CRIMINAL

COURT OF APPEALS

DECISION OF THE WEEK

People v Badji, 2/11/21 – **"CREDIT CARD" THEFT / INTANGIBLE**

The Court of Appeals affirmed the defendant's conviction of 4th degree grand larceny, based on his theft of the victim's intangible credit card information to make purchases. There was no evidence that the defendant possessed the physical card itself. Penal Law § 155.05 (7) adopted the definition of "credit card" found in General Business Law § 511 (1), which was supplemented by § 511-a, setting forth this additional meaning: "any number assigned to a credit card." Relevant legislative history revealed efforts to address the growth of economic crimes, evolving methods to commit credit card fraud, and the need for greater consumer protection. Chief Judge DiFiore wrote for the majority. Judge Rivera dissented in part in an opinion in which Judge Wilson concurred. They opined that GBL § 511-a did not apply here and that 4th degree grand larceny required theft of a tangible card. The Penal Law distinguished between theft crimes involving possession of a material thing and identity theft and fraud involving unauthorized possession of information.
http://www.nycourts.gov/reporter/3dseries/2021/2021_00897.htm

People v Duval, 2/11/21 – **SEARCH WARRANT / SUFFICIENT**

The defendant challenged the validity of a search warrant, the summary denial of suppression, and the reasonableness of the execution. The Court of Appeals affirmed. The warrant description sufficiently characterized the defendant's home as a private residence, located at a unique, specified street address. The lower court had properly considered accompanying documents to determine if the description was supported by information available to the detective—not improperly to cure deficiencies in the search warrant (*see Groh v Ramirez*, 540 US 551). No hearing was needed, given the defendant's insufficient factual showing. He failed to provide information about the actual conditions of the building, such as sworn affidavits as to the purported three separate residential units. The challenge to the execution of the search warrant was unpreserved for COA review. Judge Wilson authored the unanimous opinion.
http://www.nycourts.gov/reporter/3dseries/2021/2021_00896.htm

FIRST DEPARTMENT

People v Ballo, 2/9/21 – **ACTING-IN-CONCERT / NO INSTRUCTION**

The defendant appealed from a judgment of NY County Supreme Court, convicting him of 1st degree assault and another crime. The First Department reversed and dismissed the indictment. The defendant and a companion had an altercation with the victim. The companion slashed the victim with a box cutter and struck him with a bat. Although the proof did not support the defendant's liability as a principal, the prosecutor did not request an accessorial liability instruction. A conviction may not be sustained on an acting-in-concert theory that was not submitted to the jury. The instant verdict, finding the defendant

guilty as a principal, was against the weight of the evidence. Legal Aid Society of NYC (David Crow and Patrick Blakemore, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_00810.htm

People v McKenny, 2/11/21 – **DISCOVERY / NO PRECLUSION**
The defendant appealed from a NY County judgment, convicting him of two counts of 2nd degree robbery. The First Department affirmed. Based on a lack of pretrial disclosure, the defendant moved to preclude certain statements he made to a police officer. But they constituted res gestae statements in the course of the criminal transaction and were not discoverable under former CPL 240.20. In any event, preclusion for a discovery violation was discretionary, in contrast to the CPL 710.30 mandate regarding an unnoticed statement. Even if the instant statements were discoverable, preclusion would have been too drastic, since the defendant was not significantly prejudiced and there was no indication of prosecutorial bad faith.
http://nycourts.gov/reporter/3dseries/2021/2021_00913.htm

SECOND DEPARTMENT

People v Miller, 2/10/21 – **IGNITION INTERLOCK / VACATED**
The defendant appealed from a judgment of Orange County Court, convicting him of aggravated DWI (driving while ability impaired by drugs), upon his plea of guilty. The Second Department vacated the directive that the defendant install an ignition interlock device—a condition available only for offenses involving alcohol. Mary Raleigh represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_00868.htm

People v Rodriguez, 2/10/21 – **ORDER OF PROTECTION / REASONS**
The defendant appealed from a judgment of Kings County Supreme Court, convicting him upon his plea of guilty. The Second Department affirmed. The appeal brought up for review an order of protection. The defendant contended that the sentencing court did not state the reasons for such order, but he did not raise such issue at sentencing or move to amend the order of protection. The better practice was to request relief from the issuing court in the first instance.
http://nycourts.gov/reporter/3dseries/2021/2021_00880.htm

FOURTH DEPARTMENT

People v Jennings, 2/11/21 – **REPUGNANT VERDICT / DISMISSED**
The defendant appealed from a judgment of Onondaga County Supreme Court, convicting him of 2nd degree murder. The Fourth Department reversed and dismissed the indictment. The defendant was denied meaningful representation. There could be no valid strategic reason for counsel's failure to object to repugnant verdicts. The jury was instructed that the People had to prove that the defendant directed the codefendant to emerge from a hiding place and shoot the victim in the head. The codefendant's acquittal negated an essential element of the instant crime. The People were given leave to re-present

to another grand jury. Hiscock Legal Aid Society (John Lewis, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_00944.htm

People v Williams, 2/11/21 – **SUPPRESSION / DISMISSED**
The defendant appealed from a County Court judgment, convicting him of attempted 2nd degree CPW. The Fourth Department reversed, vacated the plea, and dismissed the indictment. The appeal brought up for review an order denying suppression. The officers stopped the vehicle for a traffic infraction. The defendant appeared to reach toward his waistband, but that was insufficient to establish reasonable suspicion, nor did his nervousness and "blading" indicate that he was engaged in criminal activity and justify pursuit. Evidence seized and statements made were suppressed. Monroe County Public Defender (Janet Somes, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_00983.htm

