

CRIMINAL

SECOND DEPARTMENT

People v Rodriguez | Nov. 3, 2021

PHYSICAL INJURY | LEGALLY INSUFFICIENT

The defendant appealed from a Queens County Supreme Court judgment of conviction. The Second Department modified. The defendant was charged with crimes relating to four separate robberies committed on two days. The evidence was legally insufficient to support the convictions of 2nd degree robbery. The People failed to establish that a physical injury was suffered by either complainant. Both testified that they were hit on the head. Neither sought medical attention. One said that he had pain for only two days, and the other indicated that his pain lasted for one week and was treated with ice and Advil. As to the crimes on February 28, 2016, the verdict was against the weight of evidence. Among other things, neither person robbed on that date was able to identify the defendant. The modus operandi of the crimes was not sufficiently distinctive to support an inference that, because evidence incriminated the defendant as to the February 29, 2016 crimes, he also committed the crimes the day before. Appellate Advocates (Martin Sawyer, of counsel) represented the appellant.

https://nycourts.gov/reporter/3dseries/2021/2021_05990.htm

People v Santos | Nov. 3, 2021

FACEBOOK: "GUILTY!!!!" | JUROR ASSURANCE

The defendant appealed from a Suffolk County Court judgment, which convicted him of 2nd degree course of sexual conduct against a child and another crime. The judgment was affirmed by the Second Department. During jury deliberations, the defendant moved for a mistrial, contending that a juror was grossly unqualified or had engaged in substantial misconduct. County Court properly performed a probing inquiry of the juror, who acknowledged that she had posted on Facebook: "Jury Duty Update: We started deliberations this afternoon, we have to make decisions on 6 separate counts. Current score: 0/6." The juror said that she had inadvertently "liked" a Facebook friend's comment—"GUILTY!!!!." The court accepted the juror's assurances of impartiality.

https://nycourts.gov/reporter/3dseries/2021/2021_05993.htm

APPELLATE TERM

People v Majid | 2021 NY Slip Op 51025 (U)

CHALLENGE FOR CAUSE | NO ASSURANCE

The defendant appealed from a judgment of Nassau County District Court, convicting him of DWI (per se) and (common law) and possession of alcohol in a State Park. Appellate Term, Second Department reversed and ordered a new trial. A prospective juror, who had been involved with Mothers Against Drunk Driving, had an actual bias and was unable to provide an unequivocal assurance that she could render an impartial verdict. The defendant exhausted his peremptory challenges; the denial of the for-cause challenge was reversible error. Martin Goldberg represented the appellant.

https://nycourts.gov/reporter/3dseries/2021/2021_51025.htm

THIRD DEPARTMENT

People v Regan | Nov. 4, 2021

UNFULFILLED PROMISE | PLEA VACATUR

The defendant appealed from a St. Lawrence County Court judgment, convicting him of 3rd degree unlawful manufacture of meth. The Third Department reversed. The plea was based on a promise that could not be fulfilled—the defendant’s court-ordered participation in shock incarceration. The issue survived the unchallenged waiver of appeal, but was unpreserved. In the interest of justice, the court vacated the plea and remitted. The Rural Law Center of New York (Keith Schockmel, of counsel) represented the appellant.

https://nycourts.gov/reporter/3dseries/2021/2021_06007.htm

People v Hoffman | Nov. 4, 2021

SORA FINDINGS | REVERSAL

The defendant appealed from an Ulster County Court order, which designated him a level-three sex offender and a predicate sex offender. The Third Department reversed. The defendant argued in the SORA court that a downward departure was warranted. In denying such request, County Court did not set forth findings or conclusions. Thus, the matter was remitted. John Ferrara represented the appellant.

https://nycourts.gov/reporter/3dseries/2021/2021_06013.htm

People v Gilbert | Nov. 4, 2021

AFFIRMATIVE DEFENSE | MENTAL DISEASE

The defendant appealed from an Ulster County Court judgment, convicting her of 2nd degree murder. The Third Department affirmed. At trial, the defendant raised the affirmative defense of lack of criminal responsibility by reason of mental disease or defect. There was competing expert proof as to whether the defendant had the capacity to know and appreciate that her conduct was wrong. Her evidence indicated that, at the time of the killing, she believed that God had ordained her to kill the victim, a demon. But the People presented equally plausible expert testimony that the defendant possessed the

requisite capacity. Further, she hid in the bathroom when police arrived, told them that she felt bad about her actions, and received a positive test score for malingering.

https://nycourts.gov/reporter/3dseries/2021/2021_06003.htm

FAMILY

FIRST DEPARTMENT

M/O of R.B. v NYS OCFS | Nov. 4, 2021

INDICATED REPORT | SUBSTANTIAL EVIDENCE

In an Article 78 proceeding, the First Department confirmed an OCFS determination that the father committed sexual abuse and that both parents provided inadequate guardianship. The requisite substantial evidence included ACS investigative notes, caseworker testimony, and pediatrician records. There was also credible evidence that the father caused the child to become depressed and have suicidal thoughts and that the mother urged her to recant and waited six weeks to secure mental health treatment for her. Hearsay evidence proffered by ACS was not inadequate simply because the parents' testimony controverted it. If sufficiently relevant and probative, hearsay alone could constitute substantial evidence. The denial of the parents' request to have the child testify did not violate their due process rights. There were no grounds to require the child's testimony, given the admissibility of her previous statements and the goal of avoiding her re-traumatization. In light of the parents' jobs in the education field and their denial of wrongdoing, their behavior was reasonably related to childcare work, adoption, or the provision of foster care.

https://nycourts.gov/reporter/3dseries/2021/2021_06063.htm

SECOND DEPARTMENT

M/O Ho v Tsesmetzis | Nov. 3, 2021

IMPUTED INCOME | IMPROPER

In a proceeding under the Uniform Interstate Family Support Act, the father appealed from an order of Putnam County Family Court. The Second Department reversed and remitted for a new hearing. The Support Magistrate properly determined that income should be imputed to the father as the sole shareholder of a subchapter S corporation; but the record did not support the amount imputed. Gross receipts were used, with no accounting for returns and allowances or the cost of goods sold. Gross profits should have been utilized. Guttridge & Cambareri, P.C. represented the appellant.

https://nycourts.gov/reporter/3dseries/2021/2021_05968.htm