CRIMINAL

SECOND DEPARTMENT

DECISION OF THE WEEK

People v Beck, 7/28/21 – **PROSECUTOR / EGREGIOUS**

The defendant appealed from a judgment of Suffolk County Court, convicting him of 2nd degree burglary. The Second Department ordered a new trial in the interest of justice. The cumulative effect of 10 instances of prosecutorial misconduct deprived the defendant of a fair trial. (1) In opening, the prosecutor argued that the case "will be a very quick deliberation" and the only proper verdict was guilty. (2) He vouched for the credibility of the People's witnesses. (3) In the direct examination a complainant, he asked irrelevant questions solely to elicit sympathy for him. (4) The prosecutor also denigrated any possible defense. Further, the summation was rife with improper conduct. (5) The prosecutor referred to jury deliberations as a "game." (6) He suggested that the defendant was a professional burglar. (7) He contended that it was improper for a deliberating juror to bring up a scenario other than that the defendant was guilty. (8) He misstated the law on circumstantial evidence. (9) In addition, the prosecutor expressed his opinion of the defendant's guilt and asserted that his opinion was the only one anyone could hold. (10) Finally, he indicated that the jury should not consider the defense. Thomas Scott represented the appellant.
https://nycourts.gov/reporter/3dseries/2021/2021_04556.htm

People v Garcia, 7/28/21 – **CPL 440.20 / VINDICTIVE**

The defendant appealed from a resentence imposed by Kings County Supreme Court upon his convictions of attempted 2nd degree murder and 1st degree robbery (nine counts). The Second Department reversed and remitted. The defendant was convicted after jury trials in 1998 and 1999 and was sentenced to an aggregate term of 125 years. In 2019, he moved under CPL 440.20 to set aside the sentence. On the People's consent, Supreme Court granted relief, but stated that it lacked discretion to consider the defendant's post-sentence conduct and imposed an aggregate term of 35 years. That was error. The defendant should have been given the chance to supply information about matters that occurred after the original sentencing. *See People v Kuey*, 83 NY2d 278. Unlike in *Kuey*, this proceeding was not based on a technical defect but on vindictiveness. The resentencing court was required to exercise discretion and consider the crime charged, the defendant's particular circumstances, and the purpose of a penal sanction. There was an updated presentence investigation report here, but it was rife with errors and failed to include an interview with the defendant because he was incarcerated. Remittal proceedings should include consideration of a corrected, updated PSI report. Mark Diamond represented the appellant.
https://nycourts.gov/reporter/3dseries/2021/2021_04558.htm

THIRD DEPARTMENT

People v Simpson, 7/29/21 – **DISSENT / PLEA INVALID**
The defendant appealed from a Broome County Court judgment, convicting him of attempted 1st degree assault and other crimes. The Third Department affirmed. One justice dissented. County Court did not adequately explain the *Boykin* rights waived. Although the defendant failed to preserve the issue, the judgment should be reversed in the interest of justice. The plea court failed to refer to any constitutional trial-related rights forfeited by a plea. Instead, the lower court focused almost exclusively on the waiver of an intoxication defense. The record also failed to disclose that the plea court obtained any assurance that the defendant had discussed with counsel trial-related rights forfeited. In the dissenter's view, the plea was invalid and corrective action was warranted.
https://nycourts.gov/reporter/3dseries/2021/2021_04579.htm

People v Sanchez, 7/29/21 – **MRTA / BURNT CANNABIS**
The defendant appealed from a Chemung County Court judgment, convicting him of 3rd degree criminal possession of a controlled substance and another crime. The Third Department affirmed. The search was lawful. The odor of marihuana emanating from a vehicle, when detected by a qualified officer, could constitute probable cause. The appellate court noted that, although not applicable in this case, the Marijuana Regulation and Taxation Act was signed into law on March 31, 2021. Under the MRTA, the odor of burnt cannabis no longer provided reasonable cause to believe that a crime had been committed, unless a law enforcement officer was investigating whether a person operating a vehicle was impaired by drugs, alcohol, or a combination. Even during such investigations, the cannabis odor would not provide probable cause to search an area of a vehicle not readily accessible to the driver or reasonably likely to contain proof relevant to the driver's condition. *See* Penal Law § 222.05.
https://nycourts.gov/reporter/3dseries/2021/2021_04581.htm

FAMILY

SECOND DEPARTMENT

M/O Gast v Faria, 7/28/21 – **COMMITMENT / REVERSED**
In a Family Court Act Article 4 proceeding, the father appealed from an order of Suffolk County Family Court, which summarily revoked an order suspending his commitment and directed that he be incarcerated. The Second Department reversed the challenged order—which was stayed pending appeal—and remitted for a hearing. Given the liberty interest at stake, Family Court had to give the father an opportunity to be heard and present witnesses to show that there was no good cause to justify ending the suspension. Christina Nankervisa represented the appellant.
https://nycourts.gov/reporter/3dseries/2021/2021_04549.htm

Weiss v Nelson, 7/28/21 – **MAINTENANCE / PALTRY**
The wife appealed from a divorce judgment entered in Nassau County Supreme Court. The Second Department modified. Supreme Court erred in imputing annual income of $80,000 to the wife, age 55, when calculating maintenance. During the 28-year marriage, she had been a stay-at-home mother and homemaker for nearly a decade; and, upon returning to work, she never earned more than $19/hr. Imputed income of $35,000 was more apt. The trial court further abused its discretion in awarding the wife maintenance of only $1,500 per month until she reached age 62, given the above facts and the husband's annual income exceeding $200,000 a year. Instead, she should receive $3,500 a month until eligibility for full Social Security benefits or other specified events. Jeanine Rooney and Arnold Klein represented the appellant.
https://nycourts.gov/reporter/3dseries/2021/2021_04573.htm

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