Indigent Legal Services

Decisions of Interest

JANUARY 14, 2022

CRIMINAL

COURT OF APPEALS

People v Ortiz | Jan. 11, 2022

PRE-*MIRANDA* ERROR | HARMLESS

The defendant appealed from a judgment of New York County Supreme Court, convicting him of 2nd degree CPW after a jury trial. The appeal brought up for review an order denying suppression. The First Department affirmed the judgment. After his arrest but before *Miranda* warnings, the defendant initiated a conversation with police and provided information about criminal activity by other persons in other matters in the hope of receiving lenient treatment. When the defendant spontaneously made a self-incriminating remark, he was *Mirandized*. On appeal, he contended that the police engaged in an improper pre-*Miranda* custodial interrogation. The First Department held that the unwarned statement did not result from questioning likely to induce an inculpatory statement. That was error. In the instant decision, the Court of Appeals found that the defendant's unwarned statement should have been suppressed. However, given the overwhelming evidence of guilt, the error was harmless. The defendant also contended that his videotaped statement made 24 hours later was not attenuated from the earlier statement. But the issue was unpreserved for review. The COA affirmed the challenged Appellate Division order upholding the judgment of conviction.

People v Ortiz (2022 NY Slip Op 00113) (nycourts.gov)

FIRST DEPARTMENT

People v Grant-Byas | Jan. 11, 2022

50-YR PROTECTION | JAIL-TIME CREDIT

The defendant appealed from a May 2016 judgment of New York County Supreme Court, convicting him of sex trafficking (two counts) and another crime. The First Department modified, vacating the May 2066 expiration date of orders of protection because it did not take jail-time credit into account. The matter was remanded to set the proper duration of the orders. The trial court's conduct toward defense counsel did not warrant reversal. The court's sometimes caustic comments to counsel were permissible, given that counsel ignored court rulings, badgered witnesses, wasted time, and delivered a summation

replete with irrelevant and incorrect statements. The Center for Appellate Litigation (John Palmer) represented the appellant.
People v Grant-Byas (2022 NY Slip Op 00137) (nycourts.gov)

People v Griffith | Jan. 11, 2022
NJ ROBBERY | NOT EQUIVALENT
The defendant appealed from a judgment of NY County Supreme Court, convicting him of 2nd degree robbery. The First Department modified, vacating the second violent felony offender adjudication. The New Jersey robbery conviction did not qualify as the equivalent of a New York felony. *See People v Gilchrist*, 223 AD2d 382 (NJ statute punished knowing use of force in immediate flight from theft, while NY law punished only force with intent to compel person to give up property or prevent resistance). The Center for Appellate Litigation (John Palmer, of counsel) represented the appellant.
People v Griffith (2022 NY Slip Op 00146) (nycourts.gov)

People v Felix | Jan. 13, 2022
TATTOO | PROOF
The defendant appealed from a judgment of NY County Supreme Court, convicting him of 1st degree rape (four counts). The First Department affirmed. The court providently admitted a photograph of a tattoo in the defendant's genital area to corroborate the victim's testimony that she saw the body art when the defendant first engaged in sexual conduct with her at age 12. It could not be said that the sole purpose of the photo was to arouse the emotions of the jury. The trial court erred in admitting a full body photo, which depicted not only the tattoo but also the defendant's torso and face, and which was published to the jury without first having been shown to defense counsel. But such error was harmless. The court also properly admitted proof of uncharged acts of sexual abuse for necessary background and to complete the narrative and explain the victim's delayed reporting and continued sexual contact. The probative value of the evidence outweighed its prejudicial effect, which was minimized by a limiting instruction.
People v Felix (2022 NY Slip Op 00258) (nycourts.gov)

SECOND DEPARTMENT

People v Lisene | Jan. 12, 2022
REPUTATION | NEW TRIAL
The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 1st degree criminal sexual act and another crime. The Second Department reversed and ordered a new trial because of the erroneous preclusion of certain witness testimony. A party had a right to call a witness to testify that a key opposing witness had a bad reputation in the community for truth and veracity. *See People v Fernandez*, 17 NY3d 70. This defendant sought to introduce testimony from Marie Anisca-Oral, a friend of his sister, regarding the reputation for truthfulness and veracity of the eight-year-old complainant's mother. To lay the foundation, Anisca-Oral described a community of eight friends and acquaintances, predominantly of Haitian nationality and living in certain neighborhoods in Brooklyn. Anisca-Oral said that she had known the mother since 1999; that almost everyone she knew also

