Indigent Legal Services

Decisions of Interest

AUGUST 27, 2021

CRIMINAL

FIRST DEPARTMENT

People v Brown | August 19, 2021

EAVESDROPPING | VALID WARRANTS

The defendant appealed from a judgment of New York County Supreme Court, convicting him of 4th degree conspiracy and other crimes. The First Department affirmed. Justices of both the Second Department and the citywide Special Narcotics Court issued valid eavesdropping warrants to intercept cell phone calls and electronic messages. CPL 700.10 (1), providing that "a justice may issue an eavesdropping warrant," encompassed the jurists here. The subject calls and messages were made and received in North Carolina, but heard and recorded in a Brooklyn NYPD office. A warrant was "executed" when and where a law enforcement officer intentionally recorded or overheard phone communications and accessed electronic communications targeted by the warrant. Execution depended on the officers' actions vis-à-vis the communications—not the target's location or communication devices, or the participants engaged in the call.
https://nycourts.gov/reporter/3dseries/2021/2021_04737.htm

SECOND DEPARTMENT

People v Johnson | August 25, 2021

GRAND JURY TESTIMONY | EXCULPATORY

The defendant appealed from a Dutchess County Court judgment, convicting him of 2nd degree murder. The Second Department reversed and ordered a new trial. County Court erred in denying a defense request to introduce the grand jury testimony of a witness who was unavailable to testify at trial. The proffered proof was material and exculpatory, since the description of the shooter was inconsistent with the defendant. The prosecutor had a full and fair opportunity to examine the witness. The error was not harmless. Eric Renfro represented the appellant.
https://nycourts.gov/reporter/3dseries/2021/2021_04763.htm

People v Costan | August 25, 2021

ROBBERY ONE | MERE THREAT

The defendant appealed from a judgment of Kings County Supreme Court, convicting him of several crimes. The Second Department modified. To sustain the 1st degree robbery

conviction, the People had to show that the defendant consciously displayed something that could reasonably be perceived as a firearm, with the intent of forcibly taking property, and that the victim actually perceived the display. A mere verbal threat was insufficient. The instant witness, whose store been robbed earlier, testified that the defendant threatened to use the gun again, but denied seeing him make motions with his hands. The subject count was reduced to 2nd degree robbery. Appellate Advocates (Kathleen Whooley and Dina Zloczower, of counsel) represented the appellant.
https://nycourts.gov/reporter/3dseries/2021/2021_04760.htm

People v Bugge | August 18, 2021

SEALING | REVERSED

The defendant pro se appealed from a Suffolk County Court order, which summarily denied his CPL 160.59 motion to seal his conviction of the crime of unlawful possession of examination questions, in violation of the Civil Service Law, and related offenses. The Second Department reversed and remitted. In 1999, the defendant pleaded guilty to the subject charges and was sentenced to probation. County Court thereafter granted his application for a certificate of relief from disabilities. After a prior sealing application was denied, in the instant motion, the defendant explained that he was the owner of a security guard training school; he would like to extend training to religious institutions; and sealing would enable him to apply for various government grants. The People opposed the motion. The defendant properly appealed as of right pursuant to CPLR 5701 (a) (2) (v). Under the plain terms of the sealing law, the defendant was entitled to a hearing. A remedial statute, CPL 160.59 was to be interpreted broadly to accomplish its goals.
https://nycourts.gov/reporter/3dseries/2021/2021_04718.htm

People v Davis | August 18, 2021

CORAM NOBIS | GRANTED

Based on ineffective assistance of appellate counsel, the appellant applied for a writ of error coram nobis to vacate a prior appellate decision, which affirmed a Suffolk County Court judgment convicting him of 1st and 2nd degree murder. The Second Department vacated the 2nd degree murder convictions and dismissed those counts. Former counsel was ineffective in failing to seek dismissal of those lesser counts as inclusory concurrent counts of the 1st degree murder conviction. Richard Herzfeld represented the appellant.
https://nycourts.gov/reporter/3dseries/2021/2021_04720.htm

People v McPhee | August 18, 2021

SENTENCING | RECUSAL

The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 1st degree burglary and other crimes. The Second Department granted his motion for reargument, recalled a prior decision, vacated the sentence, and remitted. The trial justice should have recused himself from presiding over the sentencing proceeding, since the justice's law clerk was a former Queens County Assistant DA who worked on the early stages of this case. Appellate Advocates (Samuel Barr, of counsel) represented the appellant.
https://nycourts.gov/reporter/3dseries/2021/2021_04723.htm

