

CRIMINAL

FIRST DEPARTMENT

***People v Jennings*, 5/20/21 – RIKERS CALLS / ADMISSIBLE**

The defendant appealed from a judgment of NY County Supreme Court, convicting him of attempted 2nd degree murder and other crimes. The admission of a recorded telephone call the defendant made at Rikers Island trial did not violate his constitutional right to equal protection. He was treated differently than he would have been if at liberty only insofar as he had to consent to monitoring and recording of nonprivileged calls or not make them. Substantial interests in prison security justified such policy. Once an inmate implicitly consented to the recording of calls, he/she retained no reasonable expectation of privacy that would prevent disclosure.

http://nycourts.gov/reporter/3dseries/2021/2021_03264.htm

SECOND DEPARTMENT

***People v Garcia*, 5/19/21 – ROBBERY / AGAINST WEIGHT**

The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 1st degree robbery and other crimes. The Second Department dismissed the indictment, finding the verdict against the weight of evidence. While the defendant was found in possession of a distinctive bandana shortly after the crime near the scene, no witnesses testified that the complainant mentioned a bandana before the arrest. It was not clear why police expected to find one suspect in the park, given that the complainant said that the four suspects left together after the robbery. Also, the complainant testified that he had seen the man with the bandana twice before—but that he had never seen the defendant before the crime. Steven A. Feldman represented the appellant.

http://nycourts.gov/reporter/3dseries/2021/2021_03196.htm

***People v Ramos*, 5/19/21 – 440.10 / NEW TRIAL**

The defendant appealed from an order of Kings County Supreme Court, denying his CPL 440.10 motion to vacate a judgment, convicting him of 2nd degree course of sexual conduct against a child and another crime. The Second Department reversed and ordered a new trial. Counsel was ineffective, where the case turned on credibility, and there was no valid reason for the failure to: investigate the alibi defense; impeach the complainant with her grand jury testimony; and object when the People elicited precluded testimony. Appellate Advocates (Yvonne Shivers, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2021/2021_03200.htm

***M/O Cruz v D'Emic*, 5/19/21 – 440.10 / MANDAMUS GRANTED**

The Second Department granted the petitioner's Article 78 petition in the nature of mandamus to compel two procrastinating Kings County Supreme Court justices to issue written orders deciding the petitioner's motions to reargue, one as to a CPL 440.10 motion and another as to a bench decision. The petitioner demonstrated a clear legal right to the orders. Justin Bonus represented the petitioner.

http://nycourts.gov/reporter/3dseries/2021/2021_03175.htm

***People v Commissiong*, 5/19/21 – JUDICIAL DIVERSION / REVERSED**

The defendant appealed from a judgment of Richmond County Supreme Court, convicting him of 3rd degree criminal possession of a controlled substance. The appeal brought up for review denial of his motion seeking judicial diversion. The Second Department reversed. Appellate review of the claim was not foreclosed by the guilty plea. Supreme Court abused its discretion in summarily denying the application for a hearing as to whether the defendant should receive alcohol/substance abuse treatment. He was eligible for diversion, and an evaluation supported a hearing. Appellate Advocates (Mark Vorkink, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2021/2021_03193.htm

***People v Ranot*, 5/19/21 – SENTENCE / 15 TO 8 YEARS**

The defendant appealed from a Queens County Supreme Court judgment, convicting her of 1st degree assault. The Second Department reduced the determinate term from 15 to 8 years, plus five years' supervision, without explaining why. The crime involved the defendant striking her stepdaughter with the sharp metal handle of a broom, resulting in a permanent wrist injury. Mischel & Horn represented the appellant.

http://nycourts.gov/reporter/3dseries/2021/2021_03201.htm

***People v Hubert*, 5/19/21 – APPEAL TO SYMPATHY / HARMLESS**

The defendant appealed from a judgment of Richmond County Supreme Court, convicting him of 2nd degree murder and 2nd degree CPW. The Second Department affirmed but found two errors. The prosecutor should not have appealed to the jury's sympathy by eliciting testimony from a witness that the victim was her only child, with whom she stayed in the hospital while he was dying, and that she brought a college acceptance letter to his grave. Supreme Court also erred in admitting a video of the defendant's interview with the police without redacting statements as to his commission of uncharged crimes. Both errors were harmless.

