Indigent Legal Services

Decisions of Interest

NOVEMBER 19, 2021

CRIMINAL

COURT OF APPEALS

People v Powell | Nov. 18, 2021

FALSE CONFESSIONS | EXPERT PRECLUDED

The defendant appealed from a Second Department order, sustaining a judgment convicting him of 1st degree robbery. A sharply divided Court of Appeals affirmed, in an opinion authored by Chief Judge DiFiore. The trial court's preclusion of expert testimony on false confessions, after holding *Frye* and *Huntley* hearings, was not an abuse of discretion as a matter of law. Judge Rivera wrote a dissent in which Judges Fahey and Wilson joined. Proof at the *Frye* hearing established the expert's undisputed credentials. The phenomenon of false confessions was generally accepted in the relevant scientific community, and there was consensus in the literature on factors that increase the likelihood of a false confession. The general public did not fully understand the factors, several of which were present in this case. Preclusion of the expert testimony was not harmless. The defendant presented strong evidence of innocence based on differences in his age and physical appearance as compared to the victim's description of the robber, and the confession was critical to the case. The trial court also erred in denying the defendant's request to present expert testimony on cross-racial eyewitness identification.
https://www.nycourts.gov/reporter/3dseries/2021/2021_06424.htm

People v Williams | Nov. 18, 2021

SUPPLEMENTAL INSTRUCTIONS | CONSENT

The defendant appealed from a Fourth Department order, convicting him of drug and weapon possession charges. The Court of Appeals affirmed. Pursuant to CPL 310.30, when the jury requests a supplemental instruction with respect to a statute, the court may "give to the jury copies of the text of any statute," but only with the consent of the parties. The defendant argued that the consent provision was violated by the trial judge's use of a "visualizer" (projector) to display statutory text to the jury, over defense objection. The Court of Appeals held that the trial judge did not "give" the jurors copies of the relevant text, and the approach employed fell within the judge's discretion to provide requested information or instruction. Judge Garcia authored the unanimous opinion.
https://www.nycourts.gov/reporter/3dseries/2021/2021_06426.htm

FIRST DEPARTMENT

People v Santana | Nov. 16, 2021

VIDEO | GUILT BY ASSOCIATION

The defendant appealed from a judgment of Bronx County Supreme Court, convicting him of attempted 1st degree robbery. The First Department reversed and ordered a new trial. The defense moved to set aside the verdict after a juror revealed that he and other jurors had seen a YouTube video of the codefendant punching a man, thereby causing his death. In denying the CPL 330.30 motion after a hearing, the trial court found that the defendant did not demonstrate that the recording had an impact. That was error. The video created a substantial risk of prejudice to the defendant by allowing jurors to perceive the codefendant—and by association, the defendant—as having a propensity for violence. The Legal Aid Society, NYC (David Crow and Matthew Vasilakos, of counsel) represented the appellant.
https://nycourts.gov/reporter/3dseries/2021/2021_06329.htm

SECOND DEPARTMENT

People v Sevaughn G. | Nov. 17, 2021

WAIVER | SURCHARGES AND FEES

The defendant appealed from a judgment of Queens County Supreme Court, adjudicating him a youthful offender upon his plea of guilty to 2nd degree robbery. The Second Department modified. The defendant was convicted before the enactment of CPL 420.35 (2-a), which permits the waiver of surcharges and fees for individuals who were under age 21 at the time of the crime. This provision applies retroactively to cases pending on direct appeal on the effective date of the legislation. In the interest of justice and on the consent of the People, the appellate court vacated the surcharges and fees. Appellate Advocates (Lynn W. L. Fahey, of counsel) represented the appellant.
https://nycourts.gov/reporter/3dseries/2021/2021_06371.htm

People v Bamugo | Nov. 17, 2021

PEQUE | REMITTAL

The defendant appealed from two judgments of Kings County Supreme Court, convicting him of 1st degree sexual abuse and another crime. The Second Department remitted. The defendant contended that his due process rights were violated by Supreme Court's failure to warn him that his guilty pleas could result in deportation (*see People v Peque*, 22 NY3d 168). Such argument was excepted from the preservation requirement because the record did not show that the defendant was aware of possible immigration consequences. The defendant was entitled to a chance to seek to vacate his pleas by establishing that there was a reasonable probability that he would not have pleaded guilty if properly warned. Appellate Advocates (Mark Vorkink, of counsel) represented the appellant.
https://nycourts.gov/reporter/3dseries/2021/2021_06363.htm

People v Campbell | Nov. 17, 2021

ANDERS | NEW COUNSEL

The defendant appealed from two judgments of Westchester County Court, convicting him of 2nd degree assault and other crimes. Assigned counsel submitted an *Anders* brief, and the Second Department assigned new counsel. The brief did not review, in any detail, the colloquies regarding the plea or the waiver of appeal and did not discuss the defendant's factual admissions to support his conviction. Further, whether the lower court improperly restitution was a nonfrivolous issue.
https://nycourts.gov/reporter/3dseries/2021/2021_06367.htm

