Indigent Legal Services

Decisions of Interest

DECEMBER 31, 2021

CRIMINAL

FIRST DEPARTMENT

People v Solomon | Dec. 28, 2021

SORA | TAKING BLAME

The defendant appealed from an order of New York County Supreme Court, which adjudicated him to be a level-three sexually violent offender. The First Department affirmed. Ten points were properly assessed for the defendant not having accepted responsibility for his sexual misconduct. Participation in sex offender treatment was not dispositive as to factor 12. A defendant must show that he genuinely takes the blame for committing a sexual offense. In statements to police and probation, the defendant minimized or denied responsibility. Further, in a recorded call to his rape victim (an acquaintance)—he said, "sometimes when a person says no, they mean yes."
People v Solomon (2021 NY Slip Op 07519) (nycourts.gov)

SECOND DEPARTMENT

People v Moody | Dec. 29, 2021

INQUIRY | ANXIOUS JUROR

The defendant appealed from a judgment of Richmond County Supreme Court, convicting him of 2nd degree CPW. The Second Department reversed and ordered a new trial. During deliberations, a note revealed that the jury had reached a verdict on one count but no consensus on the others. After a lunch break, one juror reported that she had had anxiety attacks, felt distraught, and wanted to stop serving. Denying a defense request, the court made no inquiry before accepting a partial verdict. That was error, under *People v Buford*, 69 NY2d 290. Supreme Court should have conducted an *in camera* "probing and tactful inquiry" of the anxious juror. As a result of the failure to do so, it was unknown whether she became unable to serve before or after the jury reached a partial verdict. Appellate Advocates (Anders Nelson) represented the appellant.
People v Moody (2021 NY Slip Op 07559) (nycourts.gov)

APPELLATE TERM

People v Bullock | Dec. 22, 2021

GRAVITY KNIFE | DISMISSED

The defendant appealed from a judgment of Richmond County Criminal Court, convicting him of 4th degree CPW. The Appellate Term, Second Department reversed. The defendant contended that the amendment of Penal Law § 265.01, decriminalizing the possession of a gravity knife, should be retroactively applied. In the interest of justice, the appellate court dismissed the accusatory instrument. There was no need for the People's consent—which was given in many other gravity knife cases, but not here. Appellate Advocates (Anna Kou of counsel) represented the appellant.
https://nycourts.gov/reporter/3dseries/2021/2021_51249.htm

People v Karantinidis | Dec. 30, 2021

HARASSMENT | JURISDICTIONAL DEFECT

The defendant appealed from a judgment of Queens County Criminal Court. The Appellate Term, Second Department vacated his conviction of attempted 2nd degree aggravated harassment and dismissed that count. The charge set forth in the misdemeanor information was jurisdictionally defective. The element of "no legitimate purpose of communication" was not alleged. The allegation that the defendant made a threat during a phone conversation with the complainant did not permit the inference that there was no legitimate purpose in initiating the communication in the first place. Joseph Murray represented the appellant.
People v Karantinidis (2021 NY Slip Op 51245(U)) (nycourts.gov)

THIRD DEPARTMENT

People v Bryant | Dec. 30, 2021

SEVERANCE DENIED | NEW TRIAL

The defendant appealed from an Albany County Court judgment, convicting him of 2nd degree CPW, 2nd degree menacing, and 3rd degree assault. The Third Department reversed and ordered new trials. County Court erred in denying a defense motion to sever the weapon charge from the remaining counts. The People asserted that the proof underlying those other counts was material and admissible as to the weapon count. Even if the proof completed the narrative, its probative value was minimal, and it was highly prejudicial. The court also erred in permitting the People to read the victim's grand jury testimony into evidence where the proof did not establish that the defendant orchestrated the victim's unavailability for trial. Two justices dissented in part. Paul Connolly represented the appellant.
People v Bryant (2021 NY Slip Op 07582) (nycourts.gov)

SUPREME COURT

People v Williams | 2021 WL 6110434

FURTIVE RECORDINGS | SUPPRESSION

Kings County Supreme Court suppressed certain statements the defendant made upon arrest for murder. When interviewed at the precinct, the defendant waived his *Miranda* rights. After the recorded interrogation, a detective returned the defendant's cellphone, said he could call his "girl," left, and closed the door. The defendant phoned his girlfriend—a suspected accessory—and another person. The calls were surreptitiously recorded. Having been lured into a false sense of security, the defendant had a reasonable expectation of privacy in his statements. Edward Friedman represented the defendant.
https://nycourts.gov/reporter/3dseries/2021/2021_21352.htm

