Indigent Legal Services

Decisions of Interest

DECEMBER 27, 2021

CRIMINAL

SECOND DEPARTMENT

People v Louis | Dec. 22, 2021

CORAM NOBIS | GRANTED

The defendant sought a writ of error coram nobis to vacate a Second Department order affirming a judgment of conviction. The appellate court granted the application and dismissed two counts of endangering the welfare of child, finding that the defendant was denied effective assistance. In the appellate brief, counsel failed to contend that trial counsel was incompetent in not moving to dismiss the misdemeanor counts as time-barred. The EWC counts were not lesser included offenses of the rape and burglary counts. There was no explanation for counsel's failure to raise a defense as clear-cut and dispositive as a limitations period. Counsel was not seeking a compromise verdict. The Legal Aid Society, New York City (Ronald Zapata, of counsel) represented the appellant.
https://nycourts.gov/reporter/3dseries/2021/2021_07307.htm

People v Wilson | Dec. 22, 2021

CHALLENGE DENIED | NEW TRIAL

The defendant appealed from a judgment of Queens County Supreme Court, convicting him of leaving the scene of an incident without reporting and another crime. The Second Department reversed and ordered a new trial. The lower court erred in denying the defendant's challenges for cause to three prospective jurors. One juror would give more credence to a testifying police officer than a civilian witness, yet the court did not elicit the requisite unequivocal assurance. The two other jurors could not understand the People's burden of proof. Because the defendant exhausted his peremptory challenges, the error required reversal. Appellate Advocates (Anna Jouravleva) represented the appellant.
https://nycourts.gov/reporter/3dseries/2021/2021_07305.htm

People v Richardson | Dec. 22, 2021

ID | SUGGESTION

The defendant appealed from a judgment of Kings County Supreme Court, convicting him of attempted 2nd degree murder. The Second Department affirmed. The appeal brought up for review the denial of suppression of identification testimony. When, as here, a crime was committed by a long-time acquaintance of a witness, there was negligible risk that comments by the police, however suggestive, would lead to a misidentification. Thus,

when the protagonists knew each other, a hearing as to suggestiveness was not required. Testimony indicated that the victim and the defendant had been acquainted for three years through mutual friends.
https://nycourts.gov/reporter/3dseries/2021/2021_07287.htm

People v Fahey | Dec. 22, 2021
WAIVER | INVALID
The defendant appealed from a judgment of Nassau County Supreme Court, convicting him of 1st degree rape and another crime. The Second Department affirmed but found the purported waiver of appeal invalid, considering the defendant's limited experience with the criminal justice system. The terse oral colloquy failed to advise him that the right to appeal was separate and distinct from other rights automatically waived in taking a plea bargain and that a waiver of appeal was not an absolute bar to an appeal. The written waiver did not clarify these matters.
https://nycourts.gov/reporter/3dseries/2021/2021_07284.htm

THIRD DEPARTMENT

People v Lane | Dec. 23, 2021
SORA | SNAFUS
The defendant appealed from a County Court decision, which classified him as a level-two sex offender. The Third Department withheld decision. SORA courts often failed to comply with the statutory requirement that they render a written order setting forth the determination and the underlying findings of fact and conclusions of law. The People were supposed to ensure that a written order was entered by the County Clerk and that notice of entry, along with the written order, was served on the defendant. Failures of the trial court and the People to fulfill their duties should not harm a defendant who did not prevail at SORA hearings. Generally, when presented with an appeal from a SORA decision or order that was not properly entered, the Third Department would dismiss the appeal. Given unusual circumstances here—including steps taken, albeit imperfectly, by defense counsel to obtain a proper order—the appellate court directed the People to effectuate proper entry of the order to be challenged. The Columbia County Public Defender (Jessica Howser, of counsel) represented the defendant.
https://nycourts.gov/reporter/3dseries/2021/2021_07324.htm

People v David | Dec. 23, 2021
WAIVER | INVALID
The defendant appealed from a Clinton County Court judgment, convicting him of 2nd degree burglary. The Third Department affirmed but found the purported waiver of appeal invalid. County Court made no inquiry as to whether the defendant read the written waiver, nor if he understood it. The written document stated that the defendant waived his right to pursue all post-conviction remedies. This overbroad and inaccurate language was not cured by the limited colloquy.
https://nycourts.gov/reporter/3dseries/2021/2021_07319.htm

FOURTH DEPARTMENT

People v Hidalgo-Hernandez | Dec. 23, 2021

WARRENTLESS | NO EMERGENCY

The defendant appealed from an Onondaga County Court judgment, convicting him of 1st degree CPCS and 2nd degree CPW, upon his plea of guilty. The Fourth Department reversed and dismissed the indictment. The appeal brought up for review an order denying suppression of evidence seized in a warrantless search of the defendant's residence. Police responded to the home after a 911 call by a woman who found her roommate unconscious. Generally, a warrantless search of an individual's residence was unconstitutional. The emergency exception did not apply here. The police lacked reasonable grounds to believe there was an immediate need for their help to protect life or property. At the time of the search, the unconscious woman had been pronounced dead, and there was no indication that a crime had occurred or that there was an ongoing risk of harm. Bradley Keem represented the appellant.
https://nycourts.gov/reporter/3dseries/2021/2021_07404.htm