People v Parker | August 25, 2021

DISSENT | TOO MANY QUESTIONS

The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 2nd degree CPW and other crimes. The Second Department affirmed. Two justices dissented, opining that the defendant was deprived of a fair trial by Supreme Court's egregious intervention in asking 200 questions of witnesses. The trial justice acted like a prosecution advocate and undermined the defense strategy, and the issue should be reached in the interest of justice. Although some interjections may have facilitated the progress of the trial and clarified testimony, even proper questions from judges could present risks of unfairness.
https://nycourts.gov/reporter/3dseries/2021/2021_04766.htm

People v Crudup | August 18, 2021

COP ON ID | BOLSTERING

The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 2nd degree CPW and other crimes. The Second Department affirmed. The court did agree with the defendant that a police officer's testimony—that he generated an investigation card for the defendant after speaking with the victim's sister—constituted improper implicit bolstering of the identification of the defendant. However, the error was harmless, given strong proof of identity.
https://nycourts.gov/reporter/3dseries/2021/2021_04719.htm

FOURTH DEPARTMENT

People v Royal-Clanton | August 26, 2021

GRAND JURY | RIGHT TO TESTIFY

The defendant appealed from an Onondaga County Court judgment, convicting him of 1st degree criminal sexual act and another crime, upon a jury verdict. The Fourth Department reversed. The defendant was deprived of his right to testify before the grand jury, and the lower court erred in denying his motion to dismiss the amended indictment. Since the defendant's request was received after the grand jury voted but before the filing of the indictment, under CPL 190.50 (5) (a), he was entitled to a reopening of the grand jury proceeding. The amended indictment was dismissed without prejudice to the People to re-present any appropriate charges to another grand jury. Hiscock Legal Aid Society (J. Scott Porter, of counsel) represented the appellant.
https://nycourts.gov/reporter/3dseries/2021/2021_04856.htm

People v Tillmon | August 26, 2021

FOR-CAUSE CHALLENGE | NO ASSURANCE

The defendant appealed from Cayuga County Court judgments, convicting him of 2nd degree assault, 1st degree criminal contempt, and other crimes. The Fourth Department reversed and granted a new trial. County Court erred in denying the defense challenge for cause to a prospective juror who was not sure he could be fair and impartial, due to his family's experiences with domestic violence. The trial court failed to thereafter obtain

the requisite unequivocal assurance. The defendant exhausted all peremptory challenges before the end of jury selection. David Elkovitch represented the appellant.
https://nycourts.gov/reporter/3dseries/2021/2021_04848.htm

People v Ruiz | August 26, 2021

INSTRUCTION | FIREARM POSSESSION

The defendant appealed from a Chautauqua County Court judgment, convicting her of 2nd degree CPW. The Fourth Department reversed and granted a new trial. County Court erred in denying a request for a jury instruction on the defense of temporary and lawful possession of a firearm. The defendant testified that she discovered the firearm when someone (her estranged husband, she then believed) tried to forcibly enter her home, and she searched for an object to protect herself. Then she shot through the door to scare away the intruder, who turned out to be her boyfriend. Legal Aid Society of Buffalo (James Specyal, of counsel) represented the appellant.
https://nycourts.gov/reporter/3dseries/2021/2021_04827.htm

People v Barthel | August 26, 2021

CONSECUTIVE SENTENCE | JUMPING THE GUN

The defendant appealed from a Monroe County Court order, convicting him of 2nd degree CPW after a nonjury trial. The Fourth Department modified. County Court erred in directing that the CPW sentence would run consecutively to whatever term Supreme Court imposed the next day at a sentencing proceeding regarding a burglary conviction. When the latter punishment was imposed, no direction was given as to whether it would run concurrently or consecutively to the CPW term. Sentencing discretion under Penal Law § 70.25 belonged to the last judge in the sentencing chain. Vacating the illegal directive was the only proper remedy. Bridget Field represented the appellant.
https://nycourts.gov/reporter/3dseries/2021/2021_04834.htm

People v Ross | August 26, 2021

CPL 440.10 | INEFFECTIVE COUNSEL

The defendant appealed from an order of Erie County Supreme Court, which summarily denied his CPL 440.10 motion to vacate a judgment convicting him of attempted 2nd degree murder and other crimes, following a jury trial. The Fourth Department reversed. The defendant asserted that trial counsel failed to interview or call two exculpatory witnesses he had identified. Both witnesses submitted affidavits attesting to their willingness to testify, the nature of their exculpatory information, and the fact that defense counsel did not contact them. Such submissions raised factual issues requiring a hearing, even in the absence of an affidavit from trial counsel. Legal Aid Society of Buffalo (Alan Williams, of counsel) represented the appellant.
https://nycourts.gov/reporter/3dseries/2021/2021_04820.htm