People v Johnson | 2021 NY Slip Op 21353

NO UNLAWFUL ACTIVITY | NO SUPPRESSION

The defendant, who was charged with drug and weapon possession offenses, sought suppression. Orange County Court denied his motion. Police were notified that there was an unconscious person in a van. Upon arrival, they saw the defendant standing outside the vehicle. He appeared to be under the influence of drugs, according to an officer, who recognized the defendant as his cousin and had him taken by ambulance to the hospital. Although the defendant was not taken into custody due to unlawful activity, police were justified in doing a pat down to ensure the safety of the EMTs, hospital staff, and the defendant himself.
https://nycourts.gov/reporter/3dseries/2021/2021_21353.htm

People ex rel. Manley v Annucci | Dec. 22, 2021

HABEAS GRANTED | NO ART. 10 PETITION

Oneida County Supreme Court granted a habeas corpus petition filed on behalf of the defendant in an unpublished decision/order. He was granted parole with an open release date after having served 24 years for sex offenses. Then the defendant was notified that his case had been referred for evaluation under Mental Hygiene Law Article 10. He remained in custody, yet DOCCS had no authority to continue to hold him. No condition of release referenced completion of the Article 10 review, and the defendant was not the subject of a civil management petition. The habeas court ordered his release. Kathy Manley represented the defendant.

NEW JERSEY

New Jersey v Lodzinski | Dec. 28, 2021

MURDER | REVERSED

In 1991, a five-year-old child went missing in New Jersey. His mother claimed that he was kidnapped from a carnival. The next year, the boy's remains were found, but no charges were brought. The investigation lay dormant until reopened in 2011. Five years later, the child's mother was convicted of murder. A reviewing court affirmed. The NJ Supreme

Court initially sustained the conviction, but on reconsideration, reversed and entered a judgment of acquittal. No reasonable jury could find beyond a reasonable doubt that the defendant purposefully or knowingly caused the child's death. Pursuant to NJ Rules, a court may acquit after a guilty verdict if the evidence does not rationally support a conviction. Upon a motion for acquittal, and Supreme Court's review was de novo. No direct proof linked the defendant to the murder, and motive evidence was based a dubious stereotype that the young, struggling, single mother found the child to be a burden—even though most witnesses saw parental devotion. Reasonable people might differ about other proof—whether a child described at a carnival was the victim; whether babysitters accurately identified a blanket found near the remains; whether the defendant's varying accounts indicated guilt; and whether the location of the child's partial skeleton—in a creek bed near the defendant's former place of work—was mere coincidence. But no evidence established how, when, or where the child died, or what the cause of death was. Three justices dissented.
A-50-19 State v. Michelle Lodzinski (083398) (njcourts.gov)

New Jersey v Rivera | 2021 WL 6129758

YOUTH | MITIGATING NOT AGGRAVATING

The defendant appealed from an order of New Jersey's Appellate Division, affirming an aggregate sentence of 15 years imposed upon her conviction of 1st degree aggravated manslaughter and other crimes. The NJ Supreme Court vacated the sentence. In determining an appropriate punishment, the sentencing court must identify relevant aggravating and mitigating factors and assign appropriate weight, given the facts presented. This court gave great weight to the risk that the defendant would commit another offense and minimal weight to the lack of any prior delinquency or criminal activity. In doing so, the court impermissibly speculated that the defendant would have engaged in other criminal conduct, but did not have the opportunity to do so because of her youth. Yet youth ordinarily inured to the benefit of a defendant. Indeed, in 2020, the state legislature had added youth as a statutory mitigating factor. It could not be deemed an aggravating factor. In the case at bar, the resentencing court must consider the mitigating factor that defendant was under age 26 at the time of the offense (she was 18).
A-7-20 State v. Cynthia Rivera (084419) (Middlesex County and Statewide) (njcourts.gov)

