CRIMINAL

COURT OF APPEALS

DECISION OF THE WEEK

People ex rel. Negron v Super., Woodbourne Corr. Fac.

11/24/20 – **SARA / ENUMERATED OFFENSE**

The provision of the Sexual Assault Reform Act restricting entry upon school grounds by certain offenders (Executive Law 259-c [14]) is mandatory only for level-three offenders serving a sentence for a crime enumerated in the statute. In an opinion by Judge Garcia, the Court of Appeals affirmed a Third Department order, entered in a habeas corpus proceeding initiated by a petitioner who was serving a sentence for attempted 2nd degree burglary when granted parole. The holding, which resolved a split in authority among the Appellate Division Departments, was based on the natural meaning of the text and the history of the statute's 2005 amendment. Judge Fahey dissented in an opinion in which Chief Judge DiFiore concurred. The Legal Aid Society of NYC (Elon Harpaz, of counsel), represented the petitioner.

http://www.nycourts.gov/reporter/3dseries/2020/2020_06935.htm

People ex rel. Johnson v Super., Adirondack Corr. Fac.

11/24/20 – **SARA / INDEFINITE CONFINEMENT**

The Court of Appeals found no constitutional infirmity in temporary confinement in correctional facilities of level-three sex offenders, wait-listed for SARA-compliant shelter, after they would otherwise have been released to parole or PRS. Judge Fahey authored the majority decision. Judge Rivera dissented, decrying potentially indefinite confinement because offenders could afford not find suitable housing and the State wanted to reduce the burden on NYC's homeless shelter system. In a separate dissent, Judge Wilson opined that the subject confinement violated the petitioners' substantive due process rights and declared that sex offenders who served their time and were entitled to release could not constitutionally be detained.

http://www.nycourts.gov/reporter/3dseries/2020/2020_06934.htm

People ex rel. McCurdy v Warden, Westchester Co. Corr. Fac.

11/24/20 – **SARA / PRS AND RTF**

DOCCS had the authority to place a level-three sex offender who completed six months of PRS in a prison residential treatment facility when he could not find SARA-compliant housing, the Court of Appeals held in an opinion by Judge Stein. The Second Department properly rejected an argument based on an illusory conflict between Penal Law § 70.45 (3) and Correction Law § 73 (10). Judge Fahey dissented. By allowing DOCCS to ignore the six-month limitation of § 70.45 (3), the majority rewrote the statutory scheme. Judges Rivera and Wilson concurred in a dissent.

http://www.nycourts.gov/reporter/3dseries/2020/2020_06933.htm

People v Lendof-Gonzalez, 11/24/20 –
TRIAL / ATTEMPTED MURDER / INSUFFICIENT
A fellow jail inmate agreed with the defendant's plan to kill his wife and mother-in-law, but did nothing to effectuate the crimes, instead contacting and aiding authorities. The Fourth Department found insufficient evidence of attempted murder. The Court of Appeals affirmed in an opinion by Judge Feinman. To find attempt, the defendant must come "dangerously close" to committing the intended crime. There was no proof that this defendant and his feigned confederate took any actual step, beyond mere conversations and planning, toward achieving the plan. The law did not punish evil thoughts—nor, generally, mere preparation. Judge Rivera dissented in an opinion in which Judges Fahey and Garcia concurred. Robert Graff represented the defendant upon appeal.
http://www.nycourts.gov/reporter/3dseries/2020/2020_06940.htm

People v Edwards, 11/24/20 – **GRAND JURY / ASSAULT / SUFFICIENT**
The evidence before the Grand Jury was legally sufficient to demonstrate that the defendant acted with depraved indifference to human life, the Court of Appeals held in a memorandum decision, affirming a Third Department order which reinstated 1st degree assault charges. There was evidence that, in order to evade police, the legally intoxicated defendant sped at 119 mph down a local road, swerved across lanes of oncoming traffic, and crashed into a wall. The Grand Jury could rationally have found that his reckless conduct created a grave risk of death to his passengers, with an utter disregard for whether any harm came to them. Judge Wilson dissented.
http://www.nycourts.gov/reporter/3dseries/2020/2020_06941.htm

FIRST DEPARTMENT

People v Goldman, 11/24/20 – **DETECTIVE EXPERT / OK**
The defendant appealed from a judgment of Bronx County Supreme Court, convicting him of 1st degree manslaughter. The First Department affirmed. The trial court properly permitted a police detective to testify, as an expert on gang language, regarding the meaning of an expression allegedly uttered by the defendant during the relevant incident. The interpretation of coded communications is a proper subject of expert opinion. The challenged testimony dealt primarily with matters beyond the jurors' ken, and the detective was not intimately involved in the investigation. *Cf. People v Inoa*, 25 NY3d 466. In any event, if there was error, it was harmless.
http://nycourts.gov/reporter/3dseries/2020/2020_06965.htm

