Indigent Legal Services

Decisions of Interest

NOVEMBER 14, 2022

CRIMINAL

FIRST DEPARTMENT

People v Hall | Nov. 10, 2022

WAIVER OF APPEAL | SPEEDY TRIAL

The defendant appealed from a judgment of New York County Supreme Court, convicting him of 3rd degree CSCS. The First Department affirmed. The defendant made a valid waiver of his right to appeal, which foreclosed review of his statutory speedy trial claim. Further, by pleading guilty, he had forfeited review of such issue. The defendant was convicted before the Jan. 1, 2020 effective date of the current version of CPL 30.30 (6), which prospectively permitted defendants who pleaded guilty to raise statutory speedy trial claims on appeal, but which was not applied retroactively.

People v Hall (2022 NY Slip Op 06327)

SECOND DEPARTMENT

People v Drach | Nov. 9, 2022

PRESERVATION | CPL 330.30

The defendant appealed from a judgment of Kings County Supreme Court, convicting him of attempted 2nd degree kidnapping and other crimes. The Second Department affirmed. The defendant's argument that the merger doctrine precluded the kidnapping conviction was not raised until his post-verdict CPL 330.30 motion—too late to preserve the issue for appellate review, and the reviewing court declined to invoke its interest of justice jurisdiction. *See People v Padro*, 75 NY2d 820 (by itself, CPL 330.30 motion was not ordinarily sufficient to preserve **"question of law"** under CPL 470.05 [2]).

https://nycourts.gov/reporter/3dseries/2022/2022_06260.htm

People v Rivera | Nov. 9, 2022

PRESERVATION | SEARCH WARRANT

The defendant appealed from a judgment of Richmond County Supreme Court, convicting him of 1st degree CSCS and 2nd degree CPW, upon his plea of guilty. The Second Department affirmed. The trial court properly denied portions of the defendant's omnibus motion challenging three search warrants and seeking suppression of physical evidence. While the defendant did not argue in Supreme Court that one of the warrants was not based on probable cause, the issue was preserved for appellate review because the court **"expressly decided"** the issue. *See* CPL 470.05 (2). However, there was probable cause to issue the warrant.

https://nycourts.gov/reporter/3dseries/2022/2022_06268.htm

[**NOTE**: CPL 470.05 (2) states: "For purposes of appeal, a **question of law** with respect to a ruling or instruction of a criminal court during a trial or proceeding is presented when a protest thereto was registered, by the party claiming error, at the time of such ruling or instruction or at any subsequent time when the court had an opportunity of effectively changing the same. Such protest need not be in the form of an "exception" but is sufficient if the party made his position with respect to the ruling or instruction known to the court, or if in response to a protest by a party, the court **expressly decided** the question raised on appeal *** (emphasis added).]

People v Maggio | Nov. 9, 2022

440 REVERSAL | COLLATERAL CONSEQUENCE

The People appealed from an order of Suffolk County Supreme Court which summarily granted the defendant's CPL 440.10 motion and vacated his DWI conviction. Supreme Court found that the plea was not rendered involuntary by the plea court's failure to ensure that the defendant was aware that his driver's license could be permanently revoked due to his conviction. The Second Department reversed and reinstated the conviction. The DMV regulation that resulted in the denial of relicensing did not exist when the defendant pleaded guilty. Further, the potential permanent license revocation was a collateral consequence of a guilty plea and was not of such great importance that fundamental fairness nonetheless required that a defendant be warned of such consequence upon entering the guilty plea. *Cf. People v Peque*, 22 NY3d 168.
https://nycourts.gov/reporter/3dseries/2022/2022_06262.htm

People v Marxuach | Nov. 9, 2022

SEX OFFENSE CLAIM | NOT REVIEWABLE

The defendant appealed from an order of Kings County Supreme Court adjudicating him a level-one sex offender. The Second Department affirmed, holding that the defendant's claim that he was not convicted of a sex offense as defined by Correction Law § 168-a was not reviewable upon appeal from an order designating his SORA risk level. The certification as a sex offender was an integral part of the judgment of conviction; and a challenge to certification on the ground that the underlying conviction was for an offense which did not require registration had to be raised on direct appeal from the judgment.
https://nycourts.gov/reporter/3dseries/2022/2022_06277.htm

