Indigent Legal Services

Decisions of Interest

SEPTEMBER 9, 2021

CRIMINAL

COURT OF APPEALS

People v Guevara | September 9, 2021

PSYCHIATRIC EXAM | RIGHT TO COUNSEL

The defendant appealed from a First Department order affirming a manslaughter conviction. The Court of Appeals reversed. After providing notice that he intended to present a psychiatric defense, the defendant was twice interviewed by the People's psychologist. Defense counsel was present at the first examination but denied admittance to the second one. Over the defense objection, the expert's testimony was admitted at trial. The Sixth Amendment right to counsel applied at pretrial psychiatric examinations—a critical stage of the prosecution—to make a defendant's right of cross-examination more effective. The People bore the burden of showing that there was no reasonable possibility that the verdict was affected by the trial court's admission of the part of the expert's testimony that was based on the uncounseled examination. The error was not harmless. The Office of the Appellate Defender (Gabe Newland, of counsel) represented the appellant.
https://www.nycourts.gov/reporter/3dseries/2021/2021_04955.htm

Matter of Miller | September 9, 2021

INMATE NOTICE | UNTIMELY FILING

The respondent successfully moved to dismiss the petitioner's appeal to the Third Department, asserting that his notice of appeal was not timely served or filed. The Court of Appeals reversed and remitted. The petitioner urged that, under the pro se inmate "mailbox rule," the notice should have been deemed timely filed upon delivery to prison authorities. However, by its express terms, CPLR 5515 (1) indicated that filing occurred when the clerk's office received the notice of appeal. The COA could not endorse an exception to relevant CPLR provisions not adopted by the Legislature. *Houston v Lack*, 487 US 266 (pro se prisoner's notice of appeal filed within the meaning of FRAP when delivered to prison officials), was inapt. The Supreme Court's authority to interpret Federal Rules promulgated by the Court itself exceeded the COA's power in construing the CPLR. It was not clear whether the Third Department considered its

discretion to excuse untimely filing of a notice of appeal under certain circumstances, pursuant to CPLR 5520. The appellant represented himself.
https://www.nycourts.gov/reporter/3dseries/2021/2021_04954.htm

Veloz v Garland | September 9, 2021

CERTIFICATION | DECLINED

The Second Circuit certified to the New York Court of Appeals the question of whether an intent to "appropriate" property under Penal Law § 155.00 (4) (b) required an intent to deprive the owner of his or her property permanently or under circumstances where the owner's property rights were substantially eroded—which is how the Board of Immigration Appeals defined a theft involving moral turpitude. The issue was relevant to the petitioner's application for review of a BIA order finding him removable based on his petit larceny convictions. The NY COA respectfully declined the certification. *See* COA Rule 500.27 (d) (on its own motion, COA shall examine merits presented by certified question to determine whether to accept certification).
https://www.nycourts.gov/CTAPPS/Decisions/2021/Sep21/71ent21-Decision.pdf

APPELLATE TERM

People v Perez | 2021 NY Slip Op 50840 (U)

DWAI | AGAINST WEIGHT

The defendant appealed from a judgment of Queens County Criminal Court, convicting him of DWAI and unlicensed operation of a vehicle. The Appellate Term, Second Department reversed and dismissed, holding that the verdict against the weight of the evidence. The People failed to establish that the defendant operated the vehicle. When police arrived, he was in the backseat. The officer did not recall if the engine was running. The keys were not recovered from the defendant, and the officer did not know if any keys were vouchered. The sole evidence as to operation of the vehicle was the officer's testimony that, at the scene, the defendant said he had been driving. However, the defendant was "very out of it" and was "nodding on and off." Further, at trial, the defendant said that the vehicle owner had been driving. Legal Aid Society, NYC (Lorca Morello, of counsel) represented the appellant.
https://nycourts.gov/reporter/3dseries/2021/2021_50840.htm

People v Hatton | 2021 NY Slip Op 50838 (U)

PREDICATE SEX OFFENDER | REVERSED

The defendant appealed from an order of Kings County Criminal Court, which found him a level-three sex offender. Appellate Term, Second Department vacated a provision designating the defendant a predicate sex offender. Although the written order failed to set forth the findings of fact and conclusions of law, SORA court statements at the hearing permitted appellate review. The defendant was convicted of attempted forcible touching. His adjudication as a predicate sex offender was improperly based on a subsequent, not prior, sex offense. Legal Aid Society, NYC (Arthur Hopkirk of counsel), for appellant.

