

Decisions of Interest

OCT. 17, 2022

CRIMINAL

FIRST DEPARTMENT

People v Coleman | Oct. 13, 2022

SURCHARGES & FEES | RETROACTIVITY

The defendant appealed from two 2019 judgments of New York County Supreme Court, convicting him of 1st and 2nd degree robbery, upon his pleas of guilty. The First Department modified. The defendant validly waived the right to appeal, which foreclosed review of his claims that surcharges and fees should be vacated, pursuant to CPL 420.35 (2-a) (L. 2020, c. 155, § 1, eff. 8/24/20) (in the interest of justice, sentencing court may waive surcharges/fees for defendant who was under 21 at time of offense). However, the People consented to relief, and the appellate court waived the surcharges/fees in the interest of justice. [NOTE: See *People v Sevaughn G.*, 199 AD3d 936 (2nd Dept 2021) (above surcharges/fees waivers provision applied retroactively to cases pending on direct appeal on effective date of legislation); *People v Dyshaw B.*, 196 AD3d 638 (2nd Dept 2021) (retroactivity analysis).] The Center for Appellate Litigation (Carola Beeney, of counsel) represented the appellant.

[People v Coleman \(2022 NY Slip Op 05762\)](#)

People v Kuforiji | Oct. 13, 2022

ODOR OF MARIJUANA | RETROACTIVITY

The defendant appealed from a 2017 judgment of New York County Supreme Court, convicting him of 2nd degree CPW and another crime. The First Department affirmed. Penal Law § 222.05 (3) (L. 2021, c. 92, § 16, eff. 3/31/21) provided that “in any criminal proceeding,” including suppression hearings, no finding of probable cause shall be based solely on evidence of the odor of cannabis. But such statute did not apply retroactively; and a pending direct appeal did not constitute a “criminal proceeding.”

[People v Kuforiji \(2022 NY Slip Op 05760\)](#)

People v Addison | Oct. 13, 2022

GRAND JURY TRANSCRIPT | DENIAL

The defendant appealed from a judgment of New York County Supreme Court, convicting him of 1st degree assault and another crime, upon his plea of guilty. The First Department affirmed. The appeal brought up for review a ruling that the identification at issue was

confirmatory and no *Wade* hearing was necessary. In opposing the defendant's motion for a hearing, the People referred to facts set forth in grand jury minutes—which were submitted for in camera review and were considered by the trial and appellate courts. The First Department denied the defendant's motion to expand the record to include such transcript and to provide a copy to him. He failed to establish a compelling and particularized need for access so as to overcome the presumption of secrecy inhering in grand jury proceedings.

[People v Addison \(2022 NY Slip Op 05766\)](#)

SECOND DEPARTMENT

People v Owensford | Oct. 12, 2022

PLEA | VIOLATION | HEARING

The defendant appealed from a judgment of Kings County Supreme Court, convicting him of predatory sexual assault, attempted 2nd degree murder, and other crimes. The Second Department reversed. The defendant had entered into a plea/cooperation agreement. The People asserted that the defendant breached the agreement by omitting relevant information during interviews with prosecutors. However, the defendant countered that he had believed that the information was not relevant. Because of his untimely disclosure of the subject information, the prosecution was purportedly compelled to dismiss the indictment against the codefendant. The trial court should have held a hearing to resolve the sharply contested matter. Because of certain remarks by the Supreme Court Justice during the proceedings, the matter was remitted for proceedings before a different Justice. Appellate Advocates (Lynn Fahey and David Greenberg, of counsel) represented the appellant.

[People v Owensford \(2022 NY Slip Op 05716\)](#)

FAMILY

FIRST DEPARTMENT

M.K. v Harolyn M. | Oct. 11, 2022

CUSTODY | DELEGATING AUTHORITY

After a hearing on the mother's custody modification petition, Bronx County Family Court suspended visitation by the father. The First Department modified. Suspending visits was proper, in light of testimony and a forensic report indicating that the father's actions contributed to the child's mental health issues. The evaluator based his opinions on non-hearsay sources and observations. However, Family Court erred in delegating to a mental health professional its authority to determine when the father's access could resume and whether the visits should be supervised. Lewis Calderon represented the appellant.

