Indigent Legal Services

Decisions of Interest

NOVEMBER 24, 2021

CRIMINAL

COURT OF APPEALS

People v Wortham | Nov. 23, 2021

PEDIGREE EXCEPTION | FST DNA

The defendant appealed from a First Department order affirming a judgment of conviction. The Court of Appeals held that suppression was properly denied. The *Miranda* pedigree exception applied. A defendant's response to questions reasonably related to police administrative concerns was not suppressible—even if incriminating. The exception would not apply, though, where an officer posed purported pedigree questions to an un-*Mirandized* defendant as a guise for an investigative inquiry. Reversal was warranted based on the erroneous denial of a *Frye* hearing regarding the admissibility of FST DNA evidence. *People v Williams*, 35 NY3d 24, and *People v Foster-Bey*, 35 NY3d 959, controlled. Those cases held that a *Frye* hearing was required with respect to both LCN DNA and statistical DNA evidence derived from the FST. Judge Fahey wrote the majority decision. Judge Rivera dissented. The instant situation did not fit within the pedigree exception. The detective's question about where the defendant lived was likely to elicit an incriminating response since the defendant appeared to be at home in an apartment targeted for a drugs and weapons search. In a separate dissent, Judge Wilson opined that the remedy for the *Frye* error was not to remit for a hearing, as the majority directed, but to vacate the conviction. The Legal Aid Society, NYC (Angie Louie, of counsel) represented the appellant.
https://www.nycourts.gov/reporter/3dseries/2021/2021_06530.htm

People v Buyund | Nov. 23, 2021

SORA | SENTENCE

The People appealed from a Second Department order, which held that burglary in the 1st degree as a sexually motivated felony was not a registerable sex offense and vacated so much of the sentence as required the defendant to register as a sex offender. The Court of Appeals reversed. SORA certification was not part of the sentence. Therefore, the preservation exception for an illegal sentence did not apply to a challenge to sex-offender certification raised for the first time on an intermediate appeal. Judge Cannataro wrote for the majority. In dissent, Judge Wilson stated that certification as a sex offender was part of a defendant's sentence. Thus, the issue of the illegality of the instant sentence

required no preservation, and the matter was reviewable by the COA. Judge Rivera concurred in the dissent.
https://www.nycourts.gov/reporter/3dseries/2021/2021_06529.htm

FIRST DEPARTMENT

People v Collins | Nov. 23, 2021
SUPPRESSION | NO EXIGENCY

The defendant appealed from a judgment of New York County Supreme Court, convicting him of 4th degree CPCS and 2nd degree escape. The First Department modified. In a prior appeal, the appellate court found that the police had probable cause to arrest the defendant for criminal trespass, but remanded for a determination of whether exigent circumstances justified the search of a backpack. On remand, the lower court erred in concluding that the search was valid as incident to a lawful arrest. There was no reasonable basis to believe that the backpack's contents might pose a danger to the arresting officers or that the loss of evidence loss was a concern. The Office of the Appellate Defender (Margaret Knight, of counsel) represented the appellant.
https://nycourts.gov/reporter/3dseries/2021/2021_06552.htm

SECOND DEPARTMENT

People v Johnson | Nov. 24, 2021
BATSON | VIOLATION

The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 4th degree CPCS and related crimes. The Second Department reversed and ordered a new trial. The prosecutor exercised five peremptory challenges to exclude prospective black jurors, including S.K., a school counselor. She indicated that it did not make sense to her when "something doesn't follow logic or kind of like when your children tell you a story about what happened at school, something doesn't make sense, there seems to be a missing part. You are thinking, I am not sure if this is the truth." The defendant lodged a *Batson* challenge, and the trial court found that he made a prima facie showing. Regarding a race-neutral reason, the prosecutor said that S.K. indicated that she wanted to hear from both sides in settling disputes. Defense counsel pointed out that the prosecutor did not strike a prospective white juror—another school counselor who also said that she would need to hear both stories when resolving a conflict at work. Supreme Court erred in denying the defense challenge. The race-neutral reason was a pretext for discrimination. Appellate Advocates (White & Case, of counsel) represented the appellant.
https://nycourts.gov/reporter/3dseries/2021/2021_06627.htm

People v Wright | Nov. 24, 2021
PRS | ILLEGAL

The defendant appealed from a Dutchess County Court judgment, convicting him of 2nd degree CPW and 3rd degree CPCS. The Second Department modified. The purported

waiver of appeal was invalid. The oral colloquy erroneously stated the waiver barred the filing of a brief or the assignment of appellate counsel. The plea court failed to confirm that the defendant understood the written waiver, which failed to state that appellate review was available for certain issues. The three-year period of post-release supervision for the drug conviction was illegal and was reduced to two years, as authorized under the Penal Law § 70.45 (2) (b). Carol Kahn represented the appellant.
https://nycourts.gov/reporter/3dseries/2021/2021_06635.htm

People v Patterson | Nov. 24, 2021

PRS | EXCESSIVE

The defendant appealed from a judgment of Orange County Court, convicting her of sex trafficking (two counts), upon her plea of guilty, and imposing an enhanced sentence of concurrent determinate terms of 12 years in prison, followed by 20 years of post-release supervision. The Second Department modified. County Court could properly impose an enhanced sentence, but the period of PRS was excessive and was reduced to five years, as promised in the original plea agreement. Geoffrey Chanin represented the appellant.
https://nycourts.gov/reporter/3dseries/2021/2021_06631.htm