APPELLATE TERM

People v Zuniga-Mejia | 2021 NY Slip Op 51019 (U)

AFFIDAVIT OF ERRORS | AGAINST WEIGHT

The defendant pro se appealed from a judgment convicting him, after a nonjury trial, of disobeying a traffic-control device. The Appellate Term, Second Department reversed. In response to an affidavit of errors, a trial court must summarize the evidence adduced at the underlying proceeding, as necessary for proper determination of the appeal. *See* CPL 460.10 (3). The defendant contended that the verdict was against the weight of evidence. Yet the Justice Court in Nassau County did not state what evidence established the weight element as to the commercial vehicle. The accusatory instrument was dismissed.
https://nycourts.gov/reporter/3dseries/2021/2021_51019.htm

People v Lopez | 2021 NY Slip Op 51016 (U)

CPL 30.30 | TRAFFIC INFRACTIONS

The People appealed from an order of City Court in Westchester County, which granted the defendant's speedy trial motion to dismiss an accusatory instrument charging him solely with driving while ability impaired, a traffic infraction. *See* VTL §§ 1192 (1), 1193 (1). The Appellate Term, Second Department reversed. CPL 30.30 (1) (d) did not apply. Such provision stated that the People must be ready for trial within 30 days of commencement of a criminal action where the defendant was accused of one or more offenses, "at least one of which is a violation and none of which is a crime." A traffic infraction is not a violation. *See* Penal Law § 10.00 (3). CPL 30.30 (1) (e) provides that the term "offense" shall include VTL infractions, but in enacting such provision, the legislature did not amend subdivision (1) (d).
https://nycourts.gov/reporter/3dseries/2021/2021_51016.htm

THIRD DEPARTMENT

People v Smith | Nov. 18, 2021

SORA | MISSOURI CRIME

The defendant appealed from a Rensselaer County Court order, which classified him as a level-three sex offender and a sexually violent offender. The Third Department reversed. The SORA court added 15 points under risk factor 9 for the defendant's 2008

Missouri felony drug conviction. The Missouri statute, requiring that a person knowingly possess a controlled substance, set forth no minimum drug quantity. New York's felony provisions all contained a weight element or required an intent to sell or a predicate conviction. The conduct underlying the Missouri conviction was not revealed in the record, so it was unclear if the defendant's acts there would constitute a felony here. Thus, the record only supported the assessment of 5 points under risk factor 9, resulting in presumptive level two. Dana Salazar represented the appellant.
https://nycourts.gov/reporter/3dseries/2021/2021_06403.htm

FAMILY

FIRST DEPARTMENT

Phillip D.S. v Shamel B. | Nov. 18, 2021

FAMILY OFFENSE | REINSTATED

The petitioner, by his guardian, appealed from an order of New York County Family Court, which granted the respondent's motion to dismiss an Article 8 petition. The First Department reversed. The petitioner met his prima facie burden of showing that a family offense occurred through the child's testimony that he was beaten by "Shamel" with a belt on various occasions. However, the Referee found that there was no showing that the respondent in this case was the same person named "Shamel" who committed the alleged offenses. That was error, given the child's testimony stating that she lived with the mother and Shamel in Virginia and listing the names of Shamel's children. On appeal, the respondent did not challenge the Referee's determination that Family Court could exercise subject matter jurisdiction, notwithstanding that the offenses occurred out of state. The appellate court found no basis to depart from that finding. Rosemary Rivieccio represented the appellant.
https://nycourts.gov/reporter/3dseries/2021/2021_06460.htm

SECOND DEPARTMENT

Matter of Tereza R. | Nov. 17, 2021

NEGLECT | COLLATERAL ESTOPPEL

The father appealed from an order of Kings County Family Court, which granted the petitioner's motion for summary judgment on the issue of neglect. The Second Department affirmed. In full satisfaction of a multi-count indictment, the father pleaded guilty to endangering the welfare of a child. The father's EWC conviction was based on the acts alleged to constitute neglect. A criminal conviction may be given collateral estoppel effect in Family Court where the identical issue has been resolved and the defendant had a full and fair opportunity to litigate the criminal conduct. He was properly required to engage in a sex offender program.
https://nycourts.gov/reporter/3dseries/2021/2021_06358.htm

THIRD DEPARTMENT

David Q. v Schoharie County DSS | Nov. 18, 2021

ICPC | OUT-OF-STATE PARENTS

The father appealed from an order of Schoharie County Family Court, which dismissed his custody/visitation applications. The Third Department dismissed the appeals as moot and in dictum stated that the Interstate Compact on the Placement of Children (Special Services Law § 374-a) does not apply to out-of-state noncustodial parents, as held by the First Department in *Matter of Emmanuel J.*, 175 AD3d 49.