[M.K. v Harolyn M. \(2022 NY Slip Op 05663\)](#)

SECOND DEPARTMENT

Matter of Kingston T. | Oct. 12, 2022

NEGLECT | NO HARM | REVERSED

The defendant appealed from a fact-finding order rendered by Kings County Family Court, which found that she neglected the subject child. The Second Department reversed. The finding was based on an incident of domestic violence in which the father yelled at the mother in the presence of the then two-month-old child. There was no showing that, as a result, the child's physical, mental, or emotional condition was impaired or in imminent danger of becoming impaired. Catherine Bridge represented the appellant.

[Matter of Kingston T. \(2022 NY Slip Op 05694\)](#)

Matter of Katherine L. | Oct. 12, 2022

DERIVATIVE NEGLECT | AGE GAP | REVERSED

The father appealed from a dispositional order of Kings County Family Court, which brought up for review a fact-finding order holding that he abused Heymi M., then age 14, and derivatively neglected Katherine L., then age five months. The Second Department modified. The finding of derivative neglect was improper, given the age difference between the children and their different mothers, living situations, and relationships with the father. Carol Kahn represented the appellant.

[Matter of Katherine L. \(2022 NY Slip Op 05691\)](#)

Matter of Gabriele G. | Oct. 12, 2022

DERIVATIVE ABUSE | RISK OF HARM | AFFIRMED

The father appealed from an order of fact-finding issued by Richmond County Family Court, granting the petitioner's motion for summary judgment on the issue of derivative abuse. The Second Department affirmed. The petitioner met its prima facie burden by demonstrating that the father pleaded guilty to having committed sexual offenses against the subject child's friends, then under age 11, in his home when his child was present. He thereby evinced a flawed understanding of his parental duties and impaired parental judgment so as to create a substantial risk of harm to the subject child. On appeal, the father argued that he was denied his right to due process, but such contention was unpreserved and, in any event, without merit.

[Matter of Gabriele G. \(2022 NY Slip Op 05689\)](#)

Moore v Glasper | Oct. 12, 2022

TPR | *ANDERS* BRIEF

In a termination of parental rights proceeding, the prior foster mother appealed from orders of Richmond County Family Court, which transferred custody and guardianship of the child for the purpose of adoption and dismissed the appellant's custody petition after a hearing. Appellate counsel filed an *Anders* brief. The Second Department assigned new counsel. Nonfrivolous issues existed, including whether it was in the best interests of the child to dismiss the custody petition and free the child for adoption by the current foster parent. Since a review of the record by the Appellate Division could not substitute for the

single-minded advocacy of appellate counsel, assignment of new counsel was warranted to prosecute the appeal.

[Moore v Glasper \(2022 NY Slip Op 05692\)](#)

Buljeta v Fuchs | Oct. 12, 2022

ARTICLE 4 | IAC CLAIM

In an Article 4 proceeding, the mother appealed from an order of Orange County Family Court, which granted the father's motion to dismiss her violation and enforcement petitions. The Second Department affirmed. The contention that the mother was deprived of the effective assistance of counsel rested partially on matters dehors the record and thus was not properly before the appellate court. Moreover, for proceedings in which there was no statutory right to counsel under Family Ct Act § 262—such as many Article 4 support matters—IAC claims would not be entertained absent extraordinary circumstances. **[NOTE: A CPLR 5015 motion may be a proper vehicle to raise an IAC claim in some Family Court cases. See e.g. *Ritter v Moll*, 148 AD3d 1427; *Commissioner v Faresta*, 11 AD3d 750.]**

[Buljeta v Fuchs \(2022 NY Slip Op 05687\)](#)



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)