THIRD DEPARTMENT

People v Cota | Nov. 24, 2021

CONSTRUCTIVE POSSESSION | AGAINST WEIGHT

The defendant appeal from a Chemung County Court judgment, convicting him of 3rd degree CPCS. The Third Department reversed and dismissed the indictment. The weight of evidence did not support the jury's determination that the defendant constructively possessed crack cocaine. Police responded to a domestic disturbance call at the apartment of the defendant's sister and found drugs in her bedroom under a pile of female clothes. There was no proof that any of the defendant's personal belongings were in that bedroom. Even if he was a daily visitor to the apartment, the defendant was not shown to have lived there or exercised control over any part of it. Further, a friend testified that the cocaine was his, he threw some out the window, and the defendant had no knowledge that drugs were in the apartment. Kathy Manley represented the appellant.
https://nycourts.gov/reporter/3dseries/2021/2021_06574.htm

People v McClendon | Nov. 24, 2021

COERCION | INSUFFICIENT PROOF

The defendant appealed from a judgment of Albany County Supreme Court, convicting him of several crimes. The Third Department modified. The defendant's conviction of 1st degree coercion was not supported by legally sufficient evidence. Because the victim was able to call police, the People failed to establish that the defendant caused her to abstain from conduct that she was legally permitted to engage in due to fear of physical injury. Mitchell Kessler represented the appellant.
https://nycourts.gov/reporter/3dseries/2021/2021_06573.htm

People v Teixeira-Ingram | Nov. 24, 2021

MIRANDA | HEARSAY

The defendant appealed from a Columbia County Court judgment, convicting him of 2nd and 3rd degree CPCS. The Third Department reversed, suppressed the defendant's statements, and vacated the plea of guilty. The appeal brought up for review the denial of suppression of cocaine found in a vehicle in which the defendant was a passenger. The defendant's statements, made in response to questioning by State Police at the barracks, were obtained during a custodial interrogation. He was not validly notified of his rights. The People relied on an inference that a trooper told an investigator that he had read the defendant his rights. However, the trooper said that he had no conversation with the defendant. Hearsay was admissible in suppression hearings, but the inference here was insufficient to prove that the defendant was advised of his *Miranda* rights. David Woodin represented the appellant.

https://nycourts.gov/reporter/3dseries/2021/2021_06575.htm

NINTH CIRCUIT

Goulart v Garland | 2021 WL 5366992

DISSENT | EQUITABLE TOLLING

The petitioner sought review of a Board of Immigration Appeals decision denying his motion for reconsideration. The Ninth Circuit affirmed. One judge dissented. Petitioner, a lawful permanent resident, was deported to Brazil after a California burglary conviction, which was deemed a crime of violence under federal law. Several years later, *Sessions v Dimaya*, 138 S Ct 1204, held that the subject federal statute was unconstitutional. When the petitioner learned of the new decision from former counsel, he retained immigration counsel and filed the instant motion—three months after the change in the law. Equitable tolling should not have been denied. The fact that the Ninth Circuit had reached the same holding as *Dimaya* two years earlier was irrelevant in determining due diligence. Many deported aliens were poor, uneducated, unskilled in English, and unable to follow developments in our legal system. Even assuming that a removed noncitizen should learn of immigration cases decided by the U.S. Supreme Court, it would be unreasonable to expect him/her to scour the Ninth Circuit docket seeking a helpful case in the maze of immigration laws.

https://cdn.ca9.uscourts.gov/datastore/opinions/2021/11/18/19-72007.pdf

FAMILY

THIRD DEPARTMENT

Joseph II. v Luisa JJ. | Nov. 24, 2021

UCCJEA | ITALY HOME STATE

The mother appealed from an order of Washington County Supreme Court, which denied her motion to dismiss in a divorce action. The Third Department reversed. The mother correctly asserted that Supreme Court lacked personal jurisdiction over her due to improper service of the divorce summons and complaint and had no subject matter jurisdiction over custody under the UCCJEA. The child's home state was Italy, where she had lived with the mother since July 2019, pursuant to a settlement agreement. Supreme Court improperly authorized substituted service by email. The father failed to prove that he made an actual effort to effectuate service on the wife at her residence in Italy and that service of process under the provisions of the Hague Convention was impracticable. Gregory Canale represented the appellant.
https://nycourts.gov/reporter/3dseries/2021/2021_06586.htm

Zachary C. v Janaye D. | Nov. 24, 2021

PARENTING TIME | UNWARRANTED REDUCTION

The father appealed from an order of Fulton County Family Court, which dismissed his custody modification petition. The Second Department modified the order. The lower court significantly reduced the father's parenting time during the school year—a provision unsupported by the record. Family Court should have granted the father more parenting time on additional weekends or during breaks and holidays not accounted for in the parties' stipulation. Since nearly two years had elapsed since entry of the challenged order, the matter was remitted. Beth Lockhart represented the father.
https://nycourts.gov/reporter/3dseries/2021/2021_06585.htm