SECOND DEPARTMENT

People v Walker, 11/25/20 – **ATTEMPTED MURDER / AGAINST WEIGHT**
The defendant appealed from a judgment of Kings County Supreme Court, convicting him of attempted 2nd degree murder and other crimes. The Second Department vacated the attempted murder conviction, finding that it was against the weight of evidence. The conviction was based solely on the testimony of the eyewitness to a murder, who stated that after his brother was shot, the witness moved toward the defendant, who shot at him three times but missed. Given the facts presented, it was just as likely that the defendant

intended merely to deter the eyewitness from following him as to injure him. The Legal Aid Society of NYC (Harold Ferguson, of counsel) represented the appellant.
http://www.courts.state.ny.us/courts/ad2/Handdowns/2020/Decisions/D64377.pdf

People v Bernazard, 11/25/20 – **ASSAULT 2ND / LEGALLY INSUFFICIENT**
The defendant appealed from a judgment of Queens County Supreme Court, convicting him of multiple crimes. The Second Department dismissed a count for 2nd degree assault, finding the proof legally insufficient to prove physical injury. The evidence showed only that the victim suffered a minor injury, described as a redness on the child's cheek or a slight swelling under his eye or a bruise to his cheek, which was treated with a cold pack. The sentence imposed for 1st degree burglary was reduced from a determinate term of 25 years to 10 years, plus post-release supervision; and certain consecutive sentences were found legal, but deemed excessive. Appellate Advocates (Ronald Zapata, of counsel) represented the appellant.
http://www.courts.state.ny.us/courts/ad2/Handdowns/2020/Decisions/D64772.pdf

People v Boykin, 11/25/20 – **NO PROBABLE CAUSE / CPW DISMISSED**
The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 2nd and 3rd degree CPW and another crime, after a nonjury trial. The Second Department dismissed the weapon possession counts. The appeal brought up for review an order denying suppression. Officers' observations of a brown liquid in cups in the front console of a vehicle driven by the defendant, and the smell of alcohol emanating from the vehicle, provided probable cause. But nothing indicated that a prescription bottle in the seat pocket contained contraband, so as to justify its inspection or the subsequent search that yielded weapons. Appellate Advocates (Paris DeYoung, of counsel) represented the appellant.
http://www.courts.state.ny.us/courts/ad2/Handdowns/2020/Decisions/D64780.pdf

People v Boothe, 11/25/20 – **BAD SEARCH WARRANT / NEW TRIAL**
The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 1st degree robbery. The Second Department reversed and ordered a new trial. The appeal brought up for review the denial of the defendant's motion to controvert a search warrant and suppress certain physical evidence. The arresting officer's conclusory statement, that the defendant's cell phone contained information relevant to the robbery, contained no supporting factual allegations and thus was insufficient to establish probable cause. The error in denying the motion and admitting photographs downloaded from the phone could not be deemed harmless. Murray Singer represented the appellant.
http://www.courts.state.ny.us/courts/ad2/Handdowns/2020/Decisions/D64659.pdf

People v Duncan, 11/25/20 – ***MOLINEUX* / NEW TRIAL**
The defendant appealed from a judgment of Kings County Supreme Court, convicting him of various crimes. The Second Department vacated the conviction of attempted 1st degree rape and granted a new trial as to that count. The trial court erred in permitting the People to present *Molineux* evidence regarding the defendant's prior convictions for a robbery and sexual assault. The similarities between those crimes and the instant offense were not sufficiently unique or unusual to establish a distinctive modus operandi. As to the

attempted rape, the error was not harmless. The Legal Aid Society of NYC (Harold Ferguson, of counsel) represented the appellant.
http://www.courts.state.ny.us/courts/ad2/Handdowns/2020/Decisions/D64730.pdf

People v Powell, 11/25/20 – **CORAM NOBIS / NEW TRIAL**
The Second Department granted the defendant's application for a writ of error coram nobis to vacate a judgment of conviction rendered in Kings County Supreme Court. A new trial was ordered. Supreme Court failed to comply with CPL 310.30 and *People v O'Rama*, 78 NY2d 270, in the handling of jury notes. No strategic decision could explain appellate counsel's failure to make the dispositive argument on appeal. Craig Leeds represented the appellant.
http://www.courts.state.ny.us/courts/ad2/Handdowns/2020/Decisions/D64842.pdf

People v Ulanov, 11/25/20 – **PLEA / IMMIGRATION / REMITTAL**
The defendant appealed from a judgment of Kings County Supreme Court, convicting her of 2nd degree larceny and other crimes. The Second Department remitted and held the appeal in abeyance, due to the plea court's failure to advise her of the possibility that she could be deported as a consequence of her guilty plea, as required by *People v Peque*, 22 NY3d 168. The defendant's contention that her due process rights were violated by such failure was excepted from the preservation requirement. Despite notations in the presentence investigation report about the defendant's immigration status, the record did not demonstrate that she was aware that she could be deported as a consequence of her guilty plea. The Legal Aid Society of NYC (Whitney Elliott, of counsel) represented the appellant.
http://www.courts.state.ny.us/courts/ad2/Handdowns/2020/Decisions/D64848.pdf

