

Decisions of Interest

OCTOBER 10, 2023

CRIMINAL

FOURTH DEPARTMENT

People v Andrews | October 6, 2023

FALSIFYING BUSINESS RECORDS | LEGALLY INSUFFICIENT | REVERSED

The defendant appealed from a Steuben County Court judgment convicting him of 1st degree falsifying business records. The Fourth Department reversed and dismissed the indictment. Although the issue was unpreserved, the reviewing court invoked its interest-of-justice jurisdiction and found the trial evidence legally insufficient to support the conviction. An officer testified that the defendant lied to him about what occurred during a shooting incident; the officer recorded the defendant's false version in a report; and that report became part of the sheriff's business records. There is no valid line of reasoning from which a rational jury could have concluded that the report contained a false record of the investigation; the report constituted accurate documentation of the defendant's statements. Mullen Associates, PLLC (Alan P. Reed, of counsel) represented the appellant.

[People v Andrews \(2023 NY Slip Op 05085\)](#)

People v Burke | October 6, 2023

TOWN COURT | ARREST WARRANT | REVERSED

The defendant appealed from a Jefferson County Court judgment convicting him of 3rd degree CPCS based on his guilty plea. The Fourth Department reversed, vacated the guilty plea, granted the defendant's suppression motion, and dismissed the indictment. A Cortland County officer stopped the defendant for a nonmoving violation and discovered that he had a seven-year-old arrest warrant issued by a Town Court in non-adjointing Jefferson County. The officer detained the defendant while he obtained an endorsement of the arrest warrant by a Cortland County Town Court justice. The Jefferson County sheriff then retrieved the defendant and transported him to their jail for booking, during which drugs were found. It was improper for the Cortland County officer to detain the defendant on the warrant before it was endorsed by a local court within that county (see CPL 120.70 [2] [b]). The arrest was therefore unauthorized. Banasiak Law Office, PLLC (Piotr Banasiak, of counsel) represented the appellant.

[People v Burke \(2023 NY Slip Op 05083\)](#)

People v McMillon | October 6, 2023

NO REASONABLE SUSPICION | REVERSED

The defendant appealed from an Ontario County Court judgment convicting him of 4th degree CPSP based on his guilty plea. The Fourth Department reversed, vacated the plea, granted suppression, and dismissed the indictment. “[T]wo suspicious black males” were seen exiting a mall “with H&M bags full of merchandise.” Individuals matching that description were spotted parked outside a different entrance, and similar individuals were then seen reentering the mall with an empty H&M bag and leaving about five minutes later with a full bag. Police stopped the defendant’s vehicle and found stolen merchandise. The information available did not provide reasonable suspicion. Although officers testified that there was no H&M store at the mall and non-store bags were commonly used for shoplifting, using your own bag is not uncommon or illegal. The observed conduct was susceptible of an innocent or culpable interpretation. Ontario County Public Defender and Keem Appeals, PLLC (Bradley E. Keem, of counsel) represented the appellant.

[People v McMillon \(2023 NY Slip Op 05064\)](#)

Matter of Charles L. v State of New York | October 6, 2023

ARTICLE 10 | HEARING REQUIRED | REVERSED

The petitioner appealed from Oneida County Supreme Court orders that: (1) sua sponte directed that his Mental Hygiene Article 10 annual review hearing be conducted on submissions only; and (2) denied his motion to vacate that order. The Fourth Department vacated the order and remitted for a hearing. The petitioner was previously determined to be a dangerous sex offender requiring confinement. Having petitioned for an annual review of that determination, he was entitled to an evidentiary hearing with live witness testimony (see Mental Hygiene Law § 10.08 [g]). Mental Hygiene Legal Services (Patrick T. Chamberlain, of counsel) represented the appellant.

[Matter of Charles L. v State of New York \(2023 NY Slip Op 05075\)](#)

U.S. SUPREME COURT

Pulsifer v United States | Argument | October 2, 2023

FIRST STEP ACT | MEANING OF “AND”

Last Monday a U.S. Supreme Court oral argument focused on the meaning of “and” as used in 18 USC § 3553 (f). The question was what “and” means as used below to define limitations that apply to statutory minimums in certain cases where the defendant does not have:

- (A)** *more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;*
- (B)** *a prior 3-point offense, as determined under the sentencing guidelines;*
- and**
- (C)** *a prior 2-point violent offense, as determined under the sentencing guidelines [emphasis added].*

Petitioner’s counsel argued that a defendant is not disqualified under the First Step Act unless he has (A), (B), **and** (C)—all three elements—pursuant to the ordinary meaning of

“and,” surrounding text, and Senate Drafting Manual rules. Congress did not say “or,” so such disjunctive meaning should not apply. In the criminal context, where liberty was at stake and fairness mattered most, Congress should be held to a higher standard of precision in the use of grammar, and statutory text should not receive the benefit of colloquialism in interpretation. The government had not offered U.S. Code examples where “and” was used in a negated conjunction and was interpreted as “or.”

