

CRIMINAL

SECOND DEPARTMENT

***People v Moreno*, 4/14/21 – DRUG SALE / INSUFFICIENT PROOF**

The defendant appealed from a judgment of Richmond County Supreme Court, convicting him of 3rd degree criminal sale of a controlled substance and 4th degree conspiracy. The Second Department reversed and dismissed. The evidence was legally insufficient as to both charges. The defendant was merely present during the sale; and the few words he uttered to another man selling drugs, before an undercover officer entered the vehicle, did not reflect his awareness of an imminent sale. Further, there was no proof of the defendant's discussions about selling heroin nor of any overt act linked to statements made during wiretapped calls.

http://nycourts.gov/reporter/3dseries/2021/2021_02316.htm

***People v Benbow*, 4/14/21 – SUPPRESSION / REASONABLE SUSPICION**

The defendant appealed from a judgment of Kings County Supreme Court, convicting him of criminal possession of a firearm upon his plea of guilty. The appeal brought up for review an order denying suppression of the weapon. The police lacked reasonable suspicion to stop the defendant and a companion, based solely on a tip that two individuals, one with a gun, were leaving a club. There was no proof about the identity of the tipster or how he/she knew about the gun.

http://nycourts.gov/reporter/3dseries/2021/2021_02304.htm

***People v Marion*, 4/7/21 – SUPPRESSION / LINEUP**

The defendant appealed from a judgment of Queens County Supreme Court, convicting him of robbery charges, upon a jury verdict. The appeal brought up for review an order denying suppression. The Second Department reversed and ordered a new trial. Prior to the lineup, the defendant's attorney in another matter identified herself to the arresting officer. Though aware of the representation, the detective doing the lineup failed to notify counsel. A hearing was needed to determine whether the in-court identification by the victim had a source independent of the lineup.

http://nycourts.gov/reporter/3dseries/2021/2021_02177.htm

***People v Saunders*, 4/7/21 – 440 / PADILLA**

The People appealed from an order of Nassau County Supreme Court, which granted the defendant's CPL 440.10 motion to vacate a judgment, convicting him of 2nd degree criminal contempt. The Second Department affirmed. The defendant was a citizen of Jamaica and a lawful permanent resident here. His guilty plea rendered him deportable. Counsel misadvised him about that consequence. The appellate court rejected the People's contention that prejudice was not shown; the defendant could rationally have decided to go to trial, where he had resided in the U.S. since 1988 and had five children here. Vacatur was proper based on ineffective assistance.

http://nycourts.gov/reporter/3dseries/2021/2021_02181.htm

***People v Breedan*, 4/7/21 – 440 / DUE PROCESS**

The defendant appealed from a Kings County Supreme Court order, which denied his CPL 440.10 motion seeking to vacate a judgment, convicting him of CPW 2. The Second Department reversed and remitted. A codefendant was initially represented by Michael Vecchione, who then joined the DA’s office and approved a plea offer made to the defendant before he went to trial and was acquitted of murder. Vecchione may have used privileged information learned as counsel for his alleged accomplice.

http://nycourts.gov/reporter/3dseries/2021/2021_02173.htm

THIRD DEPARTMENT

***People v Conrad*, 4/8/21 – SORA / REVERSED**

The defendant appealed from an Albany County Court order, which classified him as a level-two sex offender. The Third Department reversed. The SORA court used a short form order alluding to the findings of fact and conclusions of law made in open court. The findings/conclusions were not sufficient for intelligent review, but the record allowed the appellate court to make its own determination. Remittal was required due to another flaw, though—the SORA court did not address a request for a downward departure.

http://nycourts.gov/reporter/3dseries/2021/2021_02194.htm

***People v Wassilie*, 4/8/21 – SORA / DISMISSED**

The Third Department dismissed an appeal from a Columbia County Court decision, which classified the defendant as a level-three offender. The SORA court’s order was not entered and filed, as required by statute. Further, since the risk assessment instrument did not contain “so ordered” language, it was not an appealable paper.