https://nycourts.gov/reporter/3dseries/2021/2021_50838.htm

TRIAL COURTS

People v Rodriguez | 2021 NY Slip Op 21235

DISCOVERY | SANCTION

Queens County Supreme Court found the People's Certificate of Compliance valid but imposed a sanction. The People made reasonable efforts to comply with their discovery obligations, turning over 500 pages of documents. The absence of several documents from the original certificate was excusable, where the People timely rectified the matter upon realizing their error. However, the failure to provide search warrant materials in the initial disclosure was troubling, even if stemming from a good faith misunderstanding. The belated disclosure after the People announced readiness for trial prejudiced the defendant. He did not have the opportunity to move to controvert the warrant during omnibus motion practice, and his trial would be delayed because of the lapse. To mitigate prejudice, a sanction was appropriate. The court excluded as trial evidence all fruits of the search warrant, including the DNA and latent print evidence and laboratory analysis thereof. Dawn Florio represented the defendant.
https://nycourts.gov/reporter/3dseries/2021/2021_21235.htm

People v M.S. | 2021 NY Slip Op 21234

RTA | DISPLAY OF FIREARM

The Adolescent Offender was charged with 2nd and 4th degree CPW and 2nd degree menacing. The accusatory instrument and the evidence at the sixth-day appearance in Nassau County Court indicated that the Adolescent Offender removed from his backpack a loaded, operable handgun so that the victim could see it, and he threatened to shoot the victim and his father. The term "display," which is not statutorily defined, should be deemed to mean to "put or spread before one's view" or to "prominently exhibit something" where it can easily be seen, and/or "to make evident." The People satisfied their burden of proving that the AO "displayed a firearm or deadly weapon in furtherance of the offenses with which he has been charged." Thus, the application to disqualify the case from removal to Family Court was granted. The case would remain in the Youth Part.
https://nycourts.gov/reporter/3dseries/2021/2021_21234.htm

SECOND CIRCUIT

United States v Cabrera | September 8, 2021

ENTRAPMENT | JURY CHARGE

The defendant appealed from a District Court–SDNY judgment, convicting him of distributing fentanyl and another crime. The Second Circuit vacated and remanded for a new trial. Conceding that he sold drugs to an informant, the defendant interposed an entrapment defense. The jury instruction on inducement was erroneous. The defendant had the burden to

produce only "some credible" that the Government induced him to commit the crimes, thus creating an issue of fact, not the burden to prove that the Government "did initiate" the crime. Counsel, who submitted a proposed instruction and objected to the proposed charge, was not required to pester the trial judge to preserve the objection. Moreover, District Court abused its discretion by admitting as lay opinion the testimony of a special agent. Based on observations that the defendant excessively speeded and made erratic lane changes and U-turns when driving to sell drugs, the agent said that the defendant appeared to be an experienced drug dealer. Such testimony drew upon the agent's specialized knowledge and experience and constituted an expert opinion. *See* FRE 701 (c) (if witness is not testifying as expert, opinion testimony must not be based on specialized knowledge). The errors were not harmless, given how thin the Government's case was. One judge dissented.
https://www.ca2.uscourts.gov/decisions/isysquery/7517f492-81af-43b8-88a4-3d836795ec4b/3/doc/19-3363_complete_opn.pdf#xml=https://www.ca2.uscourts.gov/decisions/isysquery/7517f492-81af-43b8-88a4-3d836795ec4b/3/hilite

United States v McKenzie | September 9, 2021

STORAGE AREA | NOT SEARCH

The defendant appealed from a District Court–NDNY judgment convicting him of drug possession with intent to distribute. The Second Circuit affirmed, declaring that the canine sniff outside the door of a commercial storage unit did not violate the defendant's constitutional rights because it was not a search within the meaning of the Fourth Amendment. The defendant did not show that officers trespassed or otherwise violated anyone's property rights when they entered the storage facility. Management gave investigators access to the front gate. In any event, the defendant had no authority to exclude people from the grounds of the facility. The officers did not physically intrude on the subject rented storage unit before obtaining a warrant. Defendants did generally enjoy a reasonable expectation of privacy in the internal spaces of storage units and commercial lockers, but the defendant did not have a reasonable expectation of privacy in the air outside his storage unit, which the canine sniffed. *Cf. United States v Thomas*, 757 F2d 1359 (canine sniff outside closed apartment door violated reasonable expectation of privacy, given heightened expectation in home as opposed to other settings).
https://www.ca2.uscourts.gov/decisions/isysquery/d67a3bc2-04c8-466c-bcee-f218f404236f/1/doc/18-1018_opn.pdf#xml=https://www.ca2.uscourts.gov/decisions/isysquery/d67a3bc2-04c8-466c-bcee-f218f404236f/1/hilite

