Indigent Legal Services

Decisions of Interest

NOVEMBER 21, 2022

CRIMINAL

COURT OF APPEALS

People v Johnson | Nov. 17, 2022

CONSTITUTIONAL SPEEDY TRIAL | *TARANOVICH* MISAPPLIED

The defendant appealed from a Fourth Department order affirming a County Court judgment convicting him of 2nd degree rape. The Court of Appeals reversed and remitted. Judge Wilson wrote for a unanimous court. In several material ways, the Appellate Division misapplied the *Taranovich* factors. The length of delay (eight years pre-indictment) favored the defendant, while the fact that he was not incarcerated pretrial did not. Without analysis, the Fourth Department concluded that the factors as to the reasons for delay and the nature of the crime favored the defendant. The Appellate Division further held that the preindictment delay could not have impaired the defendant's ability to defend himself on the charge of which he was convicted, since he pled guilty only to 2nd degree rape—which depended solely on the age difference between the defendant and the victim. That was error. When an indictment had multiple counts, if the defendant's ability to defend one count was impacted by the delay, it might weaken his plea bargaining position. Thus, the prejudice analysis had to consider all counts pending when the dismissal motion was made. The Monroe County Public Defender (Timothy Davis, of counsel) represented the appellant.

People v Johnson (2022 NY Slip Op 06537)

People v Jimenez | Nov. 17, 2022

GRAND JURY | JUSTIFICATION | DOG

Queens County Supreme Court dismissed the indictment charging the defendant with aggravated cruelty to an animal and other offenses. The Second Department reversed and reinstated the indictment, and the COA affirmed. Judge Rivera authored the unanimous opinion, which rejected the defendant's argument that the grand jury proceeding was seriously impaired because the prosecutor did not deliver a charge on justification under Penal Law § 35.05 (2). That "choice of evils" provision reflected a policy to absolve a defendant of criminal liability where he committed an otherwise criminal act out of necessity to avoid a greater injury. Only in rare circumstances would that defense apply. The evidence did not support the defendant's claim that he had struck a small dog with a stick to avoid a potentially fatal dog-bite infection. He testified before the grand jury that he was not afraid of the dog, never intended to hurt her, and struck her by mistake during a struggle with another person.

People v Jimenez (2022 NY Slip Op 06541)

FIRST DEPARTMENT

People v Sanford | Nov. 15, 2022

ALTERNATE JUROR | UNAVAILABLE

The defendant appealed from a judgment of New York County Supreme Court convicting him of 2nd degree assault. The First Department reversed and order a new trial. The alternate jurors were excused after summations, but before deliberations began. Subsequently, one deliberating juror was discharged, and the defendant requested a mistrial. Supreme Court denied the request and seated a previously excused alternate. The First Department had held the appeal pending a Court of Appeals decision regarding a codefendant's appeal. Pursuant to that decision, *People v Murray* (2022 NY Slip Op 05916), an alternate juror was no longer "available for service" after being discharged. Legal Aid Society, NYC (Harold Ferguson and Isaac Gelbfish, of counsel) represented the appellant.

People v Sanford (2022 NY Slip Op 06446)

Makhani v Kiesel | Nov. 17, 2022

PROHIBITION GRANTED | AG PROSECUTION

In a CPLR Article 78 proceeding, the petitioner sought to enjoin a trial on an indictment arising from alleged fraud in obtaining titles to certain real properties. The First Department granted the writ of prohibition and dismissed the indictment. Addressing an issue of first impression, the appellate court held that the AG may not criminally prosecute an individual based on an Executive Law § 63 (3) referral from the Chief Administrative Judge of the Unified Court System. Such a referral could only come from an agency within the executive branch. Because the agencies enumerated in the statute were within the executive branch, it was reasonable to infer that the "the other agencies" must lie within that branch as well. The instant issue was the type for which the extraordinary remedy of prohibition would properly lie. The prosecutor and the court exceeded their power so as to implicate the legality of the entire criminal proceeding.

Makhani v Kiesel (2022 NY Slip Op 06556)

People v Dilligard | Nov. 17, 2022

SUPPRESSION | FORFEITED

The defendant appealed from a judgment of Bronx County Supreme Court, convicting him of 1st degree manslaughter. The First Department affirmed. By pleading guilty before a final suppression ruling was rendered, the defendant forfeited review of his request for a *Wade* hearing. In deciding the motion, the trial court had granted a *Rodriguez* hearing regarding the extent of a witness's familiarity with the defendant, to be followed by a *Wade* hearing if the People failed to establish familiarity. By its express terms, the order did not constitute an order finally denying the motion to suppress.

People v Dilligard (2022 NY Slip Op 06564)

SECOND DEPARTMENT

People v Mendoza | Nov. 16, 2022

SCI | DEFECTIVE

The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 2nd degree course of sexual conduct against a child. The Second Department vacated the defendant's plea, dismissed the SCI, and remitted. The defendant was charged by felony

complaint with 1st degree course of sexual conduct against a child and endangering the welfare of a child. The sole charge in the SCI—2nd degree course of sexual conduct against a child—was not an offense for which he had been held for the action of a grand jury, nor was it a lesser included offense of a crime charged in the felony complaint. Thus, the SCI was jurisdictionally defective. If warranted, further proceedings could be had on the felony complaint in the local criminal court. Appellate Advocates (Michael Arthus, of counsel) represented the appellant.
People v Mendoza (2022 NY Slip Op 06499)

People v Christopher D. | Nov. 16, 2022

YO | GRANTED

The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 3rd degree robbery based on his guilty plea. The Second Department reversed, replaced the conviction with a youthful offender finding, vacated the sentence, and remitted the case for further proceedings pursuant to CPL 720.35. In the exercise of its discretion, the appellate court determined that YO status should be granted. Lynn W.L. Fahey and Joshua Levine represented the appellant.
People v Christopher D. (2022 NY Slip Op 06492)

