Indigent Legal Services

Decisions of Interest

JANUARY 20, 2022

CRIMINAL

U.S. SUPREME COURT

Hemphill v New York | Jan. 20, 2022

8-1 DEFENSE WIN | NY COA REVERSED

CONFRONTATION | NO OPENING-DOOR EXCEPTION

The defendant sought review of an order of the New York Court of Appeals upholding his 2nd degree murder conviction. The U.S. Supreme Court granted cert. and reversed in an 8-1 opinion. A stray bullet from a 9-mm. handgun killed a 2-year-old. To support his theory that Nicholas Morris was the shooter, the defendant elicited testimony from a prosecution witness that police recovered 9-mm. ammunition (as well as .357-caliber bullets) from Morris's nightstand. In a plea deal, Morris—who was originally charged with the murder—had admitted to possessing a .357-magnum revolver at the time and place of the murder. He was unavailable to testify at the defendant's trial. Over defense objection, to rebut the defense theory of third-party culpability, the trial court allowed the State to introduce parts of the transcript of Morris's plea allocution in which he admitted to having possessed the .357-magnum revolver. The court reasoned that the defendant had opened the door because the testimonial, out-of-court statements were reasonably necessary to correct the misleading impression his defense created. The Supreme Court held that the admission of the plea allocution violated the defendant's Sixth Amendment right to confront witnesses against him. The defendant did not forfeit his constitutional right by rendering the plea allocution arguably relevant to his defense theory. It was not for the trial judge to determine if the defense theory was misleading nor to decide that the untested plea proof was needed to correct any inaccurate impression. Such inquiries were antithetical to the Confrontation Clause, which required that the reliability and veracity of such evidence against a defendant be tested by cross-examination. Justice Sotomayor wrote for the court. Justices Alito and Kavanaugh concurred, and Justice Thomas dissented. The appellant was represented by the Stanford Law School's Supreme Court Litigation Clinic (Jeffrey Fisher, of counsel), the Center for Appellate Litigation (Claudia Trupp and Matthew Bova, of counsel), and O'Melveny & Myers, LLP (Kendall Turner and Yaira Dubin, of counsel).

20-637 Hemphill v. New York (01/20/2022) (supremecourt.gov)

FIRST DEPARTMENT

People v Simmons | Jan. 18, 2022

SEXUALLY MOTIVATED ASSAULT | NOT REGISTERABLE

The defendant appealed from a judgment of New York County Supreme Court, convicting him of two crimes, upon his plea of guilty. The First Department modified, vacating the SORA portion of the judgment. The defendant was improperly required to register as a sex offender based on his conviction of 1st degree assault as a sexually motivated felony. The issue was preserved by the parties' presentencing memoranda. In a matter of first impression, the reviewing court held that only sexually motivated felony offenses listed in Correction Law § 168-a (2) (a) (i), (ii) were included in the definition of "sex offense." The People's interpretation of the statute was inconsistent with the text and unsupported by vague remarks invoked from the legislative history. The First Department thus agreed with *People v Buyund*, 179 AD3d 161 (2nd Dept) (1st degree burglary as sexually motivated offense not registerable offense), *rev on other grounds*, 2021 WL 5451381 (SORA certification issue not within preservation exception for illegal sentence). The Office of the Appellate Defender (Karena Rahall & Emma Shreefter, of counsel) represented the appellant.

People v Simmons (2022 NY Slip Op 00284) (nycourts.gov)

People v Goodwin | Jan. 18, 2022

PRO SE REQUEST | NEW TRIAL

The defendant appealed from a judgment of NY County Supreme Court, convicting him of 2nd degree burglary and another crime. The First Department reversed and ordered a new trial. At two appearances, the defendant asked to represent himself, and the judge neither granted nor denied either application. The second time, when the defendant pushed, the trial judge stated, "If it's up to me, I am denying your request." The judge explained that the defendant was disruptive and unable to conduct himself in an orderly manner. At an appearance before a second judge, the defendant again said that he wanted to proceed pro se, and again a ruling was deferred. The defendant told a third judge that he had "tried to go pro se." The judge responded that his application had already been rejected. The calendar courts' denial of the defendant's repeated requests deprived him of his right to represent himself. His disruptiveness was not a sound rationale for rejecting his applications; his only outbursts flowed from frustration at not receiving a ruling. The defendant was fit to proceed to trial and to waive counsel. The Center for Appellate Litigation (Megan Tallmer) represented the appellant.

