Indigent Legal Services

Decisions of Interest

DECEMBER 3, 2021

CRIMINAL

FIRST DEPARTMENT

People v Hardware | Dec. 2, 2021

INDICTMENT | DEFECTIVE

The defendant appealed from a judgment of New York County Supreme Court, convicting him of persistent sexual abuse. The First Department reversed. The indictment was jurisdictionally defective because it did not specify which of three qualifying offenses the defendant allegedly committed and thus did not give him fair notice of the accusations against him. The indictment was dismissed. The Center for Appellate Litigation (Matthew Christiana, of counsel) represented the appellant.
https://nycourts.gov/reporter/3dseries/2021/2021_06772.htm

People v Maglione | Dec. 2, 2021

SCI | DEFECTIVE

The defendant appealed from a judgment of NY County Supreme Court, convicting him of attempted 3rd degree robbery. The First Department reversed. The waiver of indictment and subsequent SCI were jurisdictionally defective. The above crime, set forth in the SCI, was not named in the misdemeanor complaint and was a greater offense than the crimes charged therein; and the defendant, who was arraigned on the misdemeanor complaint, was not held for grand jury action. *See* CPL 195.10 (1), 195.20. Legal Aid Society of NYC (Naila Siddiqui, of counsel) represented the appellant.
https://nycourts.gov/reporter/3dseries/2021/2021_06775.htm

People v Thompson | Dec. 2, 2021

DELIBERATIONS | PREMATURE

The defendant appealed from a judgment of NY County Supreme Court, convicting him of 3rd degree CPW. The First Department reversed and ordered a new trial. The trial court erred in discharging a juror and alternate as grossly unqualified. They had engaged in premature deliberations on the subway, but the court should have asked whether they were unable to render an impartial verdict. The Center for Appellate Litigation (John Vang and Sandhya Ramaswamy, of counsel) represented the appellant.
https://nycourts.gov/reporter/3dseries/2021/2021_06778.htm

People v Chodakowski | Dec. 2, 2021

DELIBERATIONS | ETHNIC ANIMUS

The defendant appealed from an order of NY County Supreme Court, which denied his CPL 440.10 motion. The First Department held the appeal in abeyance and remanded for a hearing to determine if ethnic animus tainted deliberations and deprived the defendant of his Sixth Amendment right to a jury trial. An affidavit from the jury foreperson swore that another juror made "ethnic comments" about the defendant and the complainant, revealing overt bias that cast serious doubt on the fairness of the deliberations and the verdict. Mark Baker represented the appellant.
https://nycourts.gov/reporter/3dseries/2021/2021_06781.htm

People v Baez | Dec. 2, 2021

SORA | NO SUBSTANCE ABUSE

The defendant appealed from an order of Bronx County Supreme Court, which found him a level-two sexually violent offender. The First Department reduced the risk level. The People did not establish that the defendant should have scored 15 points for drug or alcohol abuse. There was no proof that he smoked marijuana at the time of the offense or that his use was more than occasional. Bronx Defenders (Daniel Hamburg, of counsel) represented the appellant.
https://nycourts.gov/reporter/3dseries/2021/2021_06771.htm

People v Delacruz | Nov. 30, 2021

VIDEO | DAMNING

The defendant appealed from a judgment of NY County Supreme Court, convicting him of 2nd degree CPW (two counts). The First Department affirmed, rejecting the argument that a videotape should have been excluded as evidence of an uncharged crime. Hours before a codefendant shot the victim, the defendant sent a video to a WhatsApp group chat. In the video, filmed in the home of the same codefendant, the defendant displayed a pistol, declared his intent to kill the victim, and received ammunition from the other codefendant. The video was not *Molineux* proof since it did not concern a separate crime; it was direct proof as to the defendant's criminal intent in the instant crime and the theory that he acted in concert with the codefendants.
https://nycourts.gov/reporter/3dseries/2021/2021_06656.htm

SECOND DEPARTMENT

People v Thomas | Dec. 1, 2021

CHALLENGE | FAVORING COPS

The defendant appealed from a judgment of Richmond County Supreme Court, convicting him of 1st degree murder (two counts) and 2nd degree CPW. The Second Department reversed and ordered a new trial. The trial court erred in denying a defense challenge for cause to a prospective juror—a firefighter who worked in the neighborhood where the offenses occurred. He told the trial court that he saw "a lot that goes on in the area" and that police there "defended us, stuck up for us" and he would "lean a little bit more" toward what an officer had to say. Upon questioning by the court, the prospective juror offered

no unequivocal assurance that he could set aside any bias and render an impartial verdict. Appellate Advocates (Cynthia Colt) represented the appellant.
https://nycourts.gov/reporter/3dseries/2021/2021_06711.htm

People v Downing | Dec. 1, 2021

CORAM NOBIS | INEFFECTIVE COUNSEL

The Second Department granted a writ of error coram nobis to vacate an order affirming a judgment, which convicted the defendant of attempted 1st degree rape and other crimes. Former appellate counsel failed to file a supplemental brief contending that Supreme Court should have determined whether the defendant deserved youthful offender status, pursuant to *People v Rudolph*, 21 NY3d 497, decided soon after the appellant's brief was filed. The sentence was vacated and the matter remitted. Legal Aid Society of NYC (Ying-Ying Ma) represented the appellant.
https://nycourts.gov/reporter/3dseries/2021/2021_06698.htm

