Indigent Legal Services

Decisions of Interest

OCTOBER 24, 2022

CRIMINAL

COURT OF APPEALS

People v Baines | Oct. 20, 2022

PRO SE | NO SEARCHING INQUIRY

The defendant appealed from a First Department order mostly affirming a judgment convicting him of 1st degree rape and other crimes after a jury trial. In a unanimous opinion by Judge Troutman, the Court of Appeals modified. The defendant represented himself during pretrial proceedings over a period of 21 months. The trial court did not warn him of the risks of proceeding pro se or apprise him of the importance of a lawyer in the adversarial system. Initially, the court did not discuss these issues before stating that the defendant was representing himself at the outset of the relevant period. Later, the court told the defendant that it was "not a great idea" to represent himself; that he was putting himself "in a very bad position;" and that a lawyer would have knowledge of criminal procedure that he did not. However, these warnings did not satisfy the requirement for a searching inquiry. Further, when allowing for standby counsel, the court failed to explain such role to the defendant. The appropriate remedy was remittal for a repeat of pretrial proceedings during which the defendant was deprived of counsel and an opportunity to make whatever pretrial motions were, or could have been, made. The Office of the Appellate Defender (Joseph Nursey, of counsel) represented the appellant.
People v Baines (2022 NY Slip Op 05919)

People v Murray | Oct. 20, 2022

DISCHARGED ALTERNATE | NEW TRIAL

The defendant appealed from a First Department order affirming a judgment convicting him of 2nd degree robbery and other crimes. In an opinion by Judge Garcia, a unanimous Court of Appeals reversed and ordered a new trial. Prior to the start of deliberations, the court discharged the alternate jurors. A trial juror was later removed for alleged misconduct, and the court seated a discharged alternate. That was error. Pursuant to the plain terms of CPL 270.35 (1), once discharged, an alternate juror was no longer "available for service" as a replacement for a trial juror. The trial court's sole remedy was to declare a mistrial. When the trial court clearly stated on the record that an alternate juror had no further responsibilities in the case, the alternate juror was discharged from service, the COA explained. This bright line rule was consistent with the relevant CPL provisions and the State Constitution. In the instant case, there could be no doubt that, when the trial judge thanked the alternate jurors for their service and "excused [them] from this case," they were discharged and were no longer available for service. To be sure, the circumstances of this case were unusual. The trial court discharged the alternates after closing arguments and then sent the jury to lunch. It was in the brief period between the discharge of the alternates and the jury retiring to deliberate that the issue with a trial juror arose. Had the court waited to discharge

the alternates until the start of deliberations, the alternates would have remained available. The Center for Appellate Litigation (Abigail Everett, of counsel) represented the appellant.
People v Murray (2022 NY Slip Op 05916)

SECOND DEPARTMENT

People v Witherspoon | Oct. 19, 2022

SEALING | OUT-OF-STATE CONVICTION

The People appealed from an order of Nassau County Supreme Court, which granted the defendant's motion to seal his conviction of attempted 3rd degree larceny without a hearing. The Second Department reversed. In a matter of first impression, the court held that CPL 160.59 (3) (f) did not require a court to summarily deny a motion to seal an eligible offense where the defendant was subsequently convicted of a crime in another state. Instead, such conviction was a factor for the motion court to consider in its discretionary determination. The statute provided that the motion to seal "shall" be summarily denied where "the defendant was convicted of any crime after the date of the entry of judgment of the last conviction for which sealing is sought." "Any crime" did not include crimes under the laws of another state. However, Supreme Court erred in granting the opposed motion without holding a hearing. The matter was remitted.
People v Witherspoon (2022 NY Slip Op 05866)