Marquez v Garland | September 7, 2021

CHILD ENDANGERMENT | ACTUAL HARM

The petitioner sought review of a Board of Immigration Appeals order directing his removal due to his 2006 New York conviction of endangering the welfare of a minor. The Second Circuit denied relief. The NY crime was a categorial match for the federal removal ground that was based on a crime of "child abuse, child neglect, or child abandonment." Ordinarily, legislation

operated prospectively, while judicial holdings operated retroactively. Agencies exercised both quasi-legislative and quasi-judicial powers. The appellate court looked to the character of the agency ruling to determine whether it should have retroactive application. The BIA decision in *Matter of Soram*, 25 I.& N. Dec. 378 (2010) (federal "child abuse" category not limited to offenses requiring proof of actual harm to child), filled a void in an unsettled area of law and should be given retroactive effect.
https://www.ca2.uscourts.gov/decisions/isysquery/ab95d282-ec02-4a83-877f-d3e60156afd2/2/doc/18-3363_opn.pdf#xml=https://www.ca2.uscourts.gov/decisions/isysquery/ab95d282-ec02-4a83-877f-d3e60156afd2/2/hilite

TENTH CIRCUIT

United States v Dutch | 978 F3d 1341
REMAND MANDATE | DEFIED
In a previous appeal by the Government, the Tenth Circuit concluded that the Armed Career Criminal Act should govern the sentencing of the defendant and remanded the matter for resentencing. Defense counsel urged that the appellate court had not fully understand the arguments advanced. The remand court agreed and found that it was not bound by the appellate decision and that the ACCA did not apply. The original sentence was reimposed. The Tenth Circuit reversed and remanded. An appellate decision established the law of the case and prevented a decided issue from being relitigated on remand. The District Court had to strictly comply with any remand mandate. That basic principle inhered in judicial hierarchy. There were exceptions, such as for a new law or new evidence, but none applied here. The District Court had no discretion to disregard the panel's mandate, which was specific and limited. The scope of the District Court's power was not determined by the appellate court's fallibility or the lower court's dissatisfaction with the reviewing panel's explanation. To correct errors, the proper vehicles were petitions for panel rehearings, rehearings *en banc*, and petitions for certiorari to the U.S. Supreme Court.
[In a recent ABA article, an appellate leader observed that, in this case, perhaps it was unethical for defense counsel to have urged the lower court to ignore the Tenth Circuit's mandate. However, where good faith arguments are based on a recognized exception or other exceptional circumstances to the mandate rule, such arguments could constitute ethical, zealous advocacy.]
https://www.ca10.uscourts.gov/sites/ca10/files/opinions/010110433469.pdf
https://www.americanbar.org/groups/litigation/publications/litigation-news/top-stories/2021/appellate-mandate-rule-requires-strict-compliance

NEW JERSEY

State v Anderson | 2021 WL 3519981
FINE | BY ANY OTHER NAME

A retired public employee was convicted of the federal crime of interference with commerce. The Supreme Court of New Jersey held that he did not possess a constitutionally protected property right in his pension, since its forfeiture was automatic and mandatory and did not constitute a "fine" for purposes of the Eighth Amendment or NJ Constitution. One justice dissented, finding grossly disproportionate and unconstitutional the forfeiture of the pension, valued at more than $1 million, for an isolated crime (accepting a $300 bribe to alter a tax description of property for zoning purposes). The defendant had received a probationary sentence and modest fine.

[A recent commentary in the NEW JERSEY LAW JOURNAL opines that a fine by any other name is still a fine and that the defendant should petition for certiorari to the U.S. Supreme Court, which should grant cert.]

https://www.njcourts.gov/attorneys/assets/opinions/supreme/a_15_16_20.pdf
https://www.law.com/njlawjournal/2021/09/07/excessive-fine-by-any-other-name-is-still-unconstitutional

