

Decisions of Interest

OCTOBER 23, 2023

CRIMINAL

COURT OF APPEALS

People v Cerda | October 19, 2023

RAPE SHIELD LAW | FORENSIC EVIDENCE | REVERSED

The defendant appealed from a Second Department order affirming his 1st degree sexual abuse conviction. The Court of Appeals reversed and remitted for a new trial. The trial court deprived the defendant of his constitutional right to present a defense by erroneously applying the Rape Shield Law to deny his motion to admit forensic reports. The reports revealed the presence of the complainant's own saliva and DNA from the complainant and two unidentified males in samples taken from the complainant's underwear and genital region. The reports offered plausible alternative explanations for the complainant's injuries and were "relevant and admissible in the interests of justice" (CPL 60.42 [5]). Barket, Epstein, Kearon, Aldea & Loturco, LLP (Donna Aldea, of counsel) represented the appellant.

[People v Cerda \(2023 NY Slip Op 05305\)](#)

People v Justice A. | October 19, 2023

CPL 30.30 | NOT WITHOUT COUNSEL | REVERSED

The defendant appealed from an Appellate Term, First Department order affirming his 3rd degree assault conviction. The Court of Appeals reversed, granted the defendant's CPL 30.30 motion, and dismissed the accusatory instrument. The period of time in dispute, from November 5, 2018 to November 13, 2018, was chargeable to the People. The defendant was assigned a Legal Aid attorney at arraignment. While a different Legal Aid attorney appeared with the defendant on November 5th and explained that the case was being reassigned within the office, the defendant was represented and was not "without counsel" such that the time was excludable under CPL 30.30. Nor was this period excludable based on the defendant's late appearance on November 5th. The defendant arrived late on advice of counsel since he was still in school; a bench warrant issued that morning was vacated that afternoon. The Legal Aid Society of NYC (Hannah Gladstein, of counsel) represented the appellant.

[People v Justice A. \(2023 NY Slip Op 05306\)](#)

THIRD DEPARTMENT

People v Maurer | October 19, 2023

SORA | INADEQUATE NOTICE | REVERSED

The defendant appealed from a Greene County Court order that classified him a level three sex offender. The Third Department reversed and remitted. The defendant was not given notice of some of the factors County Court relied on in granting the People's request for an upward departure. County Court considered both noticed and unnoticed information in determining that a departure was warranted, which deprived the defendant of an opportunity to challenge the use of the unnoticed factors. David E. Woodin represented the appellant.

[People v Maurer \(2023 NY Slip Op 05290\)](#)

People v Mawhiney | October 19, 2023

INTOXICATION | EXPERT TESTIMONY PRECLUDED | REVERSED

The defendant appealed from a Broome County Court judgment convicting him of attempted 1st degree murder, aggravated assault upon a police officer, 4th degree CPW and 2nd degree harassment after a jury trial. The Third Department reversed and ordered a new trial. County Court erred when it precluded the defendant from presenting expert testimony on how the synergistic effect of alcohol and prescription medication affected intoxication, which was relevant to his intent. The proof that the defendant engaged in the charged conduct was undisputed, and his mental state at the time was his sole defense. Ronald R. Benjamin represented the appellant.

[People v Mawhiney \(2023 NY Slip Op 05289\)](#)

APPELLATE TERM, FIRST DEPARTMENT

People v Moronta | October 19, 2023

INVOLUNTARY PLEA | REMAND NOT SOUGHT | AFFIRMED

The defendant appealed from a New York City Criminal Court judgment that convicted him of violating Public Health Law § 229 based on his guilty plea. The Appellate Term, First Department affirmed. The defendant's plea was not knowing, voluntary and intelligent. The trial court did not ask him any questions during the allocution, nor advise him of the constitutional rights he would give up by pleading guilty. However, the defendant specifically requested affirmance if dismissal was not granted.

