APPELLATE DIVISION

Plea Cases – Other Issues

People v Power, 1/3/19 – **VIOLATION OF AGREEMENT / DUE PROCESS SATISFIED**
The defendant appealed from a judgment of New York County Supreme Court convicting him, upon his plea of guilty, of 3rd degree burglary and sentencing him as a second felony offender to two to four years. The **First Department** affirmed. The record did not establish that the defendant made an enforceable waiver of the right to appeal. However, he failed to preserve his claim that the plea court conducted an insufficient inquiry as to whether he violated the terms of his plea agreement. The appellate court declined to review the issue in the interest of justice. As an alternative holding, the reviewing court rejected the argument on the merits. Due process was satisfied, because the sentencing court conducted an adequate inquiry and provided the defendant with a reasonable opportunity to present his explanation, before finding that he willfully violated the plea agreement and forfeited his opportunity for a disposition involving dismissal of the charges.
http://nycourts.gov/reporter/3dseries/2019/2019_00038.htm

People v Winfrey, 1/3/19 – **VIOLATION OF AGREEMENT / CONSENT TO ENHANCEMENT**
The defendant appealed from a judgment of New York County Supreme Court, convicting him, upon his plea of guilty, of 3rd degree criminal sale of a controlled substance and sentencing him to three years. The **First Department** affirmed. The defendant made a valid waiver of his right to appeal. The oral colloquy, viewed in conjunction with the written waiver—which the defendant signed after the opportunity to confer with counsel—established that he made the waiver knowingly, intelligently, and voluntarily. The waiver foreclosed review of the excessive sentence claim. The defendant contended that the waiver did not apply because he was challenging the adequacy of the court's inquiry into the violation of his plea agreement. *See People v Outley*, 80 NY2d 702, 713. However, the defendant was not seeking remand for an *Outley* hearing; he was only raising the hearing in the context of his excessive sentence claim. In any event, the argument about the hearing lacked merit, because the defendant had declined Supreme Court's offer to conduct such a hearing and agreed to the six-month sentence enhancement.
http://nycourts.gov/reporter/3dseries/2019/2019_00049.htm

People v Mais, 1/3/19 – **INVOLUNTARINESS CLAIM / REJECTED**
The defendant appealed from a judgment of Schenectady County Supreme Court which convicted him, upon his plea of guilty, of 3rd degree criminal sale of a controlled substance and 2nd degree CPW. The **Third Department** affirmed. The defendant claimed that his guilty plea and waiver of appeal were involuntary because of the prescription sleep aid he had consumed the night prior to entering the plea and executing the waiver. Initially, the reviewing court rejected the contention that the waiver was involuntary. The transcript of the plea allocution demonstrated that the defendant was lucid, rational, and able to understand the consequences of his actions. His challenge to the voluntariness of his plea survived his valid appeal waiver, but was not preserved by a post-allocution motion. Moreover, the narrow exception to the preservation rule was inapplicable. Although the defendant's ineffective assistance of counsel claim survived the appeal waiver to the extent

that it implicated the voluntariness of his plea, the absence of a post-allocution motion rendered it unpreserved.
http://nycourts.gov/reporter/3dseries/2019/2019_00005.htm

People v Swain, 1/3/19 – **SUPPRESSION ARGUMENTS / REJECTED**
The defendant appealed from a judgment of Chemung County Court, convicting him, upon his plea of guilty, of attempted 2nd degree murder. The **Third Department** affirmed. After the defendant's motion to suppress was denied, he pleaded guilty. On appeal, he made suppression arguments. The First Department agreed that an officer's conduct in placing the defendant in handcuffs and locking him in the back seat of the patrol car constituted a forcible detention, and the requisite reasonable suspicion was lacking. The defendant arguably matched the description of the person who fled from the deputy, but the officer had already confirmed that the defendant did not possess a weapon. This determination did not end the suppression inquiry. Having discarded a handgun in the street, the defendant waived any challenge to its seizure. Further, his inculpatory statement was admissible, because it was sufficiently attenuated from the unlawful detention. Finally, County Court properly concluded that there was a sufficiently reliable independent basis for a witness' identification of the defendant at the suppression hearing, notwithstanding an improper photo array.
http://nycourts.gov/reporter/3dseries/2019/2019_00002.htm

Family Court Cases

Putnam v Jenney, 1/3/19 – **ORDER OF PROTECTION / OFFENSE PROVEN**
The respondent appealed from an order of Cortland County Family Court which granted the petitioner's application for an order of protection. The **Third Department** found that hearing testimony, indicating that the respondent threatened the petitioner with a knife, established that he committed the family offenses of 2nd degree menacing and 2nd degree harassment. The appellate court also rejected the respondent's claim of ineffective assistance. Trial counsel participated in the fact-finding hearing by cross-examining witnesses, making objections, and presenting a cogent albeit brief closing argument. Although the representation may not have been flawless, it was reasonably competent.
http://nycourts.gov/reporter/3dseries/2019/2019_00012.htm

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