

CRIMINAL

COURT OF APPEALS

DECISION OF THE WEEK

***People v Gordon*, 2/18/21 – SEARCH WARRANT / NOT VEHICLES**

In this People’s appeal, the issue was whether a search warrant regarding a particular house at a certain address covered two vehicles not described, but located on the property. The Court of Appeals answered “no” and affirmed a Second Department order upholding suppression. The warrant authorized a search of the defendant’s “person” and the “entire premises.” The factual materials did not allege that vehicles associated with the defendant or the premises were involved in criminal activity. But police searched a vehicle in the driveway and another in the backyard and found drugs and a weapon. The People relied on federal precedent. But the COA had independent authority to follow existing State constitutional jurisprudence—even if federal constitutional doctrine had changed—in order to properly safeguard fundamental rights. The mere presence of vehicles on the subject premises did not provide probable cause to search them. CPL 690.15 (1) and case law differentiated between searches of premises, vehicles, and persons. Specific descriptions, backed by particularized probable cause, were required for a search in each category. Judge Wilson wrote the majority opinion. Judge Feinman dissented in an opinion in which the Chief Judge and Judge Garcia concurred. Jonathan Manley represented the respondent.

http://www.nycourts.gov/reporter/3dseries/2021/2021_01093.htm

FIRST DEPARTMENT

***People v Kourouma*, 2/16/21 – ROBBERY / REDUCED**

The defendant appealed from a judgment of NY County Supreme Court, convicting him of 3rd degree robbery and other crimes. The First Department reduced the robbery conviction to petit larceny and the sentence to time served. The defendant’s conduct in snatching a purse dangling from the victim’s arm did not involve the required physical force. The Center for Appellate Litigation (Emilia King-Musza, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2021/2021_01011.htm

***People v Osbourne*, 2/18/21 – SENTENCE / UNLAWFUL UNDER DLRA**

The defendant appealed from a judgment of NY County Supreme Court, convicting him of 5th degree criminal possession of a controlled substance. The First Department modified. The sentence imposed became unlawful between the plea and sentencing, thus requiring resentencing. When the defendant pleaded guilty in 2002, he was promised a term of 2-4 years. Then he absconded. While he was at large, the 2009 DLRA was enacted, required determinate terms, and was made applicable to defendants awaiting sentence on its effective date. Thus, when sentenced in 2017, the defendant should have received a determinate term. He also appealed from a judgment convicting him of 2nd degree bail jumping. The First Department reversed and vacated the plea. Since the court mistakenly believed that the sentence had to run consecutively to the term for the drug conviction, it

misadvised the defendant as to his sentencing exposure if he were convicted after trial. The Center for Appellate Litigation (Emilia King-Musza, of counsel) represented the appellant. http://nycourts.gov/reporter/3dseries/2021/2021_01128.htm

***People v Kinsman*, 2/16/21 – PROUD BOYS v ANTIFA / ATTEMPTED ASSAULT**

The two defendants appealed from judgments of NY County Supreme Court, convicting them of attempted 2nd degree assault and other crimes. The First Department affirmed. The case involved an attack by Proud Boys against Antifa members. The defendants attempted to cause physical injury with dangerous instruments—i.e. their boots used to repeatedly kick the victim while she lay on the ground. The court properly allowed the People to call an expert on extremists to explain the animosity between the groups.

http://nycourts.gov/reporter/3dseries/2021/2021_01009.htm

SECOND DEPARTMENT

***People v Moore*, 2/17/21 – ANDERS / REJECTED**

The defendant appealed from a judgment of Nassau County Supreme Court, convicting him of attempted 2nd degree criminal possession of a forged instrument. Assigned counsel submitted an *Anders* brief, and the Second Department assigned new counsel. There were non-frivolous issues, including whether the immigration consequences of the defendant's plea agreement were sufficiently considered.

http://nycourts.gov/reporter/3dseries/2021/2021_01067.htm

THIRD DEPARTMENT

***People v Lanier*, 2/18/21 – 440 MOTION / IAC**

The defendant appealed from a Rensselaer County Court order. After a hearing, the court denied his CPL 440.10 motion collaterally attacking a judgment convicting him of attempted 2nd degree murder and other crimes, following a jury trial. The Third Department reversed and ordered a new trial. No legitimate strategy could validate counsel's failure to investigate a potential alibi witness and witnesses who would have refuted testimony about the location of an eyewitness at the time of the shooting and who might have cast doubt on whether she could have even seen the shooting. Richard Levitt represented the appellant.

