

Decisions of Interest

SEPTEMBER 24, 2021

CRIMINAL

THIRD DEPARTMENT

People v Gary | Sept. 23, 2021

SENTENCE | ILLEGAL

The defendant appealed from a County Court judgment, convicting him of DWI and sentencing him to five years' probation. The Third Department remitted. The sentence was illegally low. Given the defendant's previous 2019 conviction of DWI, the relevant statute required an additional penalty of five days in jail or 30 days of community service. The proper remedy was to vacate the sentence and give the defendant the opportunity to withdraw the plea. The Albany County Alternate Public Defender (Steven Sharp, of counsel) represented the defendant.

https://nycourts.gov/reporter/3dseries/2021/2021_05052.htm

People v Beach | Sept. 23, 2021

APPEAL WAIVER | INVALID

The defendant appealed from a Sullivan County Court judgment, convicting him of 3rd degree CPCS. The Third Department affirmed. The defendant did not validly waive the right to appeal. He signed a written waiver to forfeit his right to seek state or federal post-conviction relief, including via CPL Article 440 motions and writs of habeas corpus and error coram nobis. County Court did not overcome the overbroad waiver by explaining that some appellate review survived. Upon review, the sentence was affirmed. The defendant also argued ineffective assistance, based on counsel's response to the People's question, during the plea colloquy, as to whether the plea and waiver of appeal were entered knowingly, intelligently, and voluntarily. Counsel's affirmation made prior to *People v. Thomas*, 34 NY3d 545, did not constitute him becoming a witness against, or taking a position adverse to, the defendant. Moreover, County Court did not rely on counsel's affirmation.

https://nycourts.gov/reporter/3dseries/2021/2021_05048.htm

People v West | Sept. 23, 2021

ANDERS | NEW COUNSEL

The defendant appealed from an Albany County Court judgment, convicting him of 1st degree gang assault. The Third Department assigned new counsel. Appellate counsel sought to be relieved on the ground that there were no nonfrivolous issues to be raised.

The appellate court disagreed, finding an issue of arguable merit as to the appeal waiver that could potentially impact other issues that might be raised, such as the denial of a youthful offender adjudication and the severity of the sentence.

https://nycourts.gov/reporter/3dseries/2021/2021_05043.htm

APPELLATE TERM

People v Podmalovsky | 2021 NY Slip Op 50883 (U)

NO INTERPRETER | REVERSED

The defendant appealed from a judgment of Suffolk County District Court convicting him of speeding. Appellate Term, Second Department reversed. The defendant's right to assist in his own defense encompassed the right to be present at trial and comprehend the proceedings. In a prior trial in this action, a court order provided for an interpreter who spoke Czech. Right before commencement of the instant retrial, the prosecutor told the court that the defendant required a Czech translator. Defense counsel objected to using LanguageLine, which the trial court contacted anyway. When the service had no Czech interpreter available, the judge proceeded without one, noting that the prior Appellate Term decision in this case did not mention the need for an interpreter. That was error. Scott Lockwood represented the appellant.

https://nycourts.gov/reporter/3dseries/2021/2021_50883.htm

People v Johnson | 2021 NY Slip Op 50885 (U)

DISSENT | AGAINST WEIGHT

The defendant appealed from a judgment of Queens County Criminal Court, convicting him of DWAI and unlawful possession of marijuana. Appellate Term, Second Department affirmed the DWAI conviction. The unlawful possession conviction was dismissed as academic since it became a nullity by operation of law (CPL 160.50 [5]). A dissenter opined that the DWAI verdict was against the weight of the evidence. The arresting officer testified that, in responding to the report of an accident, he saw the defendant sleeping behind the wheel in the middle of the road with the keys in the ignition and the engine running. There was damage to the vehicle and a nearby utility pole. The officer failed to note in his memo book his purported observations of a strong alcohol odor and the defendant's swaying gait, bloodshot eyes, and slurred speech. Further, a video taken soon after arrest showed that the defendant was articulate, steady, and calm.

https://nycourts.gov/reporter/3dseries/2021/2021_50885.htm