[Pulsifer v United States \(Transcript of Argument\)](#)

TRIAL COURTS

People v Hernandez | 2023 WL 6528913

RETROGRADE EXTRAPOLATION ANALYSIS | PRECLUSION GRANTED

The defendant moved to preclude the People’s expert from using the entire portable breath test (PBT) result of .078 as the raw data for a retrograde extrapolation analysis to show that his BAC was higher at the time an accident. Bronx County Criminal Court granted the motion. Under its plain meaning, 10 NYCRR 59.5 requires that breath analysis results be expressed to the second decimal place. Also, it would be confusing to the jury if the officer who administered the PBT testified to a result of .07 BAC and the expert later testified to using the PBT result of .078 in the retrograde extrapolation analysis. The Legal Aid Society of NYC (Royce Davis, of counsel) represented the defendant.

[People v Hernandez \(2023 NY Slip Op 23302\)](#)

People v Henriquez | 2023 WL 6528934

DISCOVERY | CPL 30.30 | CHARGES DISMISSED

The defendant contested the validity of the People’s COC and moved to dismiss misdemeanor charges on speedy trial grounds. Bronx County Criminal Court granted the motion. The People inadvertently included in their initial disclosure an arrest report relating to another case. After being alerted to this oversight by defense counsel, the People promptly disclosed the actual arrest report. But they waited another 52 days to file a supplemental COC. Filing a COC with arrest paperwork unrelated to the defendant’s case is not harmless error; and the People provided no explanation or evidence of special circumstances justifying their delay in filing the supplemental COC. Thus, the initial COC was illusory, and the supplemental COC was untimely. The Bronx Defenders (Steven Benathen, of counsel) represented the defendant.

[People v Henriquez \(2023 NY Slip Op 51044\[U\]\)](#)

People v Williams | 2023 WL 6382722

DISCOVERY | CPL 30.30 | CHARGES DISMISSED

The defendant moved to dismiss the misdemeanor information on speedy trial grounds based on the People’s failure to timely comply with their discovery obligations. Buffalo City Court granted the motion. Three months after the People declared readiness, defense counsel provided notice that there may be missing body camera footage. Over two months later, and only in response to a motion challenging the validity of the COC, the People discovered the missing footage. They admitted their delay but argued that dismissal was not warranted because the defendant had not been prejudiced. However,

their “contention that a prejudice analysis should be used in determining the validity of the certificate of compliance and statement of readiness is inapposite to the clear standard set forth by the Fourth Department” in *People v Gaskin* (214 AD3d 1353 [4th Dept 2023]). The Legal Aid Bureau of Buffalo, Inc. (Osemudiamen Ojeme, of counsel) represented the defendant.

[People v Williams \(2023 NY Slip Op 51032\[U\]\)](#)

FAMILY

SECOND DEPARTMENT

Hoffman v Hoffman | October 4, 2023

CHILD SUPPORT | CIVIL CONTEMPT | REVERSED

In a matrimonial action, the defendant appealed from an Orange County Supreme Court order committing him to the sheriff’s custody and setting bail. The Second Department reversed and vacated the warrant. The plaintiff moved to hold the defendant in contempt for failing to pay child support, and the court scheduled a virtual conference. The defendant appeared 20 minutes late, after the court issued an arrest warrant and set bail for his failure to appear. The court then denied the defendant’s request for assigned counsel, stayed enforcement of the warrant for one week, and directed him to pay \$40,000. At the next appearance, the court remanded the defendant for failing to make payment and set bail at \$40,000. The court should have vacated the arrest warrant when the defendant appeared and should have inquired into his claim of indigency before denying the request for assigned counsel. It was particularly egregious for the court to issue an arrest warrant and set bail in response to the defendant’s late appearance where he claimed an inability to pay child support. Offit Kurman, P.A. (Elliot J. Rosner, of counsel) represented the appellant.

[Hoffman v Hoffman \(2023 NY Slip Op 04959\)](#)

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