http://nycourts.gov/reporter/3dseries/2021/2021_02196.htm

FAMILY

FIRST DEPARTMENT

***M/O Iscela G. (Lorenzo T.)*, 4/13/21 – DERIVATIVE NEGLECT / VIOLENCE**

The petitioner agency appealed from an order of Bronx County Family Court, which dismissed a neglect petition as to one child, on the ground that the respondent was not the biological father or person legally responsible for her care. The First Department reversed and entered a finding of derivative neglect. During the proceedings, the respondent had previously admitted that he was the father. He failed to appear at the fact-finding hearing and thus never testified, which allowed the trial court to draw a negative inference against him. Derivative neglect was proven based on the respondent’s violent attack on the mother and three other children when the subject child was not present.

http://nycourts.gov/reporter/3dseries/2021/2021_02263.htm

***M/O Anthony L. v Bernadette R.*, 4/13/21 – LAW OF CASE / RETRIAL**

The father appealed from a child support order of NY County Family Court. The First Department affirmed. In a prior decision, the appellate court directed that the Support Magistrate issue further findings regarding the reduction of support. 178 AD3d 479. Upon retrial, the law of the case doctrine did not apply to the prior evidentiary rulings. *See People v Evans* (94 NY2d 499, 504). Modification of support was retroactive to the date of the father's petition, not earlier when health insurance costs dropped.

http://nycourts.gov/reporter/3dseries/2021/2021_02248.htm

SECOND DEPARTMENT

***M/O Geraghty v Muniz*, 4/7/21 – CHILD SUPPORT / TORT AWARD**

The mother appealed from a child support order of Dutchess County Family Court. The Second Department modified. Her personal injury award was properly considered, since parents have a duty to use available financial resources for their children, and she did not show that any award money was for future medical expenses. However, the amount ordered wrongly reduced the mother's income below the self-support reserve.

http://nycourts.gov/reporter/3dseries/2021/2021_02155.htm

***M/O Johnson v Kelly*, 4/7/21 – FATHER-CHILD / STRAINED**

The parties' children appealed from a custody order of Kings County Family Court. The Second Department reversed. The order regarding father-daughter visitation was unsound, since their relationship was badly frayed. The mother and son may have influenced the daughter's negative attitude, but her feelings had to be considered. The son, now over 18, was not subject to custody orders. The court directive warning of certain consequences was not reviewable; it did not impose a penalty. A forensic evaluation was needed; the matter was remitted.

http://nycourts.gov/reporter/3dseries/2021/2021_02158.htm

***M/O Rivas v Rivas*, 4/7/21 –LEGAL CUSTODY / NOT SO BITTER**

The mother appealed from an order of Queens County Family Court, which granted the father sole legal custody of the parties' two children. The Second Department modified. While the parties had issues, their relationship was not so acrimonious that joint legal custody was unworkable.

http://nycourts.gov/reporter/3dseries/2021/2021_02164.htm

***M/O Olsen v Statile*, 4/7/21 – DISORDERLY CONDUCT / VACATED**

The petitioner initiated a family offense proceeding against her granddaughter, who challenged an order of protection issued by Richmond County Family Court. The Second Department modified, vacating a disorderly conduct finding. Although the order had expired, the appeal was not academic, given lasting consequences of protective orders. There was no proof that the appellant's threatening behavior was meant to cause public inconvenience, annoyance or alarm.

http://nycourts.gov/reporter/3dseries/2021/2021_02162.htm

***M/O Bryce E.W.*, 4/7/21 – ART. 10 / DUE PROCESS**

The mother appealed from an order placing the child with a family member until completion of the next permanency hearing. In affirming, the Second Department held that Family Court did not violate due process by interviewing the child outside the presence of the mother or counsel. At a dispositional hearing, the court's focus was on best interests, including avoiding emotional harm to the child and allowing him/her to speak freely.

http://nycourts.gov/reporter/3dseries/2021/2021_02167.htm

***M/O Myiasha K.D. (Marcus R.)*, 4/14/21 – ART. 10 / NO NEGLECT**

The paternal uncle appealed from an Article 10 disposition rendered by Queens County Family Court. The Second Department reversed. The uncle inappropriately struck the child, but the petitioner agency did not establish that such action rose to the level of excessive corporal punishment or that the child suffered the requisite harm.

http://nycourts.gov/reporter/3dseries/2021/2021_02290.htm