PENNSYLVANIA

Pennsylvania v Barr | 2021 WL 6136363

SMELL OF POT | NOT PROBABLE CAUSE

The Supreme Court of Pennsylvania held that the smell of marijuana may be a factor, but not a dispositive one, in determining whether the totality of the circumstances established probable cause to permit a police officer to conduct a warrantless search of a vehicle. The totality analysis encompassed the consideration of factors that might arguably be innocent in nature. Prior to the 2016 enactment of the state's medical marijuana law, possession was per se illegal, and the smell of marijuana alone was sufficient to establish probable cause. Since possession was no longer per se illegal in the Commonwealth, the

aroma of pot alone could not constitute probable cause but could signal the possibility of criminal activity. Concurring and dissenting opinions were filed.
2021-28-map-2021.pdf (justia.com)

FAMILY

SECOND DEPARTMENT

Sutton v Rivera | Dec. 29, 2021
CUSTODY | SUMMARY ORDER | REVERSED
The father appealed from an order of Kings County Supreme Court, which granted the mother's motion to dismiss his modification and enforcement petitions. The Second Department reversed. Supreme Court should not have summarily determined that it lacked exclusive continuing jurisdiction on the ground that the children had been residing in Florida and then Hawaii. The parties were entitled to an opportunity to present evidence under the UCCJEA, so a hearing was ordered. Austin Idehen represented the appellant.
Matter of Sutton v Rivera (2021 NY Slip Op 07548) (nycourts.gov)

Silla v Silla | Dec. 29, 2021
CUSTODY | SUMMARY ORDER | REVERSED
The father appealed from a custody modification order summarily entered by Kings County Supreme Court in divorce proceedings. The Second Department reversed. A hearing was needed where, as here, facts material to best interests. Anthony Bramante represented the appellant.
https://nycourts.gov/reporter/3dseries/2021/2021_07571.htm

DiNapoli v DiNapoli | Dec. 29, 2021
CUSTODY | SCARY DAD | REVERSED
The mother and children appealed from a custody modification order entered by Suffolk County Supreme Court in post-divorce proceedings. The Second Department reversed. The record did not support custody to the father, given his poor relationship with the children, due in part to his dismissive attitude toward their feelings. Further, a neutral forensic examiner said the children feared the father and wanted nothing to do with him. The views of the children, then age 12 and 15, were entitled to some weight. The teens wept when told they had to live with their dad. (Fortunately, shortly after the challenged order, the mother moved for a CPLR 5519 [c] stay pending appeal, which the appellate court granted.) Quatela Chimeri, PLLC represented the appellant.
DiNapoli v DiNapoli (2021 NY Slip Op 07539) (nycourts.gov)

Minor v Birkenmeyer | Dec. 29, 2021
ARTICLE 8 | RIGHT TO COUNSEL
The petitioner appealed from an order of Kings County Family Court, which dismissed her petition without a hearing, based on a lack of subject matter jurisdiction. The Second

Department reversed. A party in a Family Ct Act Article 8 proceeding had the right to be represented by counsel. For a valid waiver of such right, the trial court was required to conduct a searching inquiry. Family Court failed to do so and thus deprived the petitioner of her statutory right to counsel. Further, the lower court erred in not holding a hearing to determine whether the parties had an intimate relationship within the meaning of Family Ct Act § 812 (1) (e). The matter was remitted. Diana Kelly represented the appellant.
Matter of Minor v Birkenmeyer (2021 NY Slip Op 07546) (nycourts.gov)

THIRD DEPARTMENT

Abigail Y. v Jerry Z. | Dec. 30, 2021

CUSTODY PETITION | HEARING WARRANTED

The mother appealed from an order of Chenango County Family Court, which granted the AFC's motion to dismiss her custody modification application. The Third Department reversed. The petition was sufficient to warrant an evidentiary hearing based on the allegations that the father did not communicate with her to effectively co-parent; interfered with her relationship with the child; and failed to take advantage of his parenting time. The appellate court remitted the matter but rejected the mother's request that the case be assigned to a different judge. Although Family Court was impatient about failed negotiations, there was no showing of undue bias or an inability to fairly determine the issues presented. Larisa Obolensky represented the appellant.
Matter of Abigail Y. v Jerry Z. (2021 NY Slip Op 07588) (nycourts.gov)

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