http://nycourts.gov/reporter/3dseries/2021/2021_03197.htm

***People v Cortez-Moreno*, 5/19/21 – ANDERS / SORA**

The defendant appealed from a judgment of Nassau County Supreme Court, convicting him of 3rd degree rape, upon his plea of guilty, and imposing sentence. The Second Department relieved appellate counsel and assigned new counsel. The defendant sought only the review of the SORA adjudication that he was a level-three risk, but such a matter may not be reviewed on appeal from a judgment of conviction.

http://nycourts.gov/reporter/3dseries/2021/2021_03194.htm

***People v Cunningham*, 5/19/21 – RIGHT TO COUNSEL / NO VIOLATION**

The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 2nd degree murder and other crimes. The Second Department affirmed. The police did not violate the defendant's right to counsel when they questioned him about the murder. Assuming that the right to counsel had attached on two pending criminal matters, the murder was not closely related to the represented matters. The defendant preserved his argument that his confrontation clause rights were violated by a criminalist's testimony; and DNA testing evidence was testimonial. However, the criminalist did his own analysis and was not merely a conduit for others' conclusions. The defendant's contention that his

Fourth Amendment rights were violated, when the prosecution obtained his historical cell-site location information without a warrant, was unpreserved for review. Counsel was not ineffective for failing to anticipate *Carpenter v US*.

http://nycourts.gov/reporter/3dseries/2021/2021_03195.htm

THIRD DEPARTMENT

***People v Agudio*, 5/20/21 – TWEETS / FIRST AMENDMENT**

The defendant appealed from a judgment of Albany County Supreme Court, convicting her of 3rd degree falsely reporting an incident (two counts). The Third Department dismissed one of the counts. The evidence established that the defendant, annoyed by singing on a bus, initiated a verbal exchange that erupted into a physical altercation. Although she testified that a racial slur was uttered, other testimony and the footage indicated otherwise. The defendant reported to police that she and friends were jumped on a bus on account of their race, and she posted the false claims on social media. However, Penal Law § 240.50 (1), was unconstitutional as applied to posting false tweets. *People v Burwell*, 183 AD3d 173. Mark Mishler represented the appellant.

http://nycourts.gov/reporter/3dseries/2021/2021_03224.htm

***People v Butler*, 5/20/21 – CANINE SNIFFING / DISSENT**

The defendant appealed from a Broome County Court judgment, convicting him upon his plea of guilty of 3rd degree criminal possession of a controlled substance and another crime. The appeal brought up for review the denial of suppression—a claim that survived the guilty plea in the absence of a valid appeal waiver. The Third Department affirmed. One judge dissented, opining that probable cause—not reasonable suspicion—was needed to justify a canine’s contact sniff search of a defendant’s person. The Court of Appeals had held that a canine sniff, in the common hallway of an apartment building to detect drugs, required only reasonable suspicion; and there was a greater expectation of privacy in one’s body than in a common hallway.

http://nycourts.gov/reporter/3dseries/2021/2021_03222.htm

FAMILY

SECOND DEPARTMENT

***M/O William N. v Maria D.*, 5/19/21 – PATERNITY / ADOPTION**

The petitioner appealed from an order of Richmond County Family Court, dismissing his paternity petition. The Second Department affirmed. The parental rights of the birth mother were terminated, and there was no individual who might be the father whose consent was required for adoption or who was entitled to notice. Any rights of the putative father were extinguished upon the child's adoption by the maternal grandparents. It was true that Domestic Relations Law § 117 would not be applied literally if doing so would not serve the child's best interests, but a strict application was fitting here—to prevent the petitioner's unwanted intrusion and to promote the stability of the new adoptive family.

http://nycourts.gov/reporter/3dseries/2021/2021_03184.htm

***M/O Ortega v Sanchez*, 5/19/21 – CONSENT / APPEAL DISMISSED**

The mother appealed from an order of Queens County Family Court, which granted the father's custody petition. The Second Department dismissed the appeal. The record reflected that, during a Family Court appearance, the mother consented to an award of sole custody to the father. No appeal lies from an order entered on the appellant's consent. CPLR 5511. To the extent that the mother asserted that her consent was not voluntary or was otherwise invalid, her remedy was to move in Family Court to vacate the order.

http://nycourts.gov/reporter/3dseries/2021/2021_03185.htm