Indigent Legal Services

Decisions of Interest

SEPTEMBER 30, 2021

CRIMINAL

FIRST DEPARTMENT

People v Sneed | Sept. 28, 2021

SECURITY GUARD | POLICE AGENT

The defendant appealed from a judgment of New York County Supreme Court, convicting him of 4th degree grand larceny, upon his plea of guilty. The First Department remanded for a hearing on the factual issue of whether the security guard who detained the defendant was licensed to exercise police powers or was acting as an agent of police. The People argued that, when the defendant made his initial motion, he could have investigated the guard's status as a private or state actor and made more specific factual allegations. However, the felony and the VDF did not contain salient information needed to delve into the guard's status. Legal Aid Society, NYC (Naila Siddiqui, of counsel) represented the appellant.
https://nycourts.gov/reporter/3dseries/2021/2021_05095.htm

People v Dixon | Sept. 28, 2021

SEX OFFENDER | FEE

The defendant appealed from a judgment of New York County Supreme Court, convicting him of 1st degree sodomy, upon his plea of guilty. The First Department vacated the supplemental sex offender victim fee since the crime was committed before the effective date of Penal Law § 60.35 (1) (b). The Center for Appellate Litigation (Robert Dean, of counsel) represented the appellant.
https://nycourts.gov/reporter/3dseries/2021/2021_05103.htm

People v Gerard | Sept. 28, 2021

PROBABLE CAUSE | SUPPRESSION

The defendant appealed from a judgment of New York County Supreme Court, convicting him of attempted 2nd degree robbery and other crimes, upon his plea of guilty. The First Department affirmed. The hearing court properly denied suppression of a show-up identification and property recovered upon arrest. The defendant argued that the People failed to demonstrate probable cause as to the underlying theft of services arrest that led to the testifying Transit Bureau officer's discovery of him, because they did not present testimony from officers possessing firsthand knowledge of the fare-beating offense. It is true that the People cannot meet their burden of coming forward with evidence showing

probable cause when they rely on hearsay evidence and the defense challenges the sufficiency of the evidence by cross-examining prosecution witnesses or putting on a defense case. This defendant, however, did not present proof nor elicit statements on cross that undercut the veracity of the officers' account, as relayed by the testifying officer.
https://nycourts.gov/reporter/3dseries/2021/2021_05089.htm

SECOND DEPARTMENT

People v Singh | Sept. 29, 2021

DEADLY FORCE | NEW TRIAL

The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 2nd degree assault. The Second Department reversed and ordered a new trial. The codefendant and Gibson fought. The defendant came to the codefendant's aid. Gibson—who was much bigger than the defendant and had a BAC that was 2½ times the legal limit—punched the defendant. According to Gibson's testimony, the men then tussled on the floor, with Gibson on top. The defendant struck Gibson in the head with a hammer and a meat cleaver. At least that was Gibson's story. However, medical records indicated that it was unlikely that his injuries were caused by such weapons; and the defendant suffered a fractured ankle and other significant injuries. An eyewitness said in a 911 call that the men were fighting with knives and referred to the defendant as "the guy who was assaulted." Given such proof, Supreme Court erred in denying the defendant's request for a justification charge on deadly physical force. A rational jury could have found that the defendant reasonably believed that such force was necessary to defend himself or the codefendant. One justice dissented. Randall Unger represented the appellant.
https://nycourts.gov/reporter/3dseries/2021/2021_05134.htm

People v Gerald | Sept. 29, 2021

PLEA WITHDRAWAL | HEARING

The defendant appealed from a judgment of Suffolk County Court, convicting him of attempted 2nd degree CPW. The Second Department reversed, vacated the plea, and remitted. Prior to sentencing, the defendant made a written motion to withdraw his plea. He asserted that he had pleaded guilty because of misunderstandings about constructive possession and the People's evidence of his guilt and that his confusion was due to the ineffective assistance of prior counsel. County Court summarily denied the motion. At sentencing, the defendant alleged that he was innocent and re-asserted his motion, which was denied. That was error. The defendant had promptly sought to take back the plea. The lower court made no inquiry, even after the defendant asserted his innocence. The People did not claim prejudice. One justice dissented in part. Matthew Muraskin represented the appellant.
https://nycourts.gov/reporter/3dseries/2021/2021_05130.htm

People v Thompson | Sept. 29, 2021

CORAM NOBIS | NOTICE OF APPEAL

The defendant made a motion for a writ of error coram nobis, seeking leave to file a late notice of appeal from two judgments of Kings County Supreme Court, both rendered

February 14, 2013. The Second Department deemed the defendant's application to be a timely notice of appeal. The defendant had established his entitlement to relief pursuant to *People v Syville*, 15 NY3d 391. Levitt & Kaizer (Richard Ware Levitt and Zachary Segal, of counsel) represented the defendant. *[**NOTE**: Counsel's memo of law reveals that, at the time of the offenses, the defendant was 18 and had no record. He pleaded guilty to 1st degree manslaughter and attempted 2nd degree murder in satisfaction of two indictments and was sentenced to concurrent 25-year terms. The colloquy regarding the waiver of appeal was misleading, and there was no written waiver. The defendant asked his attorneys (one retained and one assigned), to file a notice of appeal from the judgments, but neither one did so. New counsel was retained but failed to pursue any relief. Upon direct appeal, the defendant would have been entitled to remand for consideration of youthful offender treatment, pursuant to People v Rudolph, 21 NY3d 497, the memo contended. In response to the motion, the District Attorney asserted that the coram nobis application should be granted.]*
https://nycourts.gov/reporter/3dseries/2021/2021_05135.htm