People v Goodwin (2022 NY Slip Op 00281) (nycourts.gov)

People v Fleming | Jan. 20, 2022

ABEYANCE | HEARING

The defendant appealed from a judgment of NY County Supreme Court, convicting him of 3rd degree CSCS. The First Department held the appeal in abeyance and remanded for a *Mapp/Dunaway* hearing. In this buy-and-bust case, the factual allegations in the suppression motion were sufficient to entitle the defendant to a hearing regarding whether the arresting officer had probable cause to arrest him. The defendant's motion challenged the constitutional adequacy of any transmitted description on which the seizing officers relied in detaining and arresting him. He described how he looked at the time of the arrest

and asserted that there was nothing particularly distinctive about his appearance that would tend to preclude the possibility of misidentification. This allowed for a comparison between the defendant's self-description and the transmitted one, once the People disclosed it. *See People v Jones*, 95 NY2d 721. Legal Aid Society–NYC (A. Alexander Donn, of counsel), represented the appellant.
People v Fleming (2022 NY Slip Op 00360) (nycourts.gov)

People v Tingling | Jan. 20, 2022

SORA | HARMLESS ERROR

The defendant appealed from an order of NY County Supreme Court, which adjudicated him a level-two sex offender. The SORA court erred in assessing 25 points under the risk factor for sexual contact, based on a theory of accessorial liability for promoting the prostitution of a 15-year-old girl. The People did not prove that the defendant assisted customers in obtaining the services of the victim or shared the necessary intent with his victim's customers. The defendant did not know the identity of the customers, was not present during the sexual conduct, and did not know if such conduct would occur. However, even absent the subject points, the defendant remained at level two, and there was no basis for a downward departure.
People v Tingling (2022 NY Slip Op 00363) (nycourts.gov)

SECOND DEPARTMENT

People v Green | Jan. 19, 2022

440.10 | HEARING

The defendant appealed from an order of Kings County Supreme Court, which summarily denied his CPL 440.10 motion to vacate a 1990 judgment, convicting him of 2nd degree murder, upon a jury verdict. The Second Department vacated the order denying the motion insofar as it was based on actual innocence. The defendant made a prima facie showing warranting a hearing. He submitted four supporting affidavits from alleged witnesses who described another individual as the shooter. A fifth witness stated that he saw that same person arguing with the victim, heard several gun shots, and saw the individual running away while stuffing a gun into his jacket. In addition, the sole witness who testified against the defendant at trial stated that she was not present during the shooting—which was consistent with what she initially told police. Supreme Court properly denied the branch of the defendant's motion that was based on newly discovered evidence, since he did not show due diligence after the discovery of the new evidence. The motion court also properly denied the arguments based on ineffective assistance, since the defendant could have raised the issue in one of his prior 440 motions. However, Supreme Court had erroneously found the IAC claim to be procedurally barred by CPL 440.10 (2) (c) regarding matters that could have been brought on direct appeal. That provision no longer applied to IAC claims, eff. Oct. 25, 2021 (NY State Assembly Bill A2653 (nysenate.gov). Justin Bonus represented the appellant.
People v Green (2022 NY Slip Op 00315) (nycourts.gov)

People v Lundi | Jan. 19, 2022

YO | NO DETERMINATION

The defendant appealed from an order of Kings County Supreme Court, convicting him of two counts of 1st degree robbery, upon his plea of guilty. The Second Department vacated the sentence. CPL 720.20 (1) required a youthful offender determination in every case where the defendant was eligible, even if he/she did not request it or agreed to forego it as part of a plea bargain. *See People v Rudolph*, 21 NY3d 497. Supreme Court was required to determine if the defendant, whose convictions were armed felonies, was an eligible youth under CPL 720.10 and, if so, whether he should receive YO status. Appellate Advocates (Priya Raghavan, of counsel) represented the defendant.
People v Lundi (2022 NY Slip Op 00316) (nycourts.gov)

People v Mitchell | Jan. 19, 2022

WAIVER INVALID | FEES VACATED

The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 1st degree burglary and other crimes. The Second Department modified. The purported waiver of appeal was invalid. Supreme Court erroneously stated that the waiver constituted an absolute bar to taking a direct appeal and did not tell the defendant that review was available for certain issues. Further, the written waiver inaccurately stated that the defendant was forfeiting the right to the assignment of appellate counsel and the opportunity to collaterally attack the judgment. With the People's consent, the appellate court vacated the mandatory surcharges imposed at sentencing. Appellate Advocates (Lynn W. L. Fahey, of counsel) represented the appellant.
People v Mitchell (2022 NY Slip Op 00317) (nycourts.gov)