People v Lovell, 11/25/20 – **PLEA / IMMIGRATION / AFFIRMED**
The defendant appealed from an order of Kings County Supreme Court, which summarily denied his CPL 440.10 motion to vacate a judgment convicting him of 2nd degree criminal possession of marihuana and criminal possession of a firearm. The motion was based on defense counsel's ineffective assistance in allegedly failing to advise the defendant of the immigration consequences of his plea. While the defendant alleged that counsel told him only that pleading guilty *might* have an effect on his immigration status, the record demonstrated that counsel informed him that pleading guilty *will* have an effect on such status. Thus, the defendant failed to sufficient establish that counsel's performance fell below an objective standard of reasonableness.
http://www.courts.state.ny.us/courts/ad2/Handdowns/2020/Decisions/D64850.pdf

FAMILY

COURT OF APPEALS

M/O Marian T. (Lauren R.), 11/24/20 – **ADOPTION / ADULT "CHILD"**
DRL § 111 (1) (a) required the consent of an "adoptive child" over age 14, but authorized the trial court to exercise its discretion to dispense with consent. Such discretion could encompass an adult adoptee—in this case a 66-year-old with a significant development disability. The adoption of an adult has been expressly permitted by statute since 1915. Like an adoption of a minor, an adult adoption must be in the best interests of the adoptive "child"—with such term referring not to the age of the adoptee, but to the nature of the filial relationship between the person adopting and the person being adopted. Judge Wilson concurred. Judge Rivera dissented.
http://www.nycourts.gov/reporter/3dseries/2020/2020_06932.htm

FIRST DEPARTMENT

M/O Martinez v DiFiore, 11/24/20 – **WILLFUL VIOLATIONS / NO MANDAMUS**
The petitioners—10 custodial parents seeking to enforce child support orders—appealed from an order of NY County Supreme Court denying their CPLR Article 78 petition. The First Department affirmed. The proceeding was initiated to compel the respondents to enforce the requirements of court rules requiring, among other things, hearings on willful violations within 90 days and adjournments only for good cause shown and for a limited duration. Mandamus did not lie. The hearing deadline did not implicate a ministerial duty. Instead, timely completion of hearings depended on discretionary determinations by support magistrates and Family Court judges.
http://nycourts.gov/reporter/3dseries/2020/2020_06958.htm

SECOND DEPARTMENT

M/O Treyvone A. (Manuel R.), 11/25/20 –
NEGLECT / NO EXCESSIVE CORPORAL PUNISHMENT
The respondent appealed from an order of Kings County Family Court, which found that he neglected the subject child. The Second Department modified. While the proof established that the respondent failed to provide the child with adequate food and clothing, it did not establish excessive corporal punishment. The child's out-of-court statements were not sufficiently corroborated by nonhearsay, relevant evidence. Richard Herzfeld represented the appellant.
http://www.courts.state.ny.us/courts/ad2/Handdowns/2020/Decisions/D64786.pdf

THIRD DEPARTMENT

M/O James R. v Jennifer S., 11/25/20 – **CONSENT / REVERSED**
The mother appealed from an order of Schoharie County Family Court, which granted the father's motion for a forensic evaluation. The Third Department reversed. As a threshold matter, the nonfinal order was not appealable as of right (Family Ct Act § 1112 [a]). But the reviewing court granted the mother permission to appeal. When the challenged order was issued, no custody petition was pending, since a consent order had resolved all petitions. Therefore, Family Court lacked subject matter jurisdiction to order a forensic evaluation.
http://nycourts.gov/reporter/3dseries/2020/2020_06997.htm

M/O Dupuis v Costello, 11/25/20 – **CONSENT / DISMISSED**
The father appealed from a Washington County Family Court order, finding him in willful violation of a support order and suspending his jail sentence for three years on the condition that he comply with the support order. The Third Department dismissed the appeal from the commitment order, which was entered on consent, and reversed the order suspending commitment. The father had brought support payments current, so no remedial purpose was served by the continuing threat of confinement. Alexandra Verrigni represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_06992.htm

M/O Hailey S. (Jason T.), 11/25/20 – **CONSENT / DISMISSED**
The father appealed from an order of Washington County Family Court, which found that he abused and neglected the subject children. The Third Department dismissed the appeal. At the dispositional hearing, the respondent consented to a finding of neglect. A party does not have the right to challenge an order on consent, since he is not aggrieved by such order. *See* CPLR 5511.
http://nycourts.gov/reporter/3dseries/2020/2020_06993.htm

Jessica EE. v Joshua EE., 11/25/20 – **NO JUDICIAL NOTICE / TRANSCRIPTS**
The mother appealed from an order of Columbia County Family Court, which granted the father's motion to dismiss her petition. The Third Department affirmed. The AFC contended that transcripts from appearances predating the instant proceedings should be stricken from the record. The appellate court agreed. In rendering the order appealed from, Family Court did not take judicial notice of, or otherwise consider, the transcripts regarding prior proceedings that culminated in orders on consent.
http://nycourts.gov/reporter/3dseries/2020/2020_06988.htm