

CRIMINAL

FIRST DEPARTMENT

***People v Merritt*, 4/29/21 – PRESENT SENSE IMPRESSION / ERROR**

The defendant appealed from a judgment of NY County Supreme Court, convicting him of 3rd degree CPW and 2nd degree menacing. The First Department found error in the admission of the complainant's 911 call as a present sense impression. The complainant testified that, following the incident, he walked almost one block before he thought about the incident and decided to return to the scene and call 911. The proof suggested that such call occurred around six minutes after the incident. Such time for reflection negated the "essential assurance of reliability" of a present sense impression. However, the error was harmless. The complainant's in-court testimony was consistent with his out-of-court statements, and those statements and his credibility were tested through cross-examination. There was overwhelming evidence that the defendant threatened the victim with the box cutter found in his possession. The judgment was affirmed.

http://nycourts.gov/reporter/3dseries/2021/2021_02615.htm

***People v Aleman*, 4/27/21 – SUPPLEMENTAL FEE / VACATED**

The defendant appealed from a judgment of Bronx County Supreme Court, convicting him of 3rd degree rape. The First Department vacated the supplemental sex offender fee and reduced the mandatory surcharge and crime victim assistance fee. The crime occurred before the eff. dates of Penal Law § 60.35 (1) (a) (1) (i) (mandatory surcharge of \$300, crime victim assistance fee of \$25) and subdivision (b) (supplemental sex offender victim fee of \$1,000). Center for Appellate Litigation (Teighlor Bonner, of counsel) represented appellant.

http://nycourts.gov/reporter/3dseries/2021/2021_02502.htm

***People v Green*, 4/27/21 – SURCHARGE AND FEE / VACATED**

The defendant appealed from a judgment of Bronx County Supreme Court, convicting him of 2nd degree assault. The First Department vacated the mandatory surcharge and crime victim assistance fee in the interest of justice. *See People v Chirinos*, 190 AD3d 434 (defendant was convicted before eff. date of CPL 420.35 [2-a], permitting waiver of surcharges/fees for persons under 21 at time of crime; but appellate court could waive fees). Center for Appellate Litigation (David Klem, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2021/2021_02503.htm

SECOND DEPARTMENT

***People v Gause*, 4/28/21 – GUILTY PLEA / ELEMENT NEGATED**

The defendant appealed from a judgment of Suffolk County Court, convicting him of 3rd degree CPW. The Second Department reversed and remitted. The crime at issue required “knowingly and unlawfully” possessing “a narcotic drug with intent to sell it.” During the plea allocution, the defendant denied that he intended to sell the drugs he possessed, yet the court made no further inquiry. Where a defendant’s factual recitation negates an essential element of the crime pleaded to, the court must not accept the plea without making further inquiry to ensure that the defendant understood the nature of the charge and that the plea was intelligently entered. *People v Lopez*, 71 NY2d 662. This was that rare case where the defendant’s recitation of the facts clearly cast significant doubt on his guilt or otherwise called into question the voluntariness of the plea. Thus, the defendant could challenge the sufficiency of the allocution, notwithstanding that a formal post-allocution motion was not made. Suffolk County Legal Aid Society (Anju Alexander, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2021/2021_02543.htm

***People v Velazquez-Hernandez*, 4/28/21 – GUILTY PLEA / RIGHTS NOT EXPLAINED**

The defendant appealed from a judgment of Suffolk County Court, convicting him of DWI (two counts), 1st degree AUO of a motor vehicle, and other crimes. The Second Department reversed and remitted. The plea court did not ensure that the defendant understood the rights he would be giving up by pleading guilty. *See People v Conceicao*, 26 NY3d 375. The defendant was not informed that he would be forfeiting the right to a trial by jury, of the People’s obligation to prove his guilt beyond a reasonable doubt, or of his right against self-incrimination. Notwithstanding the defendant’s failure to preserve his arguments, relief was granted in the interest of justice. Suffolk County Legal Aid Society (Lisa Marcoccia, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2021/2021_02550.htm

***People v Johnson*, 4/28/21 – YO / REQUIRED DETERMINATION**

The defendant appealed from a judgment of Kings County Supreme Court, convicting him of attempted 1st degree assault, upon his plea of guilty. The Second Department vacated the sentence. CPL 720.20 (1) required a youthful offender determination in every case where the defendant was eligible, even where he/she failed to request it or agreed to forego it as part of a plea bargain. With respect to an armed felony, such as the instant one, the court was required to consider whether the defendant was an eligible youth by considering certain statutory factors and, if so, whether the youth should be afforded YO status. No such determinations occurred here. Appellate Advocates (Chelsea Lopez, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2021/2021_02544.htm

***People v Lopez*, 4/28/21 – DEFENDANT DEPORTED / APPEAL DISMISSED**

The defendant appealed from an order of Kings County Supreme Court, which summarily denied his CPL 440.10 motion to vacate a judgment of conviction. The District Attorney moved to dismiss the appeal on the ground that the defendant had been deported and was

no longer available to obey the mandate of the court. The Second Department granted the motion and dismissed the appeal, without prejudice to a motion to reinstate the appeal should the defendant return to the court's jurisdiction. *See People v. Harrison*, 27 NY3d 281 (intermediate appellate court retains discretion to dismiss pending permissive appeal due to defendant's involuntary deportation).

http://nycourts.gov/reporter/3dseries/2021/2021_02546.htm

THIRD DEPARTMENT

***People v Smith*, 4/29/21 – NO SERIOUS INJURY / MODIFIED**

The defendant appealed from judgment of Schenectady County Supreme Court, convicting him of several crimes. The Third Department modified, finding the verdict as to 2nd degree assault against the weight of the evidence because serious physical injury was not proven. There was no evidence that: the victim lost consciousness after being shot or that a vital organ was damaged; that the injuries caused a substantial risk of death or were life threatening; or that the victim suffered from a protracted impairment of health or protracted loss or impairment of the function of a bodily organ. Although there was testimony as to the long-term effects of the gunshot wound, no medical documentation was submitted to link the impairment and the initial injury. The victim testified that he had two circular scars, but the People failed to introduce a photograph or a detailed description to establish serious disfigurement. Since there was no dispute that the victim sustained a physical injury, the conviction was reduced to the lesser included offense of 3rd degree assault. Angela Kelley represented the appellant.

http://nycourts.gov/reporter/3dseries/2021/2021_02564.htm

***People v Ferguson*, 4/29/21 – INCLUSORY COUNTS / DISMISSED**

The defendant appealed from a Rensselaer County Court judgment, convicting him of multiple crimes. The Third Department modified, dismissing convictions for 1st degree vehicular manslaughter, reckless driving, and DWI as inclusory concurrent counts of aggravated vehicular homicide. Similarly, the conviction for 1st degree vehicular assault was dismissed as an inclusory concurrent count of aggravated vehicular assault. Sandra Colatosti represented the appellant.

http://nycourts.gov/reporter/3dseries/2021/2021_02563.htm