Indigent Legal Services

Decisions of Interest

OCTOBER 3, 2022

CRIMINAL

FIRST DEPARTMENT

People v Tate | Sept. 27, 2022

CHALLENGE DENIED | REVERSED

The defendant appealed from a judgment of New York County Supreme Court, convicting her of 2nd degree arson and another crime. The First Department reversed and ordered a new trial. The defendant's challenge for cause to a prospective juror should have been granted. The panelist, who had many connections to law enforcement, stated: "I'm definitely bias[ed] toward law enforcement, toward police officers. I know a lot of cops." That indicated a state of mind likely to preclude an impartial verdict, yet the trial court did not elicit an unequivocal assurance that the panelist would set aside any bias. The Center for Appellate Litigation (Ben Schatz, of counsel) represented the appellant.
People v Tate (2022 NY Slip Op 05286)

People v Gonzalez | Sept. 29, 2022

DEPORTED | DISMISSED

The defendant appealed from an order of Bronx County Supreme Court, which denied his CPL 440.10 motion to vacate a conviction. The First Department exercised its discretion to dismiss the permissive appeal on the ground that the defendant had been deported. The appellate court noted that this was a 20-year-old case in which the defendant had absconded, fled to another country, and been tried and sentenced in absentia. In any event, the motion court had ruled correctly.
People v Gonzalez (2022 NY Slip Op 05382)

SECOND DEPARTMENT

People v Powell | Sept. 28, 2022

YO FINDING | VACATED

The defendant appealed from a judgment of Kings County Supreme Court, convicting him of attempted 2nd degree murder, upon his plea of guilty. The Second Department modified. CPL 720.20 required that a youthful offender determination be made in every case where the defendant was eligible. Despite this defendant's eligibility, the record did not demonstrate that the lower court made such a finding. The sentence was vacated,

and the matter remitted. Appellate Advocates (David Fitzmaurice, of counsel) represented the appellant.
People v Powell (2022 NY Slip Op 05335)

People v Biggs | Sept. 28, 2022
DISSENT | PRESERVATION
The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 2nd degree CPW and other crimes, upon a jury verdict. The Second Department affirmed. One justice dissented in part. The People failed to justify the vehicle stop, which was based on excessively tinted windows. The defendant's contentions were preserved. A general objection was sufficient when the trial court expressly decided the question raised on appeal. Further, a party who without success sought a particular ruling was deemed to have protested the ultimate disposition or failure to rule. To preserve an issue, CPL 470.05 (2) did not require that the trial court engage in an extended analysis or set forth reasons for its ruling. As to the merits, if credited, the police officer testimony was insufficient to show a reasonable suspicion that the rear windows of the defendant's vehicle had a light transmittance of less than 70%, in violation of the VTL. Further, the officer's testimony was incredible. He failed to explain how he could discern excessive tinting not only on the driver-side window, but also on the rear window on the opposite side of the vehicle. Further, he unconvincingly claimed that he could smell marijuana emanating from the vehicle when it was a couple of car lengths away. Further, significant aspects of the officer's testimony were contradicted by a bystander who video-recorded the incident.
People v Biggs (2022 NY Slip Op 05328)

APPELLATE TERM

People v Dollison | 2022 NY Slip Op 50911(U)
CERT. OF READINESS | 30.30 DISMISSAL
The defendant appealed from a judgment of Queens County Criminal Court, convicting him of petit larceny and another crime. The Second Department, Appellate Term reversed and granted the defendant's motion to dismiss on statutory speedy trial grounds. An unequivocal order required the People to provide a Certificate of Readiness to stop the clock but they failed to comply. Neither the court's unawareness of that lapse, nor the defendant's later participation in setting an adjourn date, absolved the People of their obligation. Appellate Advocates (Emily Lurie) represented the appellant.
People v Dollison (2022 NY Slip Op 50911(U))

