mother's egregious conduct and the emotional harm to the child, denial of vacatur was proper. The mother did complete services and did engage in therapy. Yet she did not see how her acts hurt the child or have a plan to address the child's problems.
https://nycourts.gov/reporter/3dseries/2021/2021_05667.htm

SECOND DEPARTMENT

Matter of Osher W. | Oct. 20, 2021

SEXUAL ABUSE | RABBINICAL RULING

The father appealed from orders of Kings County Family Court, which, among other things, found that he sexually abused his son, Osher. The Second Department affirmed. At age four, the child told his grandmother that his father had made him touch the father's penis. She did not report the incident to police but referred the matter to a Rabbinical Court. When Osher was six, the father became aware of a ruling by that court, which resulted in his restricted parental access for a decade. At age 16, the boy stayed at his father's house and thereafter disclosed that his father had again sexually abused him. The boy's out-of-court statements to his grandmother and an ACS caseworker were sufficiently corroborated. His descriptions of abuse were detailed and consistent. They further corroborated by changes in his behavior soon after his stay with his father, whose acquiescence to the Rabbinical Court ruling was indicative of consciousness of guilt.
https://nycourts.gov/reporter/3dseries/2021/2021_05706.htm

Matter of Jenny M. | Oct. 20, 2021

UCCJEA | NO ANALYSIS

The petitioner appealed from an order of Westchester County Family Court, which dismissed the Article 10 petition for lack of jurisdiction. The Second Department reversed. Jurisdiction was governed by the UCCJEA, but Family Court failed to determine whether New York was the child's home state—despite his Connecticut residence when the petition was filed—and whether there was temporary emergency jurisdiction. A criminal proceeding was pending in Connecticut, yet Family Court failed to determine whether such proceeding concerned custody of the child. If so, Family Court would have been required to stay proceedings and communicate with the Connecticut court.

https://nycourts.gov/reporter/3dseries/2021/2021_05701.htm

Baraz v Polyakov | Oct. 20, 2021

CUSTODY STIP | SCHOOL WORK FIRST

The husband appealed from an order of Kings County Supreme Court, which granted the wife's motion to modify the custody provisions of the stipulation of settlement incorporated but not merged into the judgment of divorce. The Second Department modified. Under the agreement, the wife and husband each had final say as to educational decisions and sports activities, respectively. The wife sought a provision that educational activities would trump extracurricular pursuits. Family Court properly granted the change but went too far in requiring sport activities to "remain local." That precluded the child's participation in a travel hockey program.

https://nycourts.gov/reporter/3dseries/2021/2021_05684.htm

THIRD DEPARTMENT

Weaver v Weaver | Oct. 21, 2021

ARTICLE 4 | SUPPORT AFFIRMED

The father appealed from a Fulton County Family Court order rendered in post-divorce child support proceedings. The Third Department affirmed. The father's central argument, as to the operative date used to modify his support obligations, was precluded by res judicata. A prior order resolved the merits on the same issue presented here. The father had a full and fair opportunity to challenge the prior determination and could not attack its validity for the first time in the instant appeal. Family Court properly prohibited any refund or credit for overpayments in child support, given the public policy against recoupment. William Newman and Pro Bono Appeals Program, Buffalo (*see* link below) (Johnathan Reiner, of counsel) represented the respondent.

https://decisions.courts.state.ny.us/ad3/Decisions/2021/532136.pdf

https://www.law.buffalo.edu/beyond/pro-bono/pbap.html

Regina R. v Frederick S. | Oct. 21, 2021

ARTICLE 6 | DEFECTIVE SERVICE

The father appealed from an order of Columbia County Family Court, which denied his motion to vacate a prior default order in a custody proceeding. The motion court held that the father failed to provide a reasonable excuse for his default. The Third Department affirmed, albeit on a different ground. The appellate court could consider, for the first time on appeal, an argument that involved a question of law appearing on the face of the

record that could not have been avoided if brought to the attention of the trial court at the appropriate juncture. The father failed to comply with CPLR 2103 (b), which required that his papers be served on the wife's attorney. The instant motion was filed only on the mother herself. Further, the AFC was not served. Thus, Family Court had no jurisdiction to entertain the motion.
https://nycourts.gov/reporter/3dseries/2021/2021_05749.htm