was familiar with the mother; and that every time she saw her acquaintances among this group, the mother's reputation for veracity was discussed. That constituted a proper foundation; the proffered testimony provided a reasonable assurance of reliability. The presentation of reputation evidence by a defendant is a matter of right if, as here, a proper foundation has been laid and the evidence is relevant to contradict the testimony of a key witness and is limited to the general reputation for veracity in the community. The mother was a key fact witness whose credibility was sharply contested and relevant both to the People's case and to the theory of defense. The error was not harmless. Appellate Advocates (David Goodwin, of counsel) represented the appellant.
https://nycourts.gov/reporter/3dseries/2022/2022_00194.htm

People v English | Jan. 12, 2022

COUNSEL | SUBSTITUTION

The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 1st degree assault and other crimes, upon a jury verdict. The Second Department reversed. The defendant's right to counsel was not adequately protected. His request for a new attorney, made through assigned counsel, contained serious complaints about counsel and allegations as to the breakdown of communications. Supreme Court failed to meet its duty of inquiry to determine if there was good cause for the requested substitution. Instead, the trial court denied the request without speaking with the defendant. The matter was restored to pre-suppression-hearing status and remitted. Appellate Advocates (Ava Page, of counsel) represented the appellant.
https://nycourts.gov/reporter/3dseries/2022/2022_00189.htm

People v Morancis | Jan. 12, 2022

COUNSEL | INEFFECTIVE | SORA

The defendant appealed from an order of Queens County Supreme Court, which designated him a level-three predicate sex offender. The Second Department reversed and remitted, based on ineffective assistance. Counsel made two arguments, both lacking in merit and revealing no understanding of the facts and the law. Even if the arguments had any viability, they would not have altered the presumptive risk level. There was no strategic decision to attack the assessment of points, while foregoing a request for a downward departure. Appellate Advocates (David Fitzmaurice, of counsel) represented the appellant.
https://nycourts.gov/reporter/3dseries/2022/2022_00202.htm

People v Varghese | Jan. 12, 2022

COUNSEL | *ANDERS*

The defendant appealed from a judgment of Nassau County Supreme Court, convicting him of aggravated DWI. In response to appellate counsel's *Anders* brief, the Second Department ordered that new counsel be assigned. The brief did not analyze potential appellate issues or highlight facts that might arguably support the appeal, including whether the appeal waiver was valid and the sentence was excessive.
https://nycourts.gov/reporter/3dseries/2022/2022_00200.htm

People v Woodley | Jan. 12, 2022

DUPLICITOUS | VACATED

The defendant appealed from a judgment of Kings County Supreme Court, convicting him of two counts of 1st degree criminal contempt and eight counts of 2nd degree criminal contempt. The Second Department modified. Even if valid on its face, a count was duplicitous where the evidence made plain that multiple criminal acts occurred during the relevant period, rendering it nearly impossible to determine the act upon which the jury reached its verdict. Seven counts charged the defendant with 2nd degree criminal contempt, arising from his alleged violation of two orders of protection during two incidents on the same day. Neither the verdict sheet nor the jury charge explained how the proof applied to the counts. Thus, the counts were dismissed. Appellate Advocates (Nao Terai, of counsel) represented the appellant.
https://nycourts.gov/reporter/3dseries/2022/2022_00201.htm

People ex rel. Rankin v Brann | Jan. 11, 2022

HABEAS | BAIL REVOCATION

The Second Department sustained the petitioner's habeas corpus petition to the extent of ordering an evidentiary hearing. CPL 530.60 (2) (a) states: "Whenever in the course of a criminal action … a defendant charged with the commission of a felony is at liberty as a result of an order of recognizance, release under non-monetary conditions or bail issued pursuant to this article, it shall be grounds for revoking such order that the court finds reasonable cause to believe the defendant committed one or more ... violent felony offenses." The provision applied here. Thus, Queens County Supreme Court was required to hold a hearing under CPL 530.60 (2) (c) (before revoking order of recognizance, release under non-monetary conditions or bail, court must hold hearing and admit relevant, admissible evidence). Douglas Rankin represented the petitioner.
https://nycourts.gov/reporter/3dseries/2022/2022_00153.htm