People v Adorno | Oct. 19, 2022

OBJECTIONS | PROMPT, TIMELY, SPECIFIC

The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 1st degree robbery and another crime. The Second Department affirmed. Defense counsel's vague and untimely objections failed to preserve issues regarding prosecution statements in summation. The most relevant objection, to "all of this," was raised after the prosecutor made 28 uninterrupted statements, some of which likened a hypodermic needle to a dangerous instrument. In any event, an isolated statement by the prosecutor about comments of a prospective juror during jury selection was not egregious. Two justices dissented. There was sufficient preservation for appellate review regarding the portion of the summation in which the prosecutor mentioned a prospective juror whose former partner contracted HIV from a needle. The sole purpose for the remark was to provoke juror emotion. The error was not harmless. Further, the sentence was harsh and excessive. The case involved a non-violent petit larceny in which the defendant exited a supermarket without paying for steaks worth $50. His conduct escalated due to the violent attack by store employees, resulting in a needle accidentally sticking a security guard.
People v Adorno (2022 NY Slip Op 05856)

THIRD DEPARTMENT

People v Jones | Oct. 20, 2022

440 MOTION | *ROBINSON* | PROFILING

The defendant appealed from a judgment of Chemung County Court convicting him of 2nd degree CPW and from the summary denial of his CPL 440.10 motion. The Third Department affirmed the judgment but reversed the order and remitted for a hearing. The defendant pleaded guilty to possessing a handgun found in a backpack in a car in which he was a passenger. In support of his motion, he submitted a sworn statement from the driver indicating that the stop was motivated by racial profiling, not a drug investigation. The defendant's claim that the judgment was obtained

in violation of his constitutional rights entitled him to a hearing. The appellate court declared that the *People v Robinson* (97 NY2d 341) standard did not preclude a challenge to a traffic stop premised on racial profiling, at least under our State constitution. *Cf. Patrolmen's Benevolent Assn. v City of NY*, 142 AD3d 53, 66 (1st Dept 2016). Christopher Hammond represented the appellant.
People v Jones (2022 NY Slip Op 05892)

People v Adrian | Oct. 20, 2022
INTOXICATION CHARGE | REVERSED
The defendant appealed from a judgment of the Greene County Court convicting him of 2nd degree assault following a jury trial. Video footage showing a marked difference in the defendant's behavior earlier the same day and right before a bar fight, combined with testimony about his alcohol consumption, constituted sufficient proof of intoxication to cast doubt on the element of intent. Thus, County Court erred in denying the defense request for a jury charge on intoxication. The trial court also abused its discretion when it denied a defense request for an adjournment to allow the defendant to review 28 hours of newly disclosed video footage. It was unreasonable for the court to expect counsel to review the extensive video evidence in one evening.
People v Adrian (2022 NY Slip Op 05896)

People v Hoyt | Oct. 20, 2022
PRIOR CONVICTION | CONSTITUTIONALITY
The defendant appealed from a judgment of the Schenectady County Supreme Court, which sentenced him as a persistent violent felony offender for his conviction of attempted 2nd degree CPW. The Third Department vacated the sentence and remitted. At the PVFO hearing, the defendant challenged the constitutionality of a 2006 felony conviction that the People sought to use as a predicate conviction. Supreme Court determined that, because the defendant had not appealed from the 2006 conviction, he could only present the argument via a CPL 440.10 motion. The appellate court held that the defendant had an independent statutory right to attack the use of the prior conviction as a predicate felony—even though he had not appealed from or otherwise previously challenged the conviction. Matthew Hug represented the appellant.
People v Hoyt (2022 NY Slip Op 05894)

FAMILY

FIRST DEPARTMENT

Jose M.R. v Adrian S. | Oct. 18, 2022
FAMILY OFFENSES | UNPROVEN
The respondent appealed from an order of New York County Family Court rendered in an Article 8 proceeding. The First Department modified. The hearing evidence did not establish that the respondent committed the family offenses of 2nd or 3rd degree assault. The victim's testimony that the respondent left him with "a lot of injuries," was insufficient to show serious physical injury. The testimony did not establish that the respondent used a dangerous instrument or that there was an impairment of a physical condition or substantial pain. When the Family Court sua sponte conformed the petition to the hearing proof, the respondent was not denied due process, since he could not have been surprised or prejudiced by his own admissions.
Jose M.R. v Arian S. (2022 NY Slip Op 05816)