Amanda YY. v Faizal ZZ. | Oct. 21, 2021

ARTICLE 6 | INTERPRETER

The father appealed from an order of Schenectady County Family Court, which dismissed his custody petition. The Third Department affirmed. Family Court must appoint an interpreter if a parent is unable to understand and communicate in English to the extent that he/she cannot meaningfully participate in the court proceedings. The father did not request an interpreter. He testified that, although his native language was Urdu, he had lived in the United States for 20 years and understood 98% of the English spoken in the courtroom. A few times, he indicated that he did not understand, resulting in questions being reframed. Under such circumstances, Family Court did not abuse its discretion by failing to sua sponte appoint an interpreter.
https://nycourts.gov/reporter/3dseries/2021/2021_05750.htm

Matter of Nicholas L. | Oct. 21, 2021

ARTICLE 10 | WILLFUL VIOLATION

In an Article 10 proceeding, the respondents-parents appealed from an order of Montgomery County Family Court, granting the petitioner's motion to find them in willful violation of three prior orders. The Third Department reversed. The prior orders did not impose a clear and unequivocal mandate upon the respondents to refrain from contact with their mutual romantic partner. Further, the petitioner failed to establish that the partner was near respondents' home prior to any unsupervised visit. Family Court also abused its discretion in finding that the mother violated the order of protection by locating the foster home, driving by it, and telling one daughter that she had done so. The decision was irreparably tainted by the admission of unproven allegations against the respondents from the underlying neglect proceeding, as well as inadmissible hearsay contained in case notes. Alexandra Verrigni represented the mother, Christopher Hammond represented the father, and Karen Crandall was the AFC.
https://nycourts.gov/reporter/3dseries/2021/2021_05746.htm

Donald QQ. v Stephanie RR. | Oct. 21, 2021

ARTICLE 10 | NO AUTHORITY

The Clinton County Department of Social Services appealed from a Family Court order. In an Article 6 proceeding, the court had sua sponte directed DSS to file a neglect petition against the parents. The Third Department reversed. Family Court lacked the authority to order a child protective agency to commence a neglect proceeding against a parent. *See* Family Ct Act § 1032. The challenged order was not appealable as of right because Family Court did not decide a motion made on notice. However, the appellate court treated the DSS notice of appeal as a motion for leave to appeal and granted leave.
https://nycourts.gov/reporter/3dseries/2021/2021_05760.htm

Matter of Khavonye FF. | Oct. 21, 2021

TPR | BRAIN INJURY

The mother appealed from an order of Schenectady County Family Court, which terminated her parental rights based on abandonment. The Third Department reversed and dismissed the petition. The petitioner relied on the testimony of caseworker, who described the mother's three supervised visits during the relevant six-month period. The mother had a good excuse for missing some visits—she had been hospitalized for brain surgery. The agency failed to controvert the mother's testimony that: (1) during visits, she brought clothing, toys, books, and cards; (2) she attended service plan reviews; (3) when she had the brain injury, she told the petitioner and tried to reschedule missed visitation; and (4) many times, she unsuccessfully tried to contact the visit supervisors to schedule parenting time. Michelle Rosien represented the appellant.
https://nycourts.gov/reporter/3dseries/2021/2021_05753.htm

Headwell v Headwell | Oct. 21, 2021

DIVORCE | CHILD SUPPORT

The husband appealed from a judgment of Washington County Supreme Court, granting a divorce and ancillary relief. The Third Department modified and remitted. The trial court did not articulate the factors considered in not including income over the statutory cap in its final support award. Further, the lower court erred in directing the husband to maintain health insurance for the children until they graduated from college, even if that occurred after age 21. Tammy Arquette represented the appellant.
https://nycourts.gov/reporter/3dseries/2021/2021_05752.htm

Weaver v Weaver | Oct. 21, 2021

DIVORCE | ENFORCEMENT

The husband appealed from certain post-divorce judgment orders rendered by Fulton County Supreme Court. The Third Department affirmed. The purported combined motion for leave to reargue and renew, pursuant to CPLR 2221 (f), presented no new facts and was only for reargument. Since the motion court did consider and address the husband's arguments, the subject order was appealable as of right. Supreme Court properly found that, in their stipulation, the parties intended the husband to immediately apply for his disability pension benefits. Counsel fees were properly awarded to the wife, given her success on the merits, the disparity in income, and the protracted litigation due to the husband's actions. William Newman and Pro Bono Appeals Program, Buffalo (*see* link below) (Johnathan Reiner, of counsel) represented the respondent.
https://decisions.courts.state.ny.us/ad3/Decisions/2021/531541.pdf
https://www.law.buffalo.edu/beyond/pro-bono/pbap.html

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