

CRIMINAL

SECOND DEPARTMENT

***People v Moore*, 3/11/20 – SEVERANCE DENIED / NEW TRIAL**

The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 1st degree robbery and 2nd degree CPW. The Second Department reversed and ordered a new trial. The defendant, who was accused of committing two separate robberies, moved prior to trial to sever the counts as to each robbery. He argued that he had important testimony to give in the first case as to a duress defense and that he had a genuine need to refrain from testifying in the second case. Denial of the severance application deprived him of a fair trial. In his written statement to police, the defendant explained that a person to whom he owed money threatened to shoot him and made him rob a pizza delivery person to pay his debt. The statement did not mean that the defendant did not need to testify regarding the first robbery. His testimony might not have mirrored his statement, which was not enough to support the duress defense. As to the second robbery, if the defendant testified, the *Sandoval* ruling would allow the People to introduce underlying facts of two youthful offender adjudications involving similar robberies. Appellate Advocates (Tammy Lin, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2020/2020_01645.htm

***People v Jones*, 3/11/20 – IAC / SENTENCING / REMITTAL**

The defendant appealed from a judgment of Queens County Supreme Court, convicting him of aggravated criminal contempt, 1st degree criminal contempt, and other charges. The Second Department vacated the sentence and remitted. The defendant was deprived of effective assistance of counsel at sentencing. Defense counsel made no substantive arguments on the defendant's behalf and displayed no meaningful knowledge of the case or the defendant's background. Appellate Advocates (Martin Sawyer, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2020/2020_01640.htm

***People v Giron*, 3/11/20 – YO / REMITTAL**

The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 1st degree robbery, upon his plea of guilty. The Second Department vacated the sentence and remitted. The defendant's contention that the trial court failed to consider youthful offender treatment was not barred by his failure to raise the issue at sentencing. Pursuant to CPL 720.20 (1), the sentencing court must determine whether an eligible youth is a YO. The defendant was an eligible youth, yet the mandated determination was not made. Legal Aid Society of NYC (Steven Berko, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2020/2020_01637.htm

***People v Galan*, 3/11/20 – CPL 440.10 / IAC / HEARING**

The People appealed from an order of Queens County Supreme Court, which summarily granted the defendant's CPL 440.10 motion to vacate a judgment, convicting him of attempted 3rd degree criminal sale of a controlled substance. The Second Department reversed and remitted for a hearing. The defendant, a native of the Dominican Republic

and a lawful permanent resident of the U.S., pleaded guilty in 1998 to the above-named offense. In 2010, removal proceedings were initiated. An order granting the defendant's prior 440 motion was reversed on appeal. The instant motion alleged—as the prior one had—that counsel misadvised the defendant concerning the deportation consequences of his plea. But the appellate court had already made an adverse determination on that issue, and the defendant did not show good cause for reconsideration. A hearing was needed as to another claim asserted in the second motion—that counsel failed to negotiate a plea preserving the defendant's eligibility for discretionary relief from deportation.

http://nycourts.gov/reporter/3dseries/2020/2020_01636.htm

THIRD DEPARTMENT

***People v Stover*, 3/12/20 – SUPPRESSION / DISMISSED**

The defendant appealed from an Albany County Court judgment convicting him of 2nd degree CPW. The Third Department reversed and dismissed the indictment. The defendant was in his parked vehicle at a club when officers asked for identification and discovered that his driver's license was suspended. They arrested him for aggravated unlicensed operation of a motor vehicle and during an inventory search found a handgun in the trunk. The police did not have the requisite objective, credible reason to approach the vehicle; there was no indication that the defendant was other than a customer with a valid reason to park legally at a club that had just closed. The vehicle's condition did not raise concerns, and police observed no erratic driving. The defendant's argument on his cell phone did not provide any nexus to drug and weapons crimes in the area. The Albany County Public Defender (Jessica Gorman, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2020/2020_01676.htm

FOURTH DEPARTMENT

***People v Spencer*, 3/13/20 – ASSAULT / FIREARM / DISMISSED**

The defendant appealed from a County Court judgment, convicting him of 2nd degree murder, 1st degree assault (two counts), 1st degree criminal use of a firearm, and another crime. The Fourth Department dismissed the assault and firearm counts based on legally insufficient evidence. The defendant was charged as an accessory to the assaults. The People did not object when their theory of transferred intent was not reflected in the jury instruction on the assault charges. Appellate review of sufficiency was limited to the court's instruction as given without objection; and there was insufficient evidence that the defendant knew that either victim was present or that he intended any harm to either. The indictment charged him with using a loaded firearm during the assault, yet the jury instructions did not specify assault as the underlying crime. The defendant did not object, but preservation was not required, since he had a non-waivable right to be tried only for crimes set forth in the indictment. The Monroe County Conflict Defender (Kathleen Reardon) represented the appellant.

http://nycourts.gov/reporter/3dseries/2020/2020_01823.htm

***People v Grimes*, 3/13/20 – SUPPRESSION / RESERVED**

The defendant appealed from an Onondaga County Supreme Court judgment, convicting him upon a plea of guilty of a drug possession offense. The Fourth Department reserved decision. On appeal, the defendant urged that the trial court erred in refusing to suppress physical evidence and statements. The contentions were preserved since counsel's arguments gave the suppression court a chance to fix the problem and avert reversible error. The lower court erred in ruling without resolving whether the pat frisk was lawful, and the appellate court lacked the power to review issues not ruled upon, so the matter was remitted. Linda Campbell represented the appellant.