People v Jones | 2022 WL 4490832
DISSENT | CONCLUSORY ID
The defendant appealed from a judgment of Queens County Criminal Court, convicting him of 3rd degree assault, upon a jury verdict. The Second Department, Appellate Term affirmed. One justice dissented. The threshold issue was whether the accusatory instrument was facially sufficient where the basis for the officer's identification of the defendant was observation of a surveillance video. The ID was too conclusory. There was

no foundation for the detective's belief that the person depicted was the defendant—such as an allegation that the defendant was personally known to the detective or that a prior encounter would support a confirmatory identification.
People v Jones (2022 NY Slip Op 22299)

THIRD DEPARTMENT

People v Fish | Sept. 29, 2022

APPEAL WAIVER | INVALID

The defendant appealed from a Tompkins County Court judgment, convicting him of 1st degree burglary, upon his plea of guilty, and an order denying his CPL 440.10 motion to vacate the judgment. The Third Department affirmed. The waiver of appeal was invalid. During the allocution, the defendant was told, "You will not be able to successfully challenge any aspect of this case" and will "have to live with" the sentence. Further, he was not advised of issues that survived a waiver. Regarding the mixed claims of ineffective assistance, there was no explanation for the absence of trial counsel's affirmation. The failure to request pretrial hearings was not ineffective where there was no indication of a colorable claim.
People v Fish (2022 NY Slip Op 05354)

People v Green | Sept. 29, 2022

RAPE SHIELD LAW | CROSS LIMITED

The defendant appealed from a judgment of Albany County Supreme Court, convicting him of 2nd degree rape and another crime. The Third Department affirmed. In a sex offense prosecution, the Rape Shield Law generally prohibited evidence of a victim's sexual conduct. Under one exception, the trial court had discretion to allow such evidence upon a finding that the proof was relevant and admissible in the interests of justice. Based on testimony about tearing and bleeding, the court determined that the victim's sexual conduct in the 12 to 24 hours before the incident was relevant, since it could aid the defendant in showing that a different sexual partner caused the injuries. Thus, the trial court properly limited cross-examination to the complainant's sexual conduct in the 48 hours leading up to the incident—thereby striking a balance between protecting the victim's privacy and preserving the defendant's ability to mount an effective defense.
People v Green (2022 NY Slip Op 05353)

FOURTH DEPARTMENT

People v Zenon | Sept. 30, 2022

O'RAMA | NEW TRIAL

The defendant appealed from a Supreme Court judgment, convicting him of 2nd degree murder. The Fourth Department reversed and granted a new trial. The trial court committed a mode-of-proceedings error in handling a jury note. *See People v O'Rama*, 78 NY2d 270. In relevant part, the note stated, "Please go over manslaughter ***vs*** murder 2 elements of the charges from your instructions [emphasis added]." The court did not read the note verbatim nor show it to the parties. Instead, the court told counsel that the jury wanted the court to "go over the instructions for

manslaughter ***and*** murder in the second degree [emphasis added]." By paraphrasing, the court altered the note's meaning and failed to give counsel meaningful notice. The Monroe County Public Defender (Shirley Gorman, of counsel) represented the defendant.
People v Zenon (2022 NY Slip Op 05446)

People v Thomas | Sept. 30, 2022

ROBBERY | WEIGHT | ALIBI

The defendant appealed from a Supreme Court judgment of conviction. The Fourth Department dismissed one count of 2nd degree robbery, finding the verdict against the weight of evidence. The victim could not identify the defendant as the perpetrator. Although the defendant's fingerprint was found on the door handle at the victim's apartment building, there was no testimony that the perpetrator touched that handle during the robbery. As to the remaining counts for 2nd and 3rd degree robbery, the appellate court ordered a new trial. Supreme Court erred in denying the defense motion to file a late notice of alibi. Counsel explained that, through his own negligence and despite his awareness of an alibi witness, he failed to notify the court and prosecutor. His failure to comply with CPL 250.20 was not willful or motivated by a desire to obtain a tactical advantage. The defendant's constitutional right to offer the testimony of the alibi witness outweighed any prejudice to the People. The error was not harmless. The Monroe County Conflict Defender (Carolyn Walther, of counsel) represented the defendant.
People v Thomas (2022 NY Slip Op 05430)

