

Decisions of Interest

NOVEMBER 22, 2021

CRIMINAL

FOURTH DEPARTMENT

People v King | Nov. 19, 2021

SUPPRESSION | NO CREDIBLE REASON

The defendant appealed from a judgment of Onondaga County Supreme Court, convicting him of 5th degree CPCS, upon his plea of guilty. The Fourth Department reversed. The appeal brought up for review an order denying suppression. The trial court should have suppressed physical evidence recovered from the defendant's person, as well as statements to police. A police officer had approached the vehicle in which the defendant was a passenger because it was parked in a high-crime area, was not running, and had three occupants. There was no evidence of conduct providing an articulable, credible basis for approaching the vehicle. The guilty plea was vacated and the indictment was dismissed. Hiscock Legal Aid Society (Bridget Field) represented the appellant.

https://nycourts.gov/reporter/3dseries/2021/2021_06499.htm

People v Herron | Nov. 19, 2021

SEARCH WARRANT | OVERBROAD

The defendant appealed from an Allegany County Court judgment, convicting him of 2nd degree burglary and other crimes, upon his plea of guilty. The Fourth Department reserved decision. The appeal brought up for review an order denying suppression. Part of the search warrant was overbroad. Troopers were permitted to search the defendant's home for "personal papers ... alcohol ... safes ... and any communication and computers that are related to criminal activity, any ... telephone records, cell phones that [may] contain evidence of a crime or illegal activity, and any associated documentation related to any criminal activity." Evidence seized pursuant to the cited language should have been suppressed, but severance was feasible because the warrant was largely specific and based on probable cause. A hearing was needed to decide what evidence, if any, should be suppressed as the fruits of the inoperative portions of the search warrant. Adam Van Buskirk represented the appellant.

https://nycourts.gov/reporter/3dseries/2021/2021_06512.htm

People v Pitcher | Nov. 19, 2021

SEARCH WARRANT | NO PROBABLE CAUSE

The People appealed from a Jefferson County Court order granting suppression. The Fourth Department affirmed. The search warrant was not supported by probable cause. The application relied on a detective's affidavit that was not based on his personal knowledge. Officers who purportedly supplied certain hearsay information were not named. Other hearsay was received from two confidential informants, but they did not testify at a *Darden* hearing after the defense challenged the information. The indictment was dismissed.

https://nycourts.gov/reporter/3dseries/2021/2021_06526.htm

People v Marrero | Nov. 19, 2021

RIGHT TO BE SILENT | HARMLESS ERROR

The defendant appealed from a Monroe County Court judgment, convicting him of 2nd degree murder and another crime. The Fourth Department affirmed but stated that the trial court should have suppressed the defendant's statements. During the interrogation, an officer asserted that "now was the time" for the defendant to explain the shooting and that doing so would benefit him. Such comments undermined the defendant's *Miranda* rights by implying that the interrogation was his only chance to speak and that his explanation would *not* be used against him. The court also erred in not suppressing certain statements elicited after the defendant invoked his right to counsel by saying that he did not "want to talk about more of this (the shooting). That's it." Any errors were harmless.

https://nycourts.gov/reporter/3dseries/2021/2021_06510.htm

People v Gumpton | Nov. 19, 2021

PLEA WITHDRAWAL | HEARING

The defendant appealed from an Orleans County Court judgment, convicting her of attempted 1st degree promoting prison contraband. The Fourth Department reserved decision. Because the challenge to the voluntariness of the plea would survive even a valid waiver of appeal, there was no need to address the enforceability of the purported waiver. County Court erred in denying, without a hearing, the defendant's motion to withdraw her plea. A triable question as to the voluntariness of the plea was raised by defense counsel's affidavit swearing that it was coerced. The matter was remitted for appointment of new defense counsel, an evidentiary hearing, and a decision on the motion to withdraw the guilty plea. David Morabito represented the appellant.

https://nycourts.gov/reporter/3dseries/2021/2021_06519.htm

People v Caballero | Nov. 19, 2021

SENTENCE REDUCED | MINIMAL REMOTE HISTORY

The defendant appealed from a judgment of Erie County Supreme Court. The Fourth Department modified. The sentence for the conviction of predatory sexual assault against a child was reduced to an indeterminate prison term of 15 years to life. The sentence for 1st degree criminal sexual act was lowered to a determinate term of 15 years' incarceration, followed by five years' post-release supervision. The reviewing court found the sentence imposed unduly harsh and severe in light of the defendant's minimal and

remote criminal history and the circumstances of the offenses. Legal Aid Bureau of Buffalo (Robert Kemp, of counsel) represented the appellant.
https://nycourts.gov/reporter/3dseries/2021/2021_06509.htm

FAMILY

FOURTH DEPARTMENT

Matter of John D. | Nov. 19, 2021

TPR | LIMITED REVIEW

The father appealed from an order of Onondaga County Family Court which terminated his parental rights. The Fourth Department dismissed the appeal, except insofar as the father challenged the denial of his attorney's request for an adjournment, and as to that challenge, the appellate court affirmed. Where, as here, an order was made upon the appellant's default, appellate review was limited to matters that were the subject of contest below. Counsel offered no good cause for the adjournment, only speculation as to why the father was absent. This was not the father's first request for an adjournment nor his only failure to appear for a scheduled hearing without providing any explanation.

https://nycourts.gov/reporter/3dseries/2021/2021_06472.htm

Allison v Seeley-Sick | Nov. 19, 2021

CUSTODY | LIMITED REVIEW

The mother appealed from an order of Livingston County Family Court, granting the father's custody modification petition. The Fourth Department dismissed the appeal insofar as it concerned visitation and otherwise affirmed. The appellate court took judicial notice of a subsequent order modifying the mother's visitation and stating that all other provisions remained in effect. The instant challenge regarding visitation was moot. However, the part of the appeal regarding the grant of sole custody to the father was not academic. As to the denial of recusal, Family Court's knowledge of the prior acts of domestic violence of the mother's husband against his former wife stemmed from a prior judicial proceeding, not an extrajudicial source. The trial court's comments about the mother's husband were ill-advised but did not reveal bias.

https://nycourts.gov/reporter/3dseries/2021/2021_06524.htm

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