

# Decisions of Interest

OCTOBER 29, 2021

## CRIMINAL

### FIRST DEPARTMENT

#### ***People v Perry*** | Oct. 26, 2021

PRO SE | COLLOQUY

The defendant appealed from a judgment of New York County Supreme Court, convicting him of 3<sup>rd</sup> degree CPW. The First Department reversed. The colloquy regarding the defendant's request to go pro se was insufficient to waive his right to counsel. The trial court did not do the required searching inquiry or explain the charges—despite the defendant's apparent confusion about them—or his sentencing exposure. The matter was remanded for a new suppression hearing and a new trial. The Center for Appellate Litigation (Mark Zeno, of counsel) represented the appellant.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_05826.htm](https://nycourts.gov/reporter/3dseries/2021/2021_05826.htm)

### SECOND DEPARTMENT

#### ***People v Rosales*** | Oct. 27, 2021

ORDER OF PROTECTION | VACATED

The defendant appealed from Kings County Supreme Court judgments, convicting him of 2<sup>nd</sup> degree criminal trespass (two counts). The appeal brought up for review an order of protection entered at the time of sentencing. The Second Department vacated the order in the interest of justice. Supreme Court lacked authority to issue the order in favor of a person who was not a victim of, or witness to, the crimes to which the defendant pleaded guilty. Also, surcharges and fees were vacated in the interest of justice. See CPL 420.35 (2-a). Appellate Advocates (David Goodwin, of counsel) represented the appellant.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_05874.htm](https://nycourts.gov/reporter/3dseries/2021/2021_05874.htm)

#### ***People v Arellano-Venegas*** | Oct. 27, 2021

PEQUE | COMPLIANCE

The defendant appealed from a judgment of Westchester County Court. The Second Department affirmed. The defendant contended that her plea of guilty to 2<sup>nd</sup> degree bail jumping was not validly entered because County Court failed to properly advise her of the immigration consequences. Such issue was unpreserved for appellate review and, in any

event, without merit. A trial court must alert a noncitizen defendant that she may be deported upon a plea of guilty. See *People v Peque*, 22 NY3d 168. County Court stated: “The plea of guilty will subject you to deportation,” and “neither your attorney, nor I, nor anyone else can guarantee that you will not be deported” as result of the plea.  
[https://nycourts.gov/reporter/3dseries/2021/2021\\_05865.htm](https://nycourts.gov/reporter/3dseries/2021/2021_05865.htm)

***People v Areizaga*** | Oct. 27, 2021

ANDERS | NEW COUNSEL

The defendant appealed from a judgment of Westchester County Court, convicting him of 3<sup>rd</sup> degree burglary. Appellate counsel filed an *Anders* brief. The Second Department assigned new counsel because the brief had several flaws. (1) It did not show that counsel reviewed the presentence report. (2) Apparently, counsel did not scrutinize the transcript of the proceeding during which the defendant purportedly admitted violating the plea agreement. (3) Regarding the appeal waiver, the brief made only a conclusory statement. (4) Finally, potential issues that would survive a valid appeal waiver were not analyzed.  
[https://nycourts.gov/reporter/3dseries/2021/2021\\_05864.htm](https://nycourts.gov/reporter/3dseries/2021/2021_05864.htm)

***People v McCurdy*** | Oct. 27, 2021

SORA | OVERRIDE

The defendant appealed from an order of Kings County Supreme Court, designating him a level-three sex offender. The Second Department affirmed. The People established the existence of a 2007 felony conviction of a sex crime and thus the applicability of the relevant override. Supreme Court properly found that the defendant was presumptively a level-three offender. He could have, but did not, seek a downward departure.  
[https://nycourts.gov/reporter/3dseries/2021/2021\\_05880.htm](https://nycourts.gov/reporter/3dseries/2021/2021_05880.htm)

