

# Decisions of Interest

JANUARY 10, 2022

## CRIMINAL

### COURT OF APPEALS

#### ***People v Sposito*** | Jan. 6, 2022

EFFECTIVE ASSISTANCE | NO SUPPRESSION | NO EXPERT

The defendant appealed from a Third Department order, affirming Albany County Supreme Court's denial, after an extensive hearing, of his CPL 440.10 motion to vacate a judgment convicting him of 1<sup>st</sup> degree rape and another crime. The Court of Appeals affirmed. The defendant failed to prove that he received ineffective assistance. Reasonably, counsel had tried to disprove the element of consent and had waived a *Huntley* hearing. The defendant's statements showed that he consistently maintained that the acts in question were consensual. As to counsel's failure to use or call an expert, the COA majority discerned a reasonable strategic choice to focus the jury on the chosen defense and noted key concessions extracted from the People's experts. Judge Wilson dissented, invoking the reasoning of a Third Department dissenter, who opined that the defendant was deprived of meaningful representation. At the 440 hearing, defense counsel admitted that testimony about the victim's injuries from the sexual assault nurse examiner (SANE) was "particularly damaging." Yet counsel failed to consult or call any experts to undermine the proof. Among other things, he did not use a toxicologist to demonstrate that, at the time of the encounter, the victim's BAC was lower than stated and that she was thus not in a stupor or unconscious.

[People v Sposito \(2022 NY Slip Op 00040\) \(nycourts.gov\)](https://www.nycourts.gov/reporter/3dseries/2021/2021_02441.htm)

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### FIRST DEPARTMENT

#### ***People v Gordon*** | Jan. 6, 2022

ORDER OF PROTECTION | UNAUTHORIZED

The defendant appealed from a judgment of Bronx County Supreme Court, convicting him of endangering the welfare of a child (two counts). The First Department vacated the order of protection issued for the benefit of T.W. and otherwise affirmed. Supreme Court lacked the authority to issue that OP because T.W. was not a victim of, or witness to, any crimes. He did not testify, and the charges for which he was a complainant were

dismissed. The Center for Appellate Litigation (Anjali Pathmanathan, of counsel) represented the defendant.

[People v Gordon \(2022 NY Slip Op 00055\) \(nycourts.gov\)](#)

### ***People v Hubbard*** | Jan. 4, 2022

STABBING | DEMO

The defendant appealed from a judgment of Bronx County Supreme Court, convicting him of 1<sup>st</sup> degree manslaughter. The First Department affirmed. After a hearing, the trial court properly denied a CPL 330.30 motion to set aside the verdict based on juror misconduct. While cutting meat at home, the subject juror recalled testimony about how the victim had been stabbed in the neck; but he did not do a home experiment nor discuss the meat episode with other jurors. During deliberations, the juror used cardboard to simulate a knife and made a stabbing motion to mimic the crime. Reenactments or demonstrations were permitted where, as here, they applied common sense and experience to the proof and did not involve expertise or an expert opinion. The other jurors testified that the demonstration had no effect on their deliberations.

[People v Hubbard \(2022 NY Slip Op 00017\) \(nycourts.gov\)](#)

### ***People v Nelson*** | Jan. 4, 2022

STABBING | HEARSAY

The defendant appealed from a judgment of New York County Supreme Court, convicting him of 3<sup>rd</sup> degree CPW. The First Department affirmed. The trial court properly admitted evidence that: (1) the defendant threatened to kill one victim hours before thrusting a knife through a bedroom door, injuring the second victim; and (2) both victims heard the defendant slap his companion right before the attack. This proof completed the narrative and provided background information to explain the victims' behavior and the defendant's intent. In a 911 call, the second victim made a statement to an EMT about how he came to be stabbed in the head through the bedroom door. The proof was permitted under the hearsay exception as to statements for medical diagnosis or treatment. The declaration was out of bounds in stating that the defendant was the assailant and that the victim pressed against the door to keep the defendant out. But the error was harmless.