People v Austen | August 26, 2021

DISCOVERY REFORM | PROSECTIVE

The defendant appealed from a judgment of Monroe County Supreme Court, convicting him of 1st degree rape and another crime. The Fourth Department affirmed. The video-recorded statement of the victim, which was provided one week before the start of trial,

was timely within the meaning of CPL former Article 240, but untimely under Article 245. In concurring, a justice opined that discovery reforms should not be applied retroactively. The eight-month delay between enactment and effective date indicated that they were meant to apply prospectively; and implementing the new provisions retroactively would severely impact the criminal justice system.
https://nycourts.gov/reporter/3dseries/2021/2021_04798.htm

People v Smith | August 26, 2021

VIOLENT PREDICATE | REMITTED

The defendant appealed from an Onondaga County Court judgment, convicting him of attempted 1st degree assault. The Fourth Department modified. County Court erred in sentencing the defendant without determining whether he had a predicate violent felony offense. At the time of sentencing, it appeared that the defendant might be a second violent felony offender, but the People failed to file the required CPL 400.15 statement. The matter was remitted for further proceedings. If the negotiated sentence was found to be illegally low, defendant would be given the opportunity to withdraw his plea.
https://nycourts.gov/reporter/3dseries/2021/2021_04883.htm

People v Fudge | August 26, 2021

COUNSEL | REPROVED

The defendant appealed from a judgment of Onondaga County Supreme Court, convicting him of 4th degree criminal possession of a controlled substance, upon his plea of guilty. The Fourth Department affirmed. The appeal brought up for review an order denying suppression of cocaine discovered during a vehicle search. The appellate court observed that both prosecutors and defense attorneys must strictly adhere to relevant ethical standards, but appellate counsel failed to do so in this case. The People were admonished for stating in their brief that a sentence that falls within the statutory range is generally not considered unduly severe—thus conflating the legality and the excessiveness of a sentence. Scathing criticism was leveled at defense counsel for failing to confront the weight of unfavorable precedent as to the suppression issue raised; advancing arguments based on sources dehors the record; and baselessly impugning the integrity of a police officer involved in the search.
https://nycourts.gov/reporter/3dseries/2021/2021_04801.htm

McDevitt v State | August 26, 2021

PRISON | NEGLIGENT

The claimant appealed from a Court of Claims judgment dismissing his case after trial. The Fourth Department reversed and granted judgment in favor of the claimant. While serving a prison term, the claimant cooperated with a DOCCS investigation into illegal sexual relationships between a female C.O. and several male inmates. Due to careless acts by State officials, a gang leader implicated in the sordid affairs learned of the claimant's cooperation and instigated a brutal attack against him. The trial proof amply demonstrated the State's grave breach of its duty to use reasonable care to protect the claimant. The intentional conduct at issue did not supersede the State's negligence, which was at least an equal proximate cause of the claimant's injuries. Two justices dissented.
https://nycourts.gov/reporter/3dseries/2021/2021_04795.htm

FAMILY

SECOND DEPARTMENT

Pulver v Pulver | August 18, 2021

REFEREE | AUTHORITY

In a divorce action, the defendant appealed from an order of Nassau County Supreme Court, which granted the plaintiff's motion to confirm a referee's report after a nonjury trial. The Second Department reversed. The referee had the power only to hear and report her findings and exceeded that authority by precluding the defendant from presenting a case as a penalty for failing to appear. Richard Tannenbaum represented the appellant.
https://nycourts.gov/reporter/3dseries/2021/2021_04727.htm

Matter of Tyler L. | August 18, 2021

JD'S STATEMENT | DISSENT

In a juvenile delinquency proceeding, the respondent appealed from a Kings County Family Court order of disposition based on a fact-finding made upon his admission. The Second Department affirmed the JD finding. Two dissenting justices would have suppressed the respondent's statements and dismissed the petition. The presentment agency did not prove a valid *Miranda* rights waiver. A forensic psychologist said that the respondent's IQ was in the fourth percentile and that he had "fundamental problems" in understanding *Miranda* rights. Further, the boy was improperly arrested at school, handcuffed, and prevented from privately consulting with his grandfather before the interrogation.
https://nycourts.gov/reporter/3dseries/2021/2021_04713.htm

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