## THIRD DEPARTMENT

***People v Banch*** | Oct. 28, 2021

SHACKLES | HARMLESS ERROR

The defendant appealed from a judgment of Chemung County Court, convicting him of aggravated harassment of an employee by an incarcerated individual. The Third Department affirmed, while stating that County Court erred in allowing the defendant to be shackled during a portion of the trial. A defendant had a right to be free of visible restraints during criminal proceedings, unless the trial court stated a specific reason for their use, such as for security or to prevent disruption or escape. Here, County Court considered the nature of the crime, correction officers’ suggestions, and the defendant’s outbursts. Those reasons were inadequate, but the error was harmless.  
[https://nycourts.gov/reporter/3dseries/2021/2021\\_05894.htm](https://nycourts.gov/reporter/3dseries/2021/2021_05894.htm)

***People v Logan*** | Oct. 28, 2021

MOTION TO DISMISS | UNPRESERVED

The defendant appealed from a judgment of Schenectady County Supreme Court, convicting him of multiple crimes. The Third Department affirmed. The defendant contended that his conviction of 2<sup>nd</sup> degree CPW should be reversed because he was not

shown to have knowledge that he had a prior conviction when he possessed the gun. In moving to dismiss, the defendant did not set forth that specific argument, so it was unpreserved for appellate review. In any event, the defendant's knowledge of his prior conviction was not a necessary element of the crime. Supreme Court also properly admitted a recording of a phone call placed by the defendant from jail using his PIN—an indicium of reliability. Since the defendant knew that his calls were being monitored and recorded, an expectation of privacy in the content of the calls was lost.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_05893.htm](https://nycourts.gov/reporter/3dseries/2021/2021_05893.htm)

## FAMILY COURT

### SECOND DEPARTMENT

***Matter of Lherisson v Goffe*** | Oct. 27, 2021

CUSTODY | RIGHT TO COUNSEL

The father appealed from an order of Nassau County Family Court, granting the mother's custody modification petition. The Second Department reversed and remitted for a new hearing. A parent seeking custody had the right to the assistance of counsel, but could waive such right. Family Court failed to conduct a searching inquiry to ensure that the father's waiver was knowing, voluntary, and intelligent. Regardless of the merits of the case, the deprivation of the fundamental right to counsel in a custody proceeding required reversal. Thomas Keating represented the appellant.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_05856.htm](https://nycourts.gov/reporter/3dseries/2021/2021_05856.htm)

### THIRD DEPARTMENT

***Benjamin GG. v Alex II.*** | Oct. 28, 2021

APPEAL | DISMISSED | NO JURISDICTION

In a paternity proceeding, the respondent appealed from an order of St. Lawrence County Family Court ordering genetic marker testing. Family Court rejected the respondent's assertion that equitable estoppel should apply. The Third Department dismissed the appeal as untimely since the notice of appeal was filed beyond that Family Ct Act § 1113 window. The statutory time bar was absolute, so the appellate court lacked jurisdiction to entertain the appeal. *[Although not noted in the decision, since the subject order was nonfinal, permission to appeal was required, pursuant to Family Ct Act § 1112 (a).]*

[https://nycourts.gov/reporter/3dseries/2021/2021\\_05896.htm](https://nycourts.gov/reporter/3dseries/2021/2021_05896.htm)

***Richard Y. v Victoria Z.*** | Oct. 28, 2021

APPEAL | DISMISSED | NO JURISDICTION

The mother appealed from an order of Saratoga County Family Court, which granted the father's custody petition. Sua sponte, the Third Department dismissed the appeal. Under the UCCJEA, a New York court that made a custody determination retained jurisdiction until another tribunal here or in a sister state determined that the child, the

child's parents, and any person acting as a parent did not presently reside in this state. This mother continued to live in New Mexico, while the father had relocated with the children to Florida, which had been found to be the children's home state. The parties had made appearances with counsel in Florida as to their custody modification petitions. Thus, New York courts were divested of jurisdiction.

[https://nycourts.gov/reporter/3dseries/2021/2021\\_05899.htm](https://nycourts.gov/reporter/3dseries/2021/2021_05899.htm)