People v Acosta | Sept. 30, 2022

SENTENCE | NONVIOLENT

The defendant appealed from an Oswego County Court judgment, convicting him of drug possession offenses and imposing an aggregate term of 18 years. The Fourth Department reduced the sentence, based on the defendant's largely remote criminal history; the nonviolent nature of these offenses, and the disparity between the pretrial sentencing promise and the term imposed after trial. The appellate court emphasized that a defendant need not show extraordinary circumstances or an abuse of discretion for the midlevel appellate court to reduce a sentence. Mark Davison represented the appellant.
People v Acosta (2022 NY Slip Op 05390)

People v Thurston | Sept. 30, 2022

CONDITIONAL DISCHARGE | ILLEGAL

The defendant appealed from an Oneida County Court judgment, convicting him of aggravated vehicular homicide and another crime, upon a plea of guilty. The Fourth Department modified, vacating the conditional discharge imposed on the above-named count, since such component of the sentence was illegal. Although the issue was not raised, the reviewing court could not allow an illegal sentence to stand. Kathryn Festine represented the appellant.
People v Thurston (2022 NY Slip Op 05443)

FAMILY

FIRST DEPARTMENT

Brennan v Caltabiano | Sept. 29, 2022

CUSTODY | FEES

The husband appealed from an order of New York County Supreme Court, which granted counsel fees to the wife as to her petition to enforce and modify a custody stipulation. The First Department affirmed. After relocating outside of New York, the husband failed to comply with detailed provisions of the parenting-time stipulation—adversely affecting the children and wife. He waived his right to a hearing on whether he violated the stipulation when he failed to request one on the wife's application for counsel fees or to object when the court indicated that the motion would be decided on the papers.

Brennan v Caltabiano (2022 NY Slip Op 05368)

Neil F.J. v Maria I.M. | Sept. 27, 2022

DEFAULT | APPEAL

The mother appealed from an order of Bronx County Family Court, which granted the father's petition to modify custody, upon her default. The First Department dismissed the appeal. The mother offered a valid reason for her default at the remote hearings—nonfunctioning Internet service. However, no appeal lies from an order entered on default. *See* CPLR 5511. The defaulting party must make a motion to vacate the default. *See* CPLR 5015 (a) (1).

Neil F.J. v Maria I.M. (2022 NY Slip Op 05273)

SECOND DEPARTMENT

Randall v Diaz | Sept. 28, 2022

CUSTODY HEARING | REVERSED

The mother appealed from an order of Westchester County Family Court, which granted the father's petition to modify a prior order and awarded him sole physical custody of the parties' two children—without a hearing. The Second Department reversed. Generally, custody determinations should be made only after a full and plenary hearing. The record here demonstrated disputed factual issues regarding the issue of physical custody. Moreover, on appeal, the AFCs alerted the appellate court to key new developments, including that the children were residing with the paternal grandmother. The matter was remitted for a hearing. Daniel Pagano represented the appellant.

Randall v Diaz (2022 NY Slip Op 05322)

Silverman v Liebowitz | Sept. 28, 2022

FAMILY OFFENSE | INTIMATE RELATIONSHIP

The petitioner appealed from orders of dismissal rendered by Rockland County Family Court in an Article 8 proceeding. The Second Department affirmed. "Intimate relationship"

did not encompass casual acquaintances and ordinary fraternization. These parties were connected only through the petitioner's children—the respondents' grandchildren, and niece and nephew, respectively.
Silverman v Leibowitz (2022 NY Slip Op 05323)

Clarissa C. v Alexei G. | Sept. 28, 2022

WILLFUL VIOLATION | MISSTEP

The father appealed from an order of New York County Family Court, which denied his objections to a Support Magistrate order finding him to be in willful violation of a child support order. The issue was not properly before the appellate court. The father should have awaited the final order of a Family Court Judge confirming the Support Magistrate's determination and then appealed from that order.
Clarissa C. v Alexei G. (2022 NY Slip Op 05266)