People v Wahhab | Nov. 9, 2022

OUT-OF-STATE FELONY | EQUIVALENT

The defendant appealed from his resentencing as a second felony offender by Nassau County Supreme Court. The Second Department affirmed. As a result of the defendant's CPL Article 440 motion, Supreme Court previously held that a federal conviction did not qualify as a predicate felony and set aside a sentence imposed in 2012. The People filed a revised predicate felony statement, this time relying on a 1998 Virginia conviction. Because the VA statute criminalized several acts which could be the equivalent of a felony or a misdemeanor in NY, the sentencing court could look beyond the statute to the facts alleged in the accusatory instrument. The acts alleged constituted a felony in this state.
https://nycourts.gov/reporter/3dseries/2022/2022_06272.htm

THIRD DEPARTMENT

People v McNeil | Nov. 10, 2022

WAIVER OF APPEAL | INVALID

The defendant appealed from a judgment of Ulster County Court, convicting him of DWI. The Third Department affirmed but found the waiver of the right to appeal invalid. County Court used overbroad language in its oral colloquy, erroneously stating that, once the defendant waived his right to appeal, it was "gone forever." Further, the written waiver inaccurately claimed to be "a complete and final disposition of this case." Because the plea court failed to ensure that the defendant understood that some appellate review survived, the waiver was invalid and unenforceable.
People v McNeil (2022 NY Slip Op 06294)

FOURTH DEPARTMENT

People v Andrews | Nov. 10, 2022

WITNESS PRECLUDED | NEW TRIAL

The defendant appealed from an Oswego County Court judgment convicting him of two counts of 1st degree sexual abuse and two counts of 2nd degree sexual abuse. The Fourth Department reversed and granted a new trial. County Court erred when it precluded a defense witness from testifying that the complainant offered to falsely accuse the witness's boyfriend of sexual abuse, around the same time that the first incident the defendant was accused of allegedly occurred. The nature of the false allegation was sufficiently similar to the charged allegations to cast doubt on the validity of the charges. D.J. & J.A. Cirando represented the appellant.
https://nycourts.gov/reporter/3dseries/2022/2022_06366.htm

People v Hemingway | Nov. 10, 2022

ADVERSE POSITION | NEW COUNSEL

The defendant previously appealed from an Onondaga County Court judgment convicting him of 1st degree criminal sexual act. The Fourth Department reversed and vacated the defendant's plea because County Court failed to advise him that the sentence included PRS. The defendant again plead guilty to 1st degree criminal sexual act, was sentenced to 15 years plus 5 years' PRS, and appealed from that conviction. The Fourth Department reserved decision and remitted the case for the assignment of new counsel and determinations regarding the defendant's pro se motion to withdraw his plea and regarding whether he should be granted youthful offender status. County Court erred when it failed to assign new counsel after defense counsel took a position adverse to the defendant's in response to his motion to withdraw his guilty plea. Defense counsel also gave erroneous advice to the defendant about the effect of the prior reversal. Hiscock Legal Aid Society (Sara Goldfarb, of counsel) represented the appellant.
https://nycourts.gov/reporter/3dseries/2022/2022_06356.htm

People v Bennett | Nov. 10, 2022

CPL 440.46-a | PROCEDURE

The defendant appealed from a judgment of Ontario County Supreme Court, convicting him of multiple counts of 2nd and 3rd degree CPW and one count of 4th degree criminal possession of marijuana. The Fourth Department affirmed the conviction, but remitted for resentencing. Instead of arguing on appeal that Penal Law Article 222 should apply retroactively to the marijuana-related conviction, the defendant should have petitioned Supreme Court to vacate the conviction pursuant to CPL 440.46-a. Resentencing was needed to correct illegally imposed indeterminate terms of incarceration on the 3rd degree weapon convictions.
https://nycourts.gov/reporter/3dseries/2022/2022_06357.htm