People v Defio | Dec. 23, 2021

ASSAULT | NO SERIOUS INJURY

The defendant appealed from a judgment of Onondaga County Supreme Court, convicting her of aggravated vehicular assault and three counts of 2nd degree assault. The Fourth Department modified, dismissing one assault count as against the weight of the evidence. The People failed to prove serious physical injury. Although the victim testified that he sustained a skull fracture, the People's expert said otherwise. The victim also stated that he had ongoing memory problems, but he had suffered prior concussions that could also have caused those issues. Hiscock Legal Aid Society (Kristen McDermott, of counsel) represented the appellant.
https://nycourts.gov/reporter/3dseries/2021/2021_07400.htm

People v Lewis | Dec. 23, 2021

CHALLENGE DENIED | NEW TRIAL

The defendant appealed from a Supreme Court judgment, convicting him of 2nd degree CPW. The Fourth Department reversed and granted a new trial. The trial court erred in denying the defendant's challenge for cause to a prospective juror whose statements as to the credibility of police as witnesses cast serious doubt on his ability to render an impartial verdict. He did not provide an unequivocal assurance that he could set aside any bias. Legal Aid Bureau of Buffalo (Jane Yoon) represented the appellant.
https://nycourts.gov/reporter/3dseries/2021/2021_07426.htm

People v Goodwin | Dec. 23, 2021

PLEA | COERCED

The defendant appealed from a Lewis County Court judgment, convicting him of predatory sexual assault against a child (two counts). The Fourth Department reversed in the interest of justice and remitted. During a court appearance, County Court offered a plea deal calling for 15 years to life imprisonment. The court said: "My policy is, if a defendant gets convicted

at trial, that means that individual has not accepted responsibility…and in all likelihood, the sentence after trial [in this case] would not even be close to the 20 years to life sought by the People, it would be…many more years, and you are looking at a potential of 100 years to life." Such statements did not describe the potential sentence range, were coercive, and rendered the plea involuntary. Caitlin Connelly represented the appellant.
https://nycourts.gov/reporter/3dseries/2021/2021_07418.htm

People v Moss | Dec. 23, 2021

PRIOR PLEA COERCED | HEARING

The defendant appealed from a Monroe County Court judgment, convicting him of 1st degree sexual abuse and EWC. The Fourth Department vacated the sentence and remitted. As the defendant contended in his pro se brief, trial court erred in sentencing him as a second child sexual assault felony offender without a hearing. The defendant asserted that, in the prior proceeding, the court coerced him into pleading guilty to a reduced charge by threatening to impose the maximum if he were convicted after trial. Such a threat was coercive. Thus, the defendant was entitled to a hearing on the constitutionality of that prior guilty plea.
https://nycourts.gov/reporter/3dseries/2021/2021_07394.htm

People v Mosley | Dec. 23, 2021

HARSH SENTENCE | AGE 17

The defendant appealed from an Onondaga County Court judgment, convicting him of 2nd degree burglary and imposing the maximum sentence of 15 years, plus post-release supervision. The Fourth Department reduced the term of imprisonment to seven years, noting that the defendant was 17 at the time of the incident. Hiscock Legal Aid Society (Nathaniel Riley, of counsel) represented the appellant.
https://nycourts.gov/reporter/3dseries/2021/2021_07395.htm

People v Edwards | Dec. 23, 2021

SORA | DEPARTURE

The defendant appealed from an Onondaga County Court order determining that he was a level-two risk under SORA. The Fourth Department reversed and remitted. The SORA court erred in denying a downward departure. The defendant established a mitigating factor not adequately considered by the Guidelines. He had been sentenced to one year in jail with no post-release supervision and, due to an oversight, was not registered as a sex offender. Despite being unsupervised, he did not reoffend during the seven years between release and the SORA hearing. Hiscock Legal Aid Society (Thomas Leith, of counsel) represented the appellant.
https://nycourts.gov/reporter/3dseries/2021/2021_07359.htm

People v Ashby | Dec. 23, 2021

INDICTMENT AMENDED | PRESERVATION

The defendant appealed from a judgment of Niagara County Supreme Court, convicting him of 3rd degree insurance fraud and another crime. The Fourth Department affirmed. The defendant contended that count one of the indictment was impermissibly amended. Although prior Fourth Department cases did not require preservation of such a contention, those decisions should not

be followed. Here the defendant failed to preserve the issue, which the appellate court declined to review in the interest of justice.
https://nycourts.gov/reporter/3dseries/2021/2021_07434.htm