http://nycourts.gov/reporter/3dseries/2020/2020_01818.htm

***People v Young*, 3/13/20 – SUPPRESSION / UPHELD**

The People appealed from an order of Chautauqua County Court, suppressing certain statements made by the defendant. The Fourth Department affirmed and dismissed the indictment. After NY police interviewed the defendant about two arsons, he fled to Pennsylvania and was arrested for another arson. At the PA arraignment, the defendant requested counsel. Days later NY police went to PA and observed while PA Troopers interrogated the unrepresented defendant about all offenses. Interrogation about the NY offenses violated the right to counsel. Once a defendant in custody on a particular matter requests counsel, custodial interrogation must cease as to any subject. The Legal Aid Bureau of Buffalo (Kaixi Xu, of counsel) represented the respondent.

http://nycourts.gov/reporter/3dseries/2020/2020_01825.htm

***People v Wallace*, 3/13/20 – SUPPRESSION / DISMISSED**

The defendant appealed from a County Court judgment, convicting him of 2nd degree CPW. The Fourth Department dismissed the indictment. The neophyte arresting officer, under the supervision of a training officer, was on patrol in a high-crime area when he saw the defendant walking and wearing a mask covering the lower part of his face. The arresting officer asked why the defendant wore a mask. Then the training officer asked what was in his bag, and the defendant replied "weed." That was a level-two intrusion—without founded suspicion that criminal activity was afoot. An ensuing frisk by the arresting officer, resulting in recovery of a firearm, was also improper, given that the officer did not testify to having feared that the defendant had a weapon. The Monroe County Conflict Defender (Kathleen Reardon, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2020/2020_01796.htm

***People v Shields*, 3/13/20 – PLEA / COERCIVE**

The defendant appealed from a judgment of Oneida County Court, convicting him of 1st degree assault. The Fourth Department reversed and remitted. At an appearance prior to the plea proceeding, the court stated that, if the defendant decided to reject the plea offer and was convicted after trial, the maximum sentence on the top count and consecutive time on an unnamed additional count would be imposed. At that same appearance, the court said that defendant and her codefendants would also be federally prosecuted. Reviewing the matter in the interest of justice, the appellate court held that the plea court's statements were not a description of the sentence range; they constituted impermissible coercion.

http://nycourts.gov/reporter/3dseries/2020/2020_01767.htm

***People v Nicholas G.*, 3/13/20 – YO / GRANTED**

The defendant appealed from a County Court judgment, convicting him upon a plea of guilty of two counts of 1st degree sexual abuse. The Fourth Department reversed in the interest of justice and found him a youthful offender for several reasons: (1) the defendant was 17 at the time of the crimes and had no criminal record or history of violence or sex offending; (2) he had cognitive limitations, learning disabilities, and mental health issues; (3) the defendant accepted responsibility and expressed genuine remorse; and (4) the Probation Department and reviewing psychologist recommended YO treatment. The Wayne County Public Defender (Bridget Field, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2020/2020_01828.htm

***People v Huntress*, 3/13/20 – PREDICATE / NOT EQUIVALENT**

The defendant appealed from a County Court judgment, convicting him upon a plea of guilty of aggravated vehicular homicide and a related crime. The Fourth Department vacated the sentence. The defendant was improperly sentenced as a second felony offender. The predicate conviction, the Pennsylvania crime of receiving stolen property, was not the equivalent of NY's 4th degree CPW, since operability of the firearm was not an element of the former offense. The Wyoming County Public Defender (Adam Koch, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2020/2020_01778.htm

***People v Scott*, 3/13/20 – CPL 440.10 / IAC / HEARING**

The defendant appealed from an Erie County Supreme Court order, which summarily denied his CPL 440.10 motion to vacate a conviction for murder and other crimes. The Fourth Department ordered a hearing. The motion asserted that counsel was ineffective in failing to call an alibi witness who would have testified that he was with the defendant in North Carolina at the time of the murder. In response to the motion, the People did not contest that the defendant was entitled to a hearing. The failure to investigate or call exculpatory witnesses may amount to ineffective assistance. The absence of an affidavit from trial counsel was not fatal to the motion. One justice dissented. Michael Stachowski represented the appellant.

http://nycourts.gov/reporter/3dseries/2020/2020_01807.htm

***People v Fox*, 3/13/20 – CPL 440.10 / IAC / HEARING**

The defendant appealed from an Oneida County order denying his CPL 440.10 motion to vacate a drug conviction. The Fourth Department ordered a hearing. An affiant said the defendant borrowed his jacket and did not know drugs were in the pockets, yet counsel did not call such witness and failed to obtain traffic stop video. Two justices dissented. John Cirando represented the appellant.

http://nycourts.gov/reporter/3dseries/2020/2020_01809.htm

FAMILY

FOURTH DEPARTMENT

Matter of Steeno v Szydowski, 3/13/20 –

EXTRAORDINARY CIRCUMSTANCES / NO FINDING

The mother appealed from an order of Erie County Family Court, which awarded the father and maternal grandmother joint custody of the subject child. The Fourth Department reserved decision and remitted. The challenged order granted parental access to the mother as the parties agreed upon or, absent an agreement, as Family Court determined after a hearing. Perhaps such provision meant that the order appealed from was not final and thus was not appealable as of right. *See* Family Ct Act 1112 § (a). So the mother's notice of appeal was deemed an application for permission to appeal, and leave was granted. Family Court failed to set forth findings as to whether the grandmother established extraordinary circumstances. The absence of the required findings precluded appellate review, and the reviewing court declined to make its own findings. One justice dissented. William Broderick represented the mother.

http://nycourts.gov/reporter/3dseries/2020/2020_01808.htm