Indigent Legal Services

Decisions of Interest

AUGUST 17, 2021

CRIMINAL

United States v Weaver | August 16, 2021

EN BANC | NO SUPPRESSION

District Court–NDNY denied a motion to suppress evidence yielded during a traffic stop by a Syracuse police officer's pat-down search of the defendant. The **Second Circuit** reversed. However, the *en banc* court vacated the original panel's decision and affirmed the District Court judgment, stating three principles. (1) A traffic stop did not become a search based on verbal directives by police that did not constitute a physical trespass on a constitutionally protected area or an intrusion into an area subject to a reasonable expectation of privacy. The instant officer's order for the defendant to stand against the car was not such trespass or intrusion. Thus, the frisk began when the officer patted down the defendant's clothing. (2) An officer's subjective intent had no weight regarding when a search occurred; it was irrelevant if this officer intended a search when ordering the defendant to exit the car. (3) In deciding if an officer had a reasonable suspicion that a suspect was armed and dangerous, courts had to consider the circumstances as viewed objectively by a reasonable officer on the scene. Upon a reasonable suspicion that a suspect had a weapon, an officer did not need to rule out alternative explanations for the suspect's behavior. Two concurring judges said that the U.S. Supreme Court should revisit precedent that has "given police officers a green light to make pretextual stops based on racial profiling." Three judges filed dissents.

https://www.ca2.uscourts.gov/decisions/isysquery/36f5b850-ce83-4e97-9291-4437175c3bd1/2/doc/18-1697_complete_opinion.pdf#xml=https://www.ca2.uscourts.gov/decisions/isysquery/36f5b850-ce83-4e97-9291-4437175c3bd1/2/hilite

See also:

https://www.ca2.uscourts.gov/clerk/case_filing/rules/title7/rule_35.html

https://news.bloomberglaw.com/us-law-week/standard-for-stop-frisk-clarified-by-full-second-circuit

https://www.law.com/newyorklawjournal/2021/08/16/en-banc-second-circuit-court-splits-on-police-searches-racial-profiling

Brennan v Demydyuk | 2021 NY Slip Op 04425

MEMO OF LAW | PRESERVATION

In resolving cross-appeals regarding a CPLR 3101 discovery order in a negligence action, the **Fourth Department** noted that the plaintiff's alternative ground for affirmance was not set forth in discovery requests or motion papers contained in the record on appeal. Further, the record did not include memoranda of law, despite the appellate court's many advisements that such documents could properly be provided for the limited purpose of

determining whether an argument was preserved for appellate review. Otherwise, such memos were not properly before the appellate court, since the unsworn allegations lacked probative value. *Byrd v Roneker*, 90 AD3d 1648. The plaintiff's alternative argument had improperly been raised for the first time on appeal. These principles as to memoranda of law have been set forth in the criminal appeals realm as well. *See e.g. People v Sinha*, 84 AD3d 35, 44 (examining memo of law in criminal case to see if argument raised on appeal was preserved in trial court).
https://nycourts.gov/reporter/3dseries/2021/2021_04425.htm

FAMILY

Matter of T.M. v Manuel R.T.M. | August 17, 2021

UCCJEA | NO JURISDICTION

In a guardianship proceeding pursuant to Family Court Act Article 6, the mother appealed from an order of Queens County Family Court, which dismissed her petition for lack of subject matter jurisdiction. The **Second Department** affirmed. The subject of the proceeding was the parties' eldest child, who was born in Ecuador in 2000 and would shortly turn 21. In 2003, the mother relocated to the U.S. and left the child with maternal grandparents in Ecuador. Last April, the boy entered this country without documentation and, since that time, had resided with his mother in NY. She initiated this proceeding to be appointed his guardian and moved for a SIJS order. The mother conceded that NY did not qualify as the child's home state under the UCCJEA, since he had not been residing here for at least six consecutive months before the proceeding. The contention that Family Court should have exercised jurisdiction pursuant to Domestic Relations Law § 76 (1) (b) was not raised before Family Court, was therefore unpreserved for appellate review, and was not considered by the Second Department.
https://nycourts.gov/reporter/3dseries/2021/2021_04688.htm