Owens v State | Dec. 23, 2021
WRONGFUL CONVICTION | CLAIM

The claimant appealed from an order granting the State's motion to dismiss his action for damages based on a wrongful conviction. After the prosecution rested at a retrial in the underlying criminal case, the claimant moved for a trial order of dismissal. The criminal court granted the motion, and the claimant was released from prison. Court of Claims Act § 8-b was enacted to compensate innocent persons who proved, by clear and convincing evidence, that they were unjustly convicted and imprisoned. A claimant may be eligible when the conviction was reversed or vacated, and where, if a new trial was ordered, the claimant was found not guilty. The Court of Claims erred in determining that a CPL 290.10 dismissal was not equivalent to a judicial acquittal. If believed, the allegations in the instant claim would establish that the claimant did not possess a gun or fire a weapon at the ex-wife, as alleged in the indictment, and that she fabricated the story of his involvement in a shooting. In finding otherwise, the Court of Claims improperly assessed the credibility of the proof. Elliot Shields represented the appellant.
https://nycourts.gov/reporter/3dseries/2021/2021_07374.htm

FAMILY

SECOND DEPARTMENT

Vellios v Vellios | Dec. 22, 2021
ARTICLE 8 | REVERSAL

The mother appealed from an order of Kings County Family Court, which granted the father's motion to dismiss her family offense petition, based on a lack of subject matter jurisdiction. The Second Department reversed. In 2018, on behalf of the parties' developmentally disabled 19-year-old daughter, the mother filed a petition alleging that the father had committed sexual misconduct against the child. After she turned 21, the father moved to dismiss. Family Court was not divested of jurisdiction based on the child's age. However, since she might need a guardian ad litem to protect her interests, Family Court should have granted the request for a hearing pursuant to CPLR 1201. The matter was remitted. Steven Bernstein represented the appellant.
https://nycourts.gov/reporter/3dseries/2021/2021_07276.htm

Hogan v Max | Dec. 22, 2021
ARTICLE 8 | *ANDERS*

The father appealed from an order of Queens County Family Court, which summarily dismissed his family offense petition based on a failure to state a cause of action. Assigned counsel submitted an *Anders* brief. The Second Department assigned new

counsel. The brief failed to analyze potential appellate issues with reference to the facts of the case and relevant legal authority. The contention that the appeal was academic was based on evidence dehors the record and therefore was not considered.
https://nycourts.gov/reporter/3dseries/2021/2021_07316.htm

Matter of Trinity E. | Dec. 22, 2021
CONSENT | NO APPEAL
The mother appealed from an order of Nassau County Family Court, finding that she neglected the subject child and, upon consent, placing her under the supervision of Social Services. The appeal from such disposition was dismissed, since no appeal lies from an order entered on the consent of the appellant. A preponderance of evidence supported the determination that the mother neglected the then-seven-month-old child by leaving him alone in the hotel room where she was living.
Matter of Trinity E. (Sherry E.) (2021 NY Slip Op 07315) (nycourts.gov)

THIRD DEPARTMENT

Brian W. v Mary X. | Dec. 23, 2021
ARTICLE 8 | DEFECTS
The petitioner appealed from orders rendered by Washington County Family Court in Article 8 proceedings. The Third Department modified. Family Court erred in sua sponte amending its dismissal order from "without prejudice" to "with prejudice." Family Court had discretion to correct an order to cure defects that did not affect a substantial right of a party. *See* CPLR 5019 (a). However, absent a motion under CPLR 2221 (d) or 5015 (a), Family Court had no authority to issue a substantive change. Thus, the amended order was reversed to the extent that it dismissed the violation petition with prejudice. Bryan Racino represented the appellant.
https://nycourts.gov/reporter/3dseries/2021/2021_07332.htm

Cecelia BB. V Frank CC. | Dec. 23, 2021
VISITS | TEEN NOT IN CHARGE
The mother appealed from an order of Washington County Family Court, which dismissed her custody modification petition, awarded sole custody to the father, and granted the mother such visitation as she and the children were able to agree upon. The Third Department modified. Family Court's rationale for its parenting schedule—that a teenager could not be forced to do something that he did not want to do—failed to give the mother meaningful access to support a meaningful relationship. Although the younger child did not want to visit the mother, nothing indicated that visits would be harmful to him. Given his feelings, access conditioned on his agreement was untenable. The matter was remitted for a definitive visitation schedule and the allocation of any other suitable resources to restore the mother-son relationship. Family Court's error was amplified by the length of the appellate process. The mother had gone years without access to the younger child, who would likely reach the age of majority before Family Court had the chance to fix its mistake. This case underscored the importance of enabling visitation wherever possible. Noreen McCarthy represented the appellant.

https://nycourts.gov/reporter/3dseries/2021/2021_07323.htm

FOURTH DEPARTMENT

Matter of Rigdon v Close | Dec. 23, 2021

VISITS | DAD'S MODEST REQUEST

The father appealed from a Family Court order, dismissing his petition seeking to communicate in writing and by phone with the subject children while he was incarcerated. The Fourth Department reversed. Family Court erred in summarily and sua sponte dismissing the petition without a hearing, based on the father's failure to complete substance abuse treatment. The prior order required, as a prerequisite to seeking modification, that the father consistently engage in such treatment, which he did. The lower court also erred in finding that the communication sought would harm the children. The petition was reinstated, and the matter remitted. The Livingston County Public Defender (Bradley Keem, of counsel) represented the appellant.
https://nycourts.gov/reporter/3dseries/2021/2021_07348.htm

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