NYCLU v Syracuse Police | Nov. 10, 2022

FOIL | DISCIPLINARY RECORDS

The petitioner appealed from a judgment of Onondaga County Supreme Court, which granted the respondents' motion to dismiss the CPLR Article 78 proceeding challenging the denial of a FOIL request. The Fourth Department modified, reinstating the petition insofar as it sought the disclosure of law enforcement disciplinary records, subject to redaction pursuant to particularized and specific justification, and granting the petition to that extent. The records at issue concerned open complaints, as well as closed but unsubstantiated complaints, of police misconduct. Supreme Court erred in determining that the personal privacy exemption under Public Officers Law § 87(2)(b) allowed the respondents to categorically withhold the records at issue. The NYCLU (Robert Hodgson, of counsel) and Latham & Watkins represented the appellant. [**NOTE:** The Fourth Department issued a similar decision against the Rochester Police Dept.]

New York Civ. Liberties Union v Syracuse (2022 NY Slip Op 06348)

New York Civ. Liberties Union v City of Rochester (2022 NY Slip Op 06346)

NYCLU Seeks Police Transparency in Appellate Court

FAMILY

SECOND DEPARTMENT

McDowell v Marshall | Nov. 9, 2022

MOTHER | NOT VEXATIOUS

The mother appealed from an order of Kings County Family Court, which granted the father's petition to modify custody provisions of the parties' stipulation. The Second Department modified. Family Court properly found a change of circumstances, based on the mother's repetition of unfounded sexual abuse allegations and the growing hostility between the parents that made joint decision-making untenable. However, Family Court improvidently exercised its discretion in directing that the mother seek permission from the court before filing additional petitions. She had not engaged in vexatious litigation or filed petitions in bad faith by filing one family offense petition, which was deemed unfounded, and one related custody modification petition. Robert Spolzino and Lisa Florio represented the mother.

McDowell v Marshall (2022 NY Slip Op 06248)

FOURTH DEPARTMENT

Grimes v Medero | Nov. 10, 2022

CHILD SUPPORT | MOOT

The mother appealed from an order of Yates County Family Court, which denied her objections to a Support Magistrate's order regarding her petition to modify child support. The appeal was dismissed as moot. As to prospective child support, during the pendency of the appeal, the subject child turned 21, so the mother's obligation to pay support ceased. Regarding support already paid, even if the mother succeeded upon appeal, she would have no avenue to regain sums she might have overpaid. There was no basis here to depart from the strong public policy against recoupment of child support overpayments.

Grimes v Medero (2022 NY Slip Op 06362)

S.P. v M.P. | Nov. 10, 2022

CONTEMPT | REVERSED

In post-divorce child custody litigation, the mother appealed from an order of Niagara County Supreme Court that fined her $1,000 upon finding her in criminal contempt. The Fourth Department reversed. As a preliminary matter, since an adequate record existed for review, the appellate court entertained the appeal. (Ordinarily, a direct appeal did not lie from an order summarily punishing a person for contempt committed in the presence of the court; a CPLR Article 78 proceeding was needed to develop the record.) Supreme Court erred in not advising the mother that she was in peril of being held in contempt and not giving her an opportunity to offer any reason in law or fact why such adjudication should not be pronounced. The mother represented herself in the appeal. [**NOTE:** In custody proceedings during matrimonial litigation, an appeal as of right would lie from many temporary orders, pursuant to CPLR 5701 (a), whereas in Family Ct Act Article 6 custody proceedings, an appeal from a temporary or interim order would be available only by permission, pursuant to § 1112 (a).

S.P. v M.P. (2022 NY Slip Op 06377)

Matter of Briana S. –S. | Nov. 10, 2022

TPR | AFFIRMED

The respondents appealed from an order of Genesee County Family Court, which terminated their parental rights on the ground of permanent neglect. The Fourth Department affirmed. As to the mother, Family Court properly admitted at the dispositional hearing a psychological report prepared after a court-ordered examination. If it was material and relevant, hearsay evidence was admissible at the dispositional stage. *See* Family Ct Act § 624. Regarding the father, Family Court properly denied a request for an adjournment when he was not transported from prison for the first day of the fact-finding hearing. The court balanced the child's need for a prompt, permanent adjudication against the father's need to be present. When absent, the father was represented by counsel, and he failed to show that prejudice flowed from the denial of an adjournment.

Briana S.-S. (Emily S.) (2022 NY Slip Op 06337)