People v Jones | Dec. 1, 2021

PEQUE | REMITTAL

The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 1st and 2nd degree assault. The Second Department held the appeal in abeyance. Due process required that a plea court apprise a defendant that, if he/she was not an American citizen, deportation might flow from a plea of guilty to a felony. *People v Peque*, 22 NY3d 168. A defendant was ordinarily required to preserve the contention that, because of a *Peque* violation, the plea was invalid. However, preservation was not required where, as here, a defendant had no practical ability to object to an error that was clear on the record. While the court noted possible "negative immigration consequences," deportation was not mentioned, and the court's admonition was confusing. Thus, the defendant was entitled to a chance to move to vacate his plea. He would have to show a reasonable probability that, had the court properly advised him, he would not have pleaded guilty. Appellate Advocates (Paris DeYoung, of counsel) represented the appellant.
https://nycourts.gov/reporter/3dseries/2021/2021_06701.htm

People v Thompson | Dec. 1, 2021

SENTENCE | MENTAL ILLNESS

The defendant appealed from a Dutchess County Court judgment, convicting him of 2nd degree robbery. The Second Department reduced the determinate term from 7 to 3½ years, plus post-release supervision. The defendant had no prior convictions but did have a history of mental illness. While suffering a bipolar episode and armed with a BB gun, he robbed a bank. Right after the incident, the defendant sought mental health treatment. The presentence report noted that he was remorseful, paid full restitution, and presented a low risk of recidivism. Thomas Angell represented the appellant.
https://nycourts.gov/reporter/3dseries/2021/2021_06712.htm

THIRD DEPARTMENT

People v Phillip | Dec. 2, 2021

ADVERSE POSITION | CONFLICT

The defendant appealed from a judgment of Sullivan County Supreme Court, convicting him of 2nd degree conspiracy and another crime, and from an order denying his CPL 440.10 motion. The Third Department vacated the sentence and remitted. Defense counsel improperly took a position adverse to the defendant. When counsel stated that he did not believe that there was a factual or legal basis for the defendant's motion to withdraw his plea, Supreme Court should have assigned a new attorney. As to the 440 motion, the defendant had not shown that counsel's failure to pursue *Brady* materials constituted ineffective assistance, particularly in light of the very advantageous plea agreement secured. Jane Bloom represented the appellant.
https://nycourts.gov/reporter/3dseries/2021/2021_06721.htm

FAMILY

FIRST DEPARTMENT

Whitfield v NYC ACS | Nov. 18, 2021

SEEING INJUSTICE | NO JOB

The petitioner appealed from a judgment of NY County Supreme Court, which denied his Article 78 petition to annul a determination by the NYC Administration for Children's Services declining to hire him as a youth development specialist. In a 2003 essay, the petitioner criticized unfairness in the criminal justice system, and such cynical views might have been disruptive in the job. Further, while possessing group counseling experience, the petitioner lacked a background in one-on-one sessions. He was not rejected because of his criminal conviction. Indeed, ACS regarded rehabilitated persons as credible messengers for at-risk youth and often hired them.
https://nycourts.gov/reporter/3dseries/2021/2021_06466.htm

THIRD DEPARTMENT

Harris v Schreibman | Dec. 2, 2021

DIVORCE | MAINTENANCE

The parties cross-appealed from a judgment of divorce and certain orders. The Third Department modified. Among other things, the appellate court directed that the wife must contribute to the cost of the children's health insurance and slightly reduced the husband's child support obligation. Supreme Court properly awarded the wife maintenance pursuant to the statutory guidelines. Both parties substantially reduced their income to spend more time with the children. It would be unjust to penalize the wife for doing so, while rewarding

the husband, who left his lucrative job as a NYC law firm partner to run for Ulster County Supreme Court. The trial court properly held that the husband violated automatic stay orders as to certain assets when he used $38,000 to pay campaign debts.
https://nycourts.gov/reporter/3dseries/2021/2021_06724.htm

Wessels v Wessels | Dec. 2, 2021

SUPPORT VIOLATION | NOT WILLFUL

The father appealed from an order of Albany County Family Court, which found that he did not willfully violate a prior child support order. The Third Department affirmed. The father was hired, by his brother, as a purchasing agent at a salary of $125,000. Through no fault of his own, the father lost the job. After diligent efforts to find similar work, he restarted his landscaping business and made $42,000—close to what he previously earned. The father tried to modify support, made regular albeit reduced payments, and borrowed money to cover large support payments.
https://nycourts.gov/reporter/3dseries/2021/2021_06739.htm

Patrick UU. v Frances VV. | Dec. 2, 2021

NO DEFAULT | BUT NO MERIT

The mother appealed from certain child custody orders entered in Ulster County Family Court. The Third Department affirmed. The father and AFC argued that the appeal from one order must be dismissed since it was entered on default. The reviewing court disagreed. The mother extensively participated in the subject proceedings before failing to appear on a hearing continuation date, when the court closed the proof. The order transferring custody to the father was sound. The mother's refusal to have the child immunized and resulting decision to homeschool him, as well as the father's release from jail, constituted a change in circumstances. The best interests of the child would be advanced by the structure of school and custody to the father, who had achieved stability. Family Court properly drew a negative inference against the mother for failing to bring the child to a *Lincoln* hearing, finding that the child would have confirmed the AFC's stated position that he wished to return to school and to spend more time with his father.
https://nycourts.gov/reporter/3dseries/2021/2021_06733.htm

Elizabeth W. v Broome DSS | Dec. 2, 2021

NO DEFAULT | BUT NO MERIT

The mother sought review of an order of OCFS denying her application to amend as unfounded and expunge a report maintained by the Central Register of Child Abuse and Maltreatment. The Third Department confirmed. Substantial evidence supported the finding that the mother placed the children at risk. Statements to a caseworker by two children, recorded in the indicated report, revealed that the mother twice drove with them after drinking; and she admitted that she relapsed and had a "buzz" while driving the children. One child reported to a caseworker that her mother was drunk and throwing up on another occasion, which a grandparent corroborated.
https://nycourts.gov/reporter/3dseries/2021/2021_06732.htm