THIRD DEPARTMENT

People v Rivera | Jan. 13, 2022

WAIVER OF APPEAL | ISSUES PRECLUDED

The defendant appealed from a Franklin County Court judgment, convicting him of attempted 1st degree promoting prison contraband, and an order denying his CPL 440.10 motion. The Third Department affirmed. The defendant's valid waiver of the right to appeal precluded his statutory speedy trial argument. His claim that his constitutional right to a speedy trial was violated survived his guilty plea and appeal waiver. However, the issue was unpreserved and, in any event, lacked merit. The alleged failure of defense counsel to pursue a post-judgment motion did not impact the voluntariness of the plea, so such challenge was precluded by the appeal waiver.
People v Rivera (2022 NY Slip Op 00218) (nycourts.gov)

FAMILY

SECOND DEPARTMENT

Schlosser v Hernandez | Jan. 12, 2022

CUSTODY | MODIFIED

The mother appealed from an order of Suffolk County Family Court, awarding the parties joint legal custody of their child, sole residential custody to the father, and parenting time for the mother. The Second Department modified. Awarding primary physical custody to the father was not sound. The parties enjoyed relatively equal parenting time for most of their daughter's life. For years, the parties had been able to work together in sharing parenting time. Further, the hearing testimony raised significant questions about the father's willingness to foster the child's relationship with the mother. For all these reasons, the best interests of the child would be served by shared residential custody. Jennifer Goody represented the appellant.
https://nycourts.gov/reporter/3dseries/2022/2022_00180.htm

Skalska v Grubeki | Jan. 12, 2022

APPENDIX | INCOMPLETE

The defendant appealed from the equitable distribution portion of a judgment of divorce rendered by Queens County Supreme Court. The Second Department dismissed the appeal. An appellant who perfected an appeal via the appendix method had to file an appendix containing all relevant portions of the record. The appellate court should not be compelled to untangle facts via an inadequate, incoherent appendix. Appellant's counsel omitted critical trial exhibits, thus impairing the reviewing court's ability to make an informed decision on the merits.
https://nycourts.gov/reporter/3dseries/2022/2022_00208.htm

THIRD DEPARTMENT

Walter Q. v Stephanie R. | Jan. 13, 2022

FAMILY OFFENSE | REVERSED

The father appealed form an order of Tompkins County Supreme Court, which granted motions by the mother and the AFC to dismiss his family offense petition. The Third Department reversed. Supreme Court erred in dismissing the petition because it did not view any relief warranted even if the father alleged a viable claim. The salient question was whether the petition sufficiently alleged an enumerated family offense. It did. The father alleged that the mother struck him, grabbed him, yelled insults and obscenities at him, and chased him on foot, prompting him to contact police—acts constituting 2nd degree harassment. Thomas Kheel represented the appellant.
Matter of Walter Q. v Stephanie R. (2022 NY Slip Op 00222) (nycourts.gov)

Stephanie R. v Walter Q. | Jan. 13, 2022

SUMMARY JUDGMENT | COLLATERAL ESTOPPEL

The father appealed from an order of Tompkins County Supreme Court, which granted the mother's motion for summary judgment regarding her family offense petition against him. The Third Department affirmed. When the father violated a stay-away order, he was arrested and the mother commenced the instant proceeding. In a criminal prosecution arising from the instant conduct, the father was found guilty of the crime of 2nd degree criminal contempt, following a jury trial. The conviction was properly given preclusive effect in Family Court based on principles of collateral estoppel, notwithstanding that the father had not yet been sentenced when summary judgment was granted. The finality of the issue was clear.

Matter of Stephanie R. v Walter Q. (2022 NY Slip Op 00219) (nycourts.gov)

M/O Kaelani KK. | Jan. 13, 2022

HYPOTHERMIA | NEGLECT

The mother appealed from an order of Schenectady County Family Court, which found that she neglected her child. The Third Department affirmed. The proof showed that, when pursuing the father outside in extremely chilly weather at 3 a.m. one day, the mother brought along their two-month-old baby, who was wearing only a onesie. The child's exposure to the cold for 45 minutes resulted in hypothermia. In addition, the mother left the hospital with the child before her temperature returned to normal, contrary to medical advice. While a friend testified that the mother appropriately cared for the child, neglect may be established through a single incident if actual or imminent harm is shown.

Matter of Kaelani KK. (Kenya LL.) (2022 NY Slip Op 00225) (nycourts.gov)

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