People v Smith | Jan. 19, 2022

PLEA WITHDRAWAL | NO COERCION

The defendant appealed from a judgment of Nassau County Supreme Court, convicting him of 1st degree assault and other crimes. The Second Department affirmed. The plea court properly denied the defendant's motion to withdraw his plea. The fact that counsel expressed pessimism about the defendant's chances at trial did not constitute coercion. The lower court adequately warned the defendant about the impact a plea of guilty would have on a statutory speedy trial claim. *See* CPL 30.30 (6) (order finally denying motion to dismiss pursuant to subdivision [1] is reviewable on appeal from judgment of conviction, even where judgment was entered on guilty plea); *People v Person*, 184 AD3d 447 (appeal waiver may forfeit review of 30.30 claim), *lv denied* 35 NY3d 1069.
People v Smith (2022 NY Slip Op 00320) (nycourts.gov)

THIRD DEPARTMENT

People v Johnson | Jan. 20, 2022

EFFECTIVE COUNSEL | NO SUPPRESSION

The defendant appealed from a Washington County Court judgment, convicting him of attempted 1st degree promoting prison contraband. The Third Department affirmed. The defendant argued that he was denied effective assistance of counsel. The preservation

requirement was inapplicable since the defendant was sentenced immediately after his guilty plea, and thus he had no chance to move to withdraw his plea. Counsel's failure to request a suppression hearing did not show defective representation in the absence of a viable suppression claim. Further, counsel negotiated a favorable plea deal.
People v Johnson (2022 NY Slip Op 00337) (nycourts.gov)

People v Stratton | Jan. 20, 2022
EFFECTIVE COUNSEL | NO PHONE RECORDS
The defendant appealed from an Albany County Court judgment, convicting him of 2nd degree CPW. The Third Department affirmed. The defendant contended that he was denied effective assistance. The claim was unpreserved since he did not make an appropriate post-allocution motion. Counsel's failure to subpoena certain cell phone records did not show defective representation since there may have been a strategic reason. Further, counsel negotiated a favorable plea deal.
People v Stratton (2022 NY Slip Op 00334) (nycourts.gov)

People v Moore | Jan. 20, 2022
WAIVER OF APPEAL | INVALID
The defendant appealed from a Fulton County Court judgment, convicting him of 1st degree assault. The Third Department affirmed. The waiver of the right to appeal was invalid. In the plea colloquy, the court did not explain the scope of the waiver. The written waiver misrepresented the law in stating that the defendant was waiving his rights to all state, federal, and collateral review. Finally, the waiver stated that the defendant was not under the influence of any drugs or medications. In fact, at the time of the plea proceedings, the defendant was taking various drugs and medications. The appellate court reviewed the challenge to the severity of the sentence imposed but found the defendant's argument unpersuasive.
People v Moore (2022 NY Slip Op 00338) (nycourts.gov)

FOURTH DEPARTMENT

People v Fudge | 199 AD3d 16
RIGHTING A WRONG | OPINION VACATED
The Fourth Department has vacated an opinion that unfairly attacked appellate counsel.
People v Fudge (2021 NY Slip Op 04801) (nycourts.gov)

FAMILY

SECOND DEPARTMENT

Hepheastou v Spaliaras | Jan. 19, 2022
CHILD SUPPORT | CAP

The husband appealed from certain aspects of a judgment of divorce rendered by Nassau County Supreme Court. The Second Department modified. Supreme Court erred in calculating child support based on combined parental income above the statutory cap. The children enjoyed the lifestyle they would have had absent their parents' split. The trial court did not examine the children's actual needs. The wife had no extraordinary expenses, lived rent-free with her parents, reported no child-care costs, and had minimal costs for education and extracurricular activities. Further, given the frequency of parental access the husband enjoyed during the pendency of the litigation, the appellate court expanded his parental access. Maria Schwartz represented the appellant.
Hepheastou v Spaliaras (2022 NY Slip Op 00303) (nycourts.gov)

Cynthia Feathers
Director, Appellate & Post-Conviction Representation
New York State Office of Indigent Legal Services
80 S Swan St, Ste 1147, Albany, NY 12210 | www.ils.ny.gov
(518) 949-6131 | cynthia.feathers@ils.ny.gov | (she/her/hers)