http://nycourts.gov/reporter/3dseries/2021/2021_01094.htm

FAMILY

FIRST DEPARTMENT

***M/O Stephen L. v Nannan L.*, 2/16/21 – FREELOADER / IMPUTED INCOME**

The father appealed from an order of NY County Family Court, which denied his petition to reduce child support. The First Department affirmed. The Support Magistrate properly imputed income to the father based on extensive support he received from family members. They allowed him to live rent-free in an Upper West Side apartment; gave him a large monthly stipend; paid for his drug treatment and medical care; and gifted him valuable securities.

http://nycourts.gov/reporter/3dseries/2021/2021_01001.htm

***M/O Noemi E. R. v Vinod S. P.*, 2/16/21 – PROCEDURAL FLAWS / AFFIRMED**

The father appealed from an order of Bronx County Family Court, which denied modification of a temporary visitation order. The First Department affirmed, but forgave missteps. The father failed to seek leave to appeal. *See* Family Ct Act § 1112 (a) (no interlocutory appeal as of right for Article 6 cases). The notice of appeal was deemed a motion for leave, which was granted. The hearing transcript was omitted from the record. The appellate court deemed the record supplemented by the transcript annexed to the mother's brief. Stipulations made after the subject order did not moot the appeal, given the father's claims that he was denied an opportunity to cross-examine the mother. He was not. When Family Court said the hearing had concluded, his attorney could have asked to reopen to conduct the previously requested cross-exam.

http://nycourts.gov/reporter/3dseries/2021/2021_01015.htm

SECOND DEPARTMENT

***M/O Leila I. (Marie V.A.)*, 2/17/21 – PERMANENCY / PARENTS WITHOUT INSIGHT**

The parents appealed from orders of Kings County Family Court continuing the permanency goal of kinship guardianship and denying applications for a trial discharge of the children. The Second Department affirmed. After delving into the framework Article 10-A proceedings, the court upheld the challenged order, in part because the parents failed to take any responsibility for their conduct, which resulted in the five-year-old contracting gonorrhea.

http://nycourts.gov/reporter/3dseries/2021/2021_01046.htm

***M/O Ricardo T. Jr. (Ricardo T. Sr.)*, 2/17/21 – ADOPTION / APPEAL ACADEMIC**

The father appealed from an order of Orange County Family Court terminating his parental rights. The Second Department dismissed in part, affirmed in part. The part of the order terminating the father's rights was academic, since the child had been legally adopted, and the father had taken no action to stay or challenge the adoption. However, the permanent neglect finding was reviewable due to the stigma and potential future impact. While in prison, the father failed to plan for the child by completing treatment programs and

parenting classes. No authority allowed a post-adoption order providing for the requested father-child contact.

http://nycourts.gov/reporter/3dseries/2021/2021_01053.htm

THIRD DEPARTMENT

***M/O Vashon H. v Bret I.*, 2/18/21 – JURISDICTION / CONFUSION**

The mother appealed from orders of Albany County Family Court sua sponte dismissing her Article 6 and 8 petitions. The Third Department reversed. Family Court failed to satisfy UCCJEA requirements regarding a custody petition pending in Ohio. The UCCJEA did not apply to the family offense petition, though. The trial court had subject matter jurisdiction, despite the fact that most of the alleged acts were committed in Ohio. Both matters were remitted. The mother also appealed from an order denying her child support petition. That appeal was dismissed, since no appeal lies from a Support Magistrate order where the appellant failed to file timely objections. Michelle Rosien represented the appellant.

http://nycourts.gov/reporter/3dseries/2021/2021_01103.htm

***M/O Kelly CC. v Zaron BB.*, 2/18/21 – HEALTH AND SCHOOL / VOICE**

The mother appealed from an order of Schoharie County Family Court, which granted the father's petition to modify a prior custody/visitation order. The Third Department modified regarding decision-making authority over medical care and education. The mother had made sound decisions in these areas and was entitled to have the father consult her and consider her positions before making final decisions. Further, she should have the right to attend all medical appointments and school meetings, and should be given full access to medical and school records. Ellen Ross represented the appellant.

http://nycourts.gov/reporter/3dseries/2021/2021_01098.htm

***M/O Lily BB. (Stephen BB.)*, 2/18/21 – ABUSE PROVEN / REVERSED**

The Department of Social Services and the AFC appealed from an order of Ulster County Family Court dismissing an abuse and neglect petition. The relatively low threshold for corroboration of out-of-court statements of the victim was satisfied. The trial court's finding that the father plausibly explained that he touched the child's private areas to treat her for eczema was contradicted by record proof. The matter was remitted for a dispositional hearing before a different judge.

http://nycourts.gov/reporter/3dseries/2021/2021_01106.htm

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