Matter of Edmond v Suffolk County | Sept. 29, 2021

POLICE FOILED | COST OF RESISTANCE

The petitioners appealed from a judgment of Suffolk County Supreme Court, which denied attorney's fees and litigation costs in a CPLR Article 78 proceeding regarding FOIL requests. The Second Department reversed and remitted. The petitioners sought Suffolk County and Police Department records related to an investigation into their criminal complaint. A typical FOIL runaround ensued. The respondents did not timely determine the FOIL appeal; they provided an incomplete response; they belatedly provided particularized justifications for denying access to enumerated requests. Only because of the litigation did they ultimately comply with most requests. Thus, the petitioners were substantially prevailing parties. Corey Morris represented the appellants.
https://nycourts.gov/reporter/3dseries/2021/2021_05121.htm

THIRD DEPARTMENT

People v Vanderhorst | Sept. 30, 2021

CPL 440.20 GRANT | REVERSED

The People appealed from an order of Albany County Supreme Court, which granted a CPL 440.20 motion and ordered resentencing as to the defendant's manslaughter conviction. The Third Department reversed. On direct appeal, the defendant, who was 16 at the time of the crime, did not argue that his sentence should be vacated because the court failed to determine if he was a youthful offender. In his 440 motion, the defendant made such argument, based on *People v Rudolph*, 21 NY3d 497, which was decided before he perfected his direct appeal from the judgment of conviction. *Rudolph* foreclosed retroactive application of the new rule to collateral proceedings. Further, there was nothing substantively illegal about the sentence imposed. The instant appeal did not concern the legality of the sentence, but instead the sentencing court's failure to consider YO status—which went to the judgment of conviction. Thus, CPL 440.20 did not authorize

the challenged order. The appellate court observed that the defendant could pursue an application for a writ of error coram nobis.
https://nycourts.gov/reporter/3dseries/2021/2021_05141.htm

People ex rel. Valenzuela v Keyser | Sept. 30, 2021
HABEAS CORPUS | DENIED
The defendant appealed from an order of Sullivan County Supreme Court, summarily denying his application for a writ of habeas corpus in a CPLR Article 70 proceeding. The Third Department affirmed. The petitioner, who was convicted of 2nd degree murder and other crimes, was not eligible for parole until 2075. He failed to demonstrate that his detention at the Sullivan Correctional Facility during the pandemic was unconstitutional under a due process or Eighth Amendment analysis. To the extent that the appellate court could consider post-order events, it noted that the respondent had stated that all incarcerated persons at the facility had been offered full vaccination.
https://nycourts.gov/reporter/3dseries/2021/2021_05151.htm

FAMILY

FIRST DEPARTMENT

Matter of Matthew P. v Linnea W. | Sept. 30, 2021
TOP | EXTENDED
The father appealed from orders of New York County Family Court, which denied his motion to extend a temporary order of protection (TOP) against the mother and modified a prior temporary order of custody. The First Department modified. The father showed good cause to extend a tailored TOP in his favor. His family offense petition indicated that she repeatedly sent numerous unsolicited text messages filled with criticisms and threats, and she had refused to vacate his Hamptons home. On one occasion, she left the child unattended at home, and an indicated finding was entered as a result. However, the father did not show good cause to extend the TOP issued on behalf of the child, where he was temporarily granted sole custody. Family Court should not have permitted the mother to have unsupervised access to the child, given the above incident and threats to take the child to Italy without the father's permission. Douglas Kepanis represented the appellant.
https://nycourts.gov/reporter/3dseries/2021/2021_05171.htm

SECOND DEPARTMENT

Matter of Tarahji N. | Sept. 29, 2021
ABUSE & NEGLECT | REVERSED
The petitioner agency and the mother filed cross appeals from orders rendered by Queens County Family Court in an Article 10 proceeding. The Second Department modified. Family Court erred in finding that ACS failed to prove that Bryan N. sexually abused one child. The victim described the abuse in detail at the fact-finding; her

testimony was sufficiently corroborated by her out-of-court descriptions; and her previous recantation was explained by family threats. Family Court also erred in finding that the mother neglected a son by inflicting excessive corporal punishment. The agency offered evidence of a single instance, in which the mother hit the child's arm with a belt to discipline him for shoplifting, but did not establish that such conduct rose to the level of neglect. Heath Goldstein represented the mother.
https://nycourts.gov/reporter/3dseries/2021/2021_05125.htm

Brandel v Brandel | Sept. 29, 2021

CUSTODY | RIGHT TO COUNSEL

The husband appealed from a judgment of divorce of Orange County Supreme Court. The Second Department modified, vacating a custody order, and remitting for a new trial on custody. A divorce litigant has a statutory right to counsel for the custody portion of the litigation, pursuant to Family Ct Act § 262 and Judiciary Law § 35 (8). When counsel withdrew during the trial, the father proceeded pro se. However, Supreme Court did not determine if he was unequivocally, voluntarily, and intelligently waiving his right to counsel. There was no inquiry to make sure the husband understood the risks and disadvantages of self-representation. Further, the court did not properly determine whether he was eligible for assigned counsel. Richard Herzfeld represented the appellant.
https://nycourts.gov/reporter/3dseries/2021/2021_05116.htm

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