People v Ponder, 2/11/21 – **CONSTRUCTIVE POSSESSION / DISMISSED**
The defendant appealed from a Supreme Court judgment, convicting him of 3rd degree criminal possession of a controlled substance and related crimes. The Fourth Department reversed and dismissed the indictment, finding the verdict against the weight of evidence. Although the defendant was present when the police executed a search warrant, no other proof showed that he was an apartment occupant or regularly present there. Thus, his constructive possession of the drugs found there was not proven. Monroe County Public Defender (Sara Miller, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_00923.htm

People v Owens, 2/11/21 – **GRAND JURY / DISMISSED**
The defendant appealed from an Onondaga County Court judgment, convicting him upon his plea of guilty of 2nd degree CPW. The Fourth Department reversed and dismissed the indictment. County Court had dismissed the original indictment based on the legal insufficiency of evidence before the grand jury. But the People failed to seek leave to resubmit the matter to the second grand jury, resulting in a lack of jurisdiction. Anthony Belletier represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_00958.htm

People v Stanley, 2/11/21 – **PLEA / VACATED**
The defendant appealed from a judgment of Monroe County Supreme Court, convicting him of 2nd degree robbery. The Fourth Department vacated the plea. Prior to sentencing, the defendant violated the terms of the plea agreement. The Supreme Court imposed an enhanced the sentence, but the court had not previously advised the defendant that a higher sentence would include PRS. The plea was not knowing, voluntary, and intelligent. Beth Ratchford represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_00924.htm

People v McLamore, 2/11/21 – **CONTRABAND / NOT DANGEROUS**
The defendant appealed from a Wyoming County Court judgment, convicting him of 1st degree promoting prison contraband and 5th degree conspiracy The Fourth Department

reduced the contraband conviction to a 2nd degree offense. The evidence was legally insufficient to establish that the substance in the packages seized—a form of synthetic marihuana—constituted dangerous contraband. Gary Muldoon represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_00926.htm

People v Meyers, 2/11/21 – **RECORD / DEPLORABLE**
The defendant appealed from a Steuben County Court judgment, convicting him of 1st degree murder and several other crimes. The Fourth Department reserved decision and remitted for a reconstruction hearing. The "deplorable" state of the record precluded appellate review. Missing were three days of jury selection, opening statements, summations, final jury instructions, the handling of a jury note, and the verdict. The transcription of testimony included notations such as "omitted," "untranscribable," and "blah, blah." David Abbatoy, Jr. represented the appellant.
http://nycourts.gov/reporter/3dseries/2021/2021_00919.htm

People v Hursh, 2/11/21 – **DUPLICITOUS / UNPRESERVED**
The defendant appealed from a County Court judgment, convicting him of 3rd degree robbery. The Fourth Department affirmed. The defendant contended that the evidence and jury instructions created the possibility that he was convicted of the crime upon a theory different from the one charged in the indictment, as amplified by the bill of particulars. The right to be tried and convicted only of crimes and theories charged is fundamental and non-waivable. *People v Allen*, 24 NY3d 441, held that issues of facial and non-facial duplicity must be preserved; and the appellate court declined to review the instant unpreserved issue in the interest of justice. No longer to be followed were Fourth Department cases stating that a defendant need not preserve non-facial duplicity that was based at least in part on a jury charge.
http://nycourts.gov/reporter/3dseries/2021/2021_00956.htm

FAMILY

FIRST DEPARTMENT

M/O Frederick T. (Maria T.), 2/9/21 – **IAC / COLLATERAL ATTACK**
The mother appealed from an order of disposition rendered by NY County Family Court, finding that she violated the terms of a suspended judgment, and terminating her parental rights. The First Department affirmed. The record demonstrated that the mother's admission was knowing, voluntary, and intelligent. The trial court fully explained the suspended judgment and gave her the opportunity to discuss the matter with counsel. The mother challenged her attorney's strategic decision not to call her as a witness, but the record did not reveal the reason for such decision.
*[**EDITOR'S NOTE**: see M/O Commissioner v Faresta, 11 AD3d 750 (ineffective assistance is permissible ground for vacatur under CPLR 5015); M/O Delfin A., 123 AD2d 318 (reversal; IAC established in JD proceeding; court had inherent and statutory power to grant vacatur)].*
http://nycourts.gov/reporter/3dseries/2021/2021_00817.htm

SECOND DEPARTMENT

M/O Weilert v Weilert, 2/10/21 – **AFC / CUSTODY**
The mother appealed from an order of Suffolk County Family Court, which denied her petition to modify a custody order regarding the parties' three children. The Second Department reversed and remitted. In the interest of justice, the appellate court agreed with the mother that Family Court erred in not appointing an AFC. Having counsel for the children in a contested custody matter was strongly preferred and should have occurred here, where the children were from 12 to 16 years old; the parties' had an antagonistic relationship; and they made conflicting assertions. Arza Feldman represented the mother.
http://nycourts.gov/reporter/3dseries/2021/2021_00850.htm

FOURTH DEPARTMENT

M/O Labella v Robertaccio, 2/11/21 – **AFC / ONE PER CHILD**
The mother and two children appealed from an order of Oneida County Family Court, which granted primary custody of the older child to the father. The Fourth Department affirmed. The change was supported by the significant deterioration in the mother-child relationship. The appellate court rejected the contention that the court erred in allowing the attorney who jointly represented the children in a divorce proceeding in 2015 to represent the older child at the instant 2019 trial, for which the children had separate counsel. There was no reasonable probability that the younger child revealed relevant confidences to the older child's trial AFC.
http://nycourts.gov/reporter/3dseries/2021/2021_00960.htm

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