Gunn v Hamilton | Oct. 18, 2022

"PARENT" | COUNSEL FEES

The petitioner appealed from orders finding her in criminal contempt, awarding the respondent interim counsel fees, and imposing a fine. The First Department reversed. Domestic Relations Law § 237, a fee-shifting statute, applied to parties litigating the issue of standing as a "parent" under § 70 proceedings regarding custody and visitation. A decision interpreting the statute after the instant fees were incurred did not establish a "new principle of law" and was sufficiently foreshadowed by the changing legal landscape regarding the definition of "parent" to permit retroactive application. Such result did not hinder the purpose of the statute, nor would it be inequitable; the law came into play where there was a significant disparity in the parties' financial situations. However, the challenged order was final, not interim, and the petitioner was entitled to an evidentiary hearing. Further, the finding of criminal contempt was vacated. The petitioner was guaranteed the same rights as a criminal defendant, including a right to be heard, to have her guilt proven beyond a reasonable doubt, and to have meaningful representation.

Gunn v Hamilton (2022 NY Slip Op 05790)

THIRD DEPARTMENT

Brett J. v Julie K. | Oct. 20, 2022

VISITATION | FIANCÉE

The father appealed from an order of Chemung County Family Court, which granted sole legal and physical custody of the children to the mother. The Third Department modified. Family Court abused its discretion in directing that the father's fiancée could not be unsupervised with the children. The children shared a close bond with her, and she assisted the father in caring for the children during his parenting time. While the fiancée had a contentious relationship with the mother, the record did not support a finding that unsupervised contact with her would impair the children's safety. However, against the mother's wishes, the fiancée became overly involved in the children's school and other events. Such overstepping was addressed through the provisions preventing her from communicating with the school and from accessing records. Alena Van Tull represented the appellant.

Brett J. v Julie K. (2022 NY Slip Op 05907)

Ajmal I v LaToya J. | Oct. 20, 2022

VISITATION | HARMFUL

The mother appealed from an order of Broome County Family Court, which modified a prior custody order and granted the father certain supervised visitation. The Third Department reversed. The father had not lived with the child in more than a decade and seldom visited. He had moved out of the area and frequently relocated around the country. When the father did visit, he behaved in an irresponsible and harmful manner. For example, during a winter-break visit with the child, the father cut off contact with the mother for days and left the child with relatives so that he could attend a party and travel to New York City. On another occasion, the father livestreamed a visit, including the child's personal conversations, over social media. The teenager's preference to have no in-person contact with the father was entitled to considerable weight.

Ajmal I. v LaToya J. (2022 NY Slip Op 05912)

Karl II v Maurica JJ. | Oct. 20, 2022

CUSTODY | NO CHANGE | TALKINGPARENTS APP

The father appealed from an order of Ulster County Family Court. The Third Department modified. Family Court erred in determining that the parties could not cooperate to raise the child and that such development constituted a change in circumstances. The parents had been able to communicate via the TalkingParents app to discuss issues regarding the child. Although their communication was strained at times, it had not completely broken down. Thus, the parents could continue to share joint legal custody. Michael DiBenedetto represented the father.
Karl II. v Maurica JJ. (2022 NY Slip Op 05905)

Kenneth N. v Elizabeth O. | Oct. 20, 2022

CUSTODY | NO CHANGE | WORK SCHEDULE

The mother appealed from an order of Delaware County Family Court, which granted the father's application to modify a prior order of visitation. The Third Department reversed. A modest change in the father's work schedule was not a change in circumstances sufficient to trigger a "best interests" analysis. As for the other factors relied upon, there was no showing that the mother's new job, the parties' new residences, their new relationships, or the introduction of half-siblings and a stepsibling into the child's life should be considered new circumstances evidencing any infirmity in the present custody arrangement. Theresa Mulliken represented the appellant.
Kenneth N. v Elizabeth O. (2022 NY Slip Op 05904)

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)