[People v Nelson \(2022 NY Slip Op 00015\) \(nycourts.gov\)](#)

## SECOND DEPARTMENT

### ***People v Martinez*** | Jan. 5, 2022

CONCURRENT TERMS | EXCESSIVE QUESTIONING

The defendant appealed from a judgment of Richmond County Supreme Court, convicting him of 2<sup>nd</sup> degree murder. The Second Department modified. The defendant had previously been convicted of murder and 2<sup>nd</sup> degree CPW, but the murder conviction was reversed and a new trial was ordered. After the second trial, Supreme Court imposed the murder sentence consecutively to the weapon possession term. That was error. The People did not establish that the defendant knowingly and unlawfully possessed a loaded firearm before forming the intent to cause a crime with that weapon. Two dissenters would have granted a new trial in the interest of justice. The defendant was deprived of a fair trial when the court improperly questioned witnesses, denigrated the affirmative defense, and advanced the prosecution's case. The reference to a "cold-blooded killer" may have contributed to the rejection of the defense of extreme emotional disturbance. Further, the

court showed undue skepticism toward the defendant's expert. Appellate Advocates (Jonathan Schoepp-Wang) represented the appellant.

[People v Martinez \(2022 NY Slip Op 00037\) \(nycourts.gov\)](#)

***People v Rivera*** | Jan. 5, 2022

BAD APPEAL WAIVER | FORFEITED ISSUE

The defendant appealed from an Orange County Court judgment, convicting him of 2<sup>nd</sup> degree gang assault. The Second Department affirmed. The purported waiver of appeal was invalid. County Court inaccurately stated that the waiver was an absolute bar to the taking of a direct appeal. The written document was similarly flawed. However, by pleading guilty, the defendant forfeited his right to contest the purported violation of his right to be present at all material stages of the proceedings.

[People v Rivera \(2022 NY Slip Op 00038\) \(nycourts.gov\)](#)

## THIRD DEPARTMENT

***People v Wassilie*** | Jan. 6, 2022

SORA | REVERSED

The defendant appealed from a Columbia County Court order, which classified him as a level-three sex offender. The Third Department reversed and set the SORA risk level at two. County Court erred in assessing points in two categories. As to risk factor 4, the record did not reflect that the crimes of conviction, for 2<sup>nd</sup> degree unlawful surveillance, involved sexual contact. Regarding risk factor 10, the record lacked proof that the defendant committed a "prior felony or sex crime" within three years of the instant offenses. Angela Kelley represented the appellant.

[People v Wassilie \(2022 NY Slip Op 00103\) \(nycourts.gov\)](#)

***People v Adams*** | Jan. 6, 2022

CRIMINAL SALE | NOT PROVEN

The defendant appealed from a judgment of Schenectady County, convicting him of 2<sup>nd</sup> degree conspiracy, 1<sup>st</sup> degree CSCS, and another crime. The Third Department modified, finding the above-named convictions against the weight of the evidence. None of the codefendants testified as to the defendant's involvement in their drug purchases; no cocaine was recovered; and the evidence did not satisfy the weight element. Kathryn Friedman represented the appellant.

[People v Adams \(2022 NY Slip Op 00076\) \(nycourts.gov\)](#)

***People v Hewitt*** | Jan. 6, 2022

DISCOVERY FAIL | PLEA NOT IMPACTED

The defendant appealed from a Warren County Court judgment, convicting him of promoting a sexual performance by a child. The Third Department affirmed. On appeal, the defendant argued that the People's failure to comply with statutory disclosure requirements prior to his February 2020 guilty plea, along with counsel's ineffective assistance, entitled him to withdraw his plea. Where, as here, the defendant made a plea withdrawal motion premised on the People's noncompliance with its discovery duties, the trial court had to consider the impact of any violation on his plea decision. However, before

pleading guilty, the defendant waived arguments regarding the People's noncompliance with their disclosure duties. Even if the waiver was not sufficient, the People substantially complied with disclosure requirements. The record did not substantiate the defense claim that the nondisclosure of grand jury minutes—which did not negate guilt—affected the defendant's plea decision.

[People v Hewitt \(2022 NY Slip Op 00079\) \(nycourts.gov\)](#)

***People v Davidson*** | Jan. 6, 2022

COUNSEL'S STATEMENTS | CONFIDENTIALITY

The defendant appealed from a Broome County Court judgment, which revoked probation and imposed a sentence of imprisonment, after a hearing. The Third Department affirmed, rejecting arguments regarding ineffective assistance. Remarks of defense counsel—made when a plea offer resolving the probation violation and a contempt charge was placed on the record and rejected—did not violate the attorney-client privilege. After stating the plea terms, County Court asked counsel if he had discussed the offer with the defendant. Counsel responded that he had explained the deal, but he expressed concern about the defendant's understanding of issues relevant to each charge. The court then offered a further explanation about the charges and the potential sentencing exposure. No confidential information was disclosed by counsel's remarks, which were an appropriate effort to ensure that the defendant understood the proceedings before rejecting the plea offer.

[People v Davidson \(2022 NY Slip Op 00073\) \(nycourts.gov\)](#)



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