FAMILY

TRIAL COURTS

Matter of J.W. v K.M. | 2021 NY Slip Op 21231

FOSTER PARENT | NO VISITATION

The former foster mother appealed from an order of Franklin County Family Court, which relieved the biological father of any obligation to provide her with visitation with his son. After the foster mother cared for the child for years, an order on consent provided custody to the father and visitation to the foster mother. The order had been in place for five years when the father sought to modify it. The requisite changed circumstances existed—a now acrimonious relationship between the father and former foster mother. The law distinguished between the rights of a nonparent who sought custody and one who sought only visitation. A former foster parent could gain standing to petition for custody upon showing extraordinary circumstances yet had no legal right to visitation with a former foster child. For a nonparent to overcome the fundamental right of a custodial parent to determine who his child might associate with, he/she had to establish a compelling state purpose. No such purpose was shown here. The father's decision to sever the relationship between the foster mother and his son was not in the child's best interests, but Family Court lacked the authority to prevent that outcome.

https://nycourts.gov/reporter/3dseries/2021/2021_21231.htm

Khan v Hasan | 2021 NY Slip Op 21236

ISLAMIC CONTRACT TERM | INVALID

The husband moved for summary judgment declaring that the mahr term of the parties' nikah agreement was invalid and unenforceable. Nassau County Supreme Court granted the motion.

A nikah contract was signed by spouses during an Islamic marriage ceremony and typically was verified by two male witnesses and included a mahr provision. By such a term, the husband gave the wife something of value. Usually, the first portion was paid at the time of the ceremony and the rest upon divorce or the husband's death. The amount was negotiated by the spouse's relatives prior to the wedding. At issue in the instant case was the enforceability of an unacknowledged deferred mahr granting the wife $50,000. New York courts have not addressed the enforceability of unacknowledged mahr agreements when all proceedings have taken place in this State. Supreme Court held that the instant mahr could not be upheld due to the lack of an acknowledgment. Domestic Relations Law § 236 (B) (3) created no relevant exception to the statutory acknowledgment requirement. Thus, the husband's motion was granted, and the mahr agreement was deemed void.
https://nycourts.gov/reporter/3dseries/2021/2021_21236.htm

NEWS

Batson | Defied

A recent ABA JOURNAL column observed that the diverse jury in the Chauvin trial—an important factor in the conviction—was an anomaly. The jury was 29% Black, 14% multiracial, and 64% female, which are higher percentages than in the City of Minneapolis. Nationwide, racial discrimination in jury selection has undermined the right to a fair trial by a jury of the defendant's peers. *Batson* challenges are easily evaded; prosecutors have nearly unfettered discretion in striking Black jurors. In 2018, Washington became the first state to reform peremptory challenge rules, using an "objective observer," rather than an "intentional discrimination," test. California and other states have passed, or have pending, similar laws. One of the most notorious cases of discrimination in jury selection was that of Curtis Flowers (see link below). None of the juries that convicted Flowers had more than one African American, but the county was 45% Black. Studies have found that diverse juries deliberate longer, more thoroughly evaluate evidence, and are less likely to harbor a presumption of guilt.
https://www.nytimes.com/2021/09/04/us/curtis-flowers-doug-evans.html

Prosecutor | Indicted

The former prosecutor charged with misconduct for her handling of the Ahmaud Arbery case was booked at a Georgia jail on Wednesday and released on her own recognizance. Last week, a grand jury indicted Jackie Johnson on a felony charge of violating her oath of office and a misdemeanor count of obstructing police. She was the area's top prosecutor when three white men chased and fatally shot Arbery last year. The indictment alleges that she used her position to discourage police from making arrests in the 25-year-old Black man's killing. When shot, Arbery was jogging and unarmed. The suspects were not charged in the killing until more than two months later, when a cell-phone video of the shooting was leaked, and the Georgia Bureau of Investigation took over the case. All three men are to stand trial on murder charges this fall.

https://www.law.com/dailyreportonline/2021/09/08/ex-prosecutor-charged-in-ahmaud-arbery-case-booked-at-jail

Chief Judge | Message
https://www.nycourts.gov/whatsnew/pdf/Sept7-CJ-Message.pdf

NYSDA | News Picks
https://myemail.constantcontact.com/News-Picks-from-NYSDA-Staff--September-1--2021.html?soid=1111756213471&aid=QcLWpZ5sogI

October 6 CLE | Bias in Family Court System
https://nysba.org/events/2021-howard-a-levine-award-ceremony-and-cle-program-its-not-me-its-them-blind-spot-bias-in-the-family-court-system

Forensic Science | Implicit Bias
https://thecrimereport.org/2021/09/08/forensic-testimony-distorted-by-implicit-racial-bias-paper