[People v Moronta \(2023 NY Slip Op 51108\[U\]\)](#)

TRIAL COURTS

People v Nesbitt | 2023 WL 6934604

CPL 30.30 | DISMISSAL | NO DUE DILIGENCE

The defendant moved to dismiss the charges against him pursuant to CPL 30.30. Erie County Criminal Court granted the motion. The People failed to exercise due diligence in ascertaining the existence of body camera video that the police possessed. The People must actively seek out evidence in police possession, not just await its arrival. The failure

to exercise such due diligence rendered the COC/SOR invalid and illusory. The Legal Aid Bureau of Buffalo (Dominique N. Tauffner, of counsel) represented the defendant.

[People v Nesbitt \(2023 NY Slip Op 23323\)](#)

People v Lewis | 2023 WL 6857446

CRIMINAL CONTEMPT | LEGALLY INSUFFICIENT | DISMISSED

The defendant moved to dismiss an indictment charging him with 2nd degree criminal contempt. Essex County Court granted the motion. The indictment alleged that the defendant appeared in court wearing a kangaroo costume and “question[ed] the court’s knowledge of, and authority over the law.” The defendant had posted videos on social media referring to the Village Court as a “kangaroo court,” criticized a Town Justice for sleeping on the job, and stated he was going to wear a kangaroo costume for his next appearance. Having appeared pro se, the defendant was entitled to latitude in conducting his defense. It was clear from the videos that he wore the kangaroo costume expecting to appear before a different judge, and he readily complied with the court’s directive to remove the costume. At most, the evidence presented the judge with “the option to consider [the] defendant a harmless nut and forget it.” The Essex County Public Defender (James W. Hyde, IV, of counsel) represented the defendant.

[People v Lewis \(2023 NY Slip Op 23319\)](#)

FAMILY

COURT OF APPEALS

Matter of Celinette H.H. v Michelle R. | October 19, 2023

HABEAS CORPUS | NO CUSTODY ORDER | REMITTED | DISSENT

The mother appealed from a First Department order dismissing her appeal from a Family Court order that denied her habeas relief. The Court of Appeals reversed and remitted to the First Department “for an expeditious determination” on standing. Regardless of whether the mother lacked standing to seek habeas relief in the absence of a preexisting custody order, the First Department possessed subject matter jurisdiction. In the dissent’s view, remittal was unnecessary and only caused further needless delay. The First Department erroneously dismissed the mother’s appeal based on the sole ground presented—that habeas relief was unavailable in the absence of a preexisting custody order. DRL § 70 (a) plainly provides that Family Court has jurisdiction to determine custody in habeas proceedings and to grant a writ even if a custody order does not yet exist. Carol Kahn represented the appellant.

[Matter of Celinette H.H. v Michelle R. \(2023 NY Slip Op 05303\)](#)

FIRST DEPARTMENT

Matter of Marlene H. v Loren D. | October 17, 2023

RIGHT TO COUNSEL | SEARCHING INQUIRY | REVERSED

The father appealed from a Bronx County Family Court order denying his motion to vacate a final order of protection. The First Department reversed and remitted. Family Court failed to conduct a searching inquiry to ensure that the father's waiver of the right to counsel was knowing, voluntary, and intelligent. Nor did it inform the father of the dangers and disadvantages of representing himself. Marion C. Perry represented the father.

[Matter of Marlene H. v Loren D. \(2023 NY Slip Op 05225\)](#)

TRIAL COURTS

Matter of E.P. v B.S. | 2023 WL 6819194

UCCJEA | NON-WAIVABLE | DISMISSED

The father moved to dismiss custody petitions on the ground that New York lacked jurisdiction under the UCCJEA. Kings County Family Court granted the motion. The father commenced custody proceedings in NY in 2017. Although none of the children had lived in NY for the six months preceding filing, neither party objected. In November 2022, the 2017 petitions were dismissed on non-jurisdictional grounds and the parties filed the instant custody petitions. Regardless of whether the father had acquiesced to NY's jurisdiction during the pendency of the 2017 petitions, the relevant inquiry was whether the court had initial custody jurisdiction over the 2022 petitions. It did not. Further, subject matter jurisdiction is non-waivable and can be raised at any time. Devian Daniels represented the father.

[Matter of E.P. v B.S. \(2023 NY Slip Op 05303\)](#)

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