People v Garcia | Nov. 16, 2022

SHOW-UP | NOT SUGGESTIVE

The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 2nd degree assault and other crimes. The Second Department affirmed, finding that Supreme Court had properly denied the defendant's motion to suppress identification evidence from a show-up identification. Although disfavored, such identifications were permitted when exigent circumstances required an immediate identification. The show-up here was conducted near the time and place of the crime. Even though the defendant and his co-defendants were flanked by police officers during the ID, the procedure was deemed not unduly suggestive.
People v Garcia (2022 NY Slip Op 06496)

FOURTH DEPARTMENT

People v Roots | Nov. 18, 2022

IAC | NO SUPPRESSION MOTION

The defendant appealed from a County Court judgment convicting him of 1st degree burglary. The Fourth Department reversed, vacated the defendant's plea, and remitted for further proceedings. There was no legitimate strategy for defense counsel's failure to file a suppression motion contending that the police lacked reasonable suspicion to seize the defendant. Counsel had prepared the motion but forgot to file it—despite two reminders from the court to do so because the People would not consent to a hearing on the legality of the detention. A limited suppression hearing was held; and there was no discernable reason the scope of the hearing could not have been expanded to include the potentially meritorious issue. The contention survived the defendant's guilty plea because suppression of the challenged evidence would have resulted in dismissal of at least some counts of the indictment, and therefore the error infected the plea bargaining process. The Monroe County Public Defender (Paul Skip Laisure, of counsel) represented the appellant.
https://nycourts.gov/reporter/3dseries/2022/2022_06617.htm

People v Soto | Nov. 18, 2022

CIRCUMSTANTIAL EVIDENCE | REQUESTED CHARGE

The defendant appealed from a Supreme Court judgment, convicting him of four counts of 2nd degree CPW, arising from his alleged possession of two separate firearms. The Fourth Department reversed in part and ordered a new trial on two counts. Supreme Court erred when it failed to give the jury an instruction on circumstantial evidence. The proof of the defendant's possession of one of the guns was entirely circumstantial, and the evidence against him was not overwhelming. The Monroe County Public Defender (Catherine Menikotz, of counsel) represented the appellant.
https://nycourts.gov/reporter/3dseries/2022/2022_06589.htm

People v Ismael | Nov. 18, 2022

EXCITED UTTERANCE | HARMLESS ERROR

The defendant appealed from a judgment of Erie County Supreme Court, convicting him of 2nd degree aggravated harassment and 1st degree criminal contempt. The Fourth Department affirmed. The conviction stemmed from threatening texts the defendant sent to his estranged wife. The trial court erred in admitting her statement as an excited utterance. Even if she experienced the requisite startling event, the statement did not reflect a fact or circumstance personally observed by her, but rather her inferential conclusion regarding the author of the messages. It was undisputed that the texts came from a number not identified as belonging to the defendant. The wife's identification of him was not a report of her contemporaneous observation, but rather her surmise. Nonetheless, the error in admitting the statement was harmless. The proof of the defendant's guilt was overwhelming, and there was no significant probability that the jury would have acquitted him had the error not occurred.
People v Ismael (2022 NY Slip Op 06614)

FAMILY

FIRST DEPARTMENT

Matter of Jada J. | Nov. 15, 2022

DEFAULT | REVIEW

The father appealed from an order of fact-finding and disposition entered in Bronx County in a neglect proceeding. The First Department affirmed. Although the order was entered upon the father's default, the appeal brought up for review an issue decided by Family Court that was the "subject of contest below" before the default—the denial of the father's motion to dismiss the petition for failure to establish a prima facie case of neglect. But the preponderance of the evidence supported the neglect finding.
Matter of Jada J. (2022 NY Slip Op 06430)

FOURTH DEPARTMENT

Burns v Grandjean | Nov. 18, 2022

DEEPLY FLAWED | VISITATION DECISION

The mother and AFC appealed from an order of Monroe County Supreme Court, which expanded the father's visitation in post-divorce custody modification proceedings. The Fourth Department modified, finding many defects in the challenged order. Family Court erred in (1) altering the terms of the parties' agreement and imposing house rules without conducting a "best interests" hearing; (2) not holding a *Lincoln* hearing to ascertain the two teenagers' wishes; (3) finding that no evidentiary hearing was needed as to whether the father's move closer to the children warranted expanded access; (4) after a contempt hearing, assigning certain "zones of interest" for parental decision-making; (5) limiting the AFC's interactions with her clients; (5) suspending the father's child support obligation without proof that the mother severely thwarted his visitation rights; and (6) holding the mother in civil contempt and imposing punitive, excessive penalties. Michael Steinberg represented the mother, and Walter Burkard represented the children.
Burns v Grandjean (2022 NY Slip Op 06577)

Sloma v Saya | Nov. 18, 2022

AFC | INEFFECTIVE

The AFC appealed from an order of Onondaga County Family Court, which dismissed the father's custody modification petition. The Fourth Department reversed, reinstated the petition, and remitted for a new trial. As a threshold matter, the AFC had standing to appeal the order. The trial AFC rendered ineffective assistance. Counsel did not zealously advocate the child's position, and no exceptions allowing for the substitution of judgment applied. While the AFC made known to Family Court his client's wish that there should be a change in custody, counsel did not cross-examine the mother, police officers, or school social worker. Moreover, the trial AFC undermined the child's position in the cross-examination of the father and in a written submission opining that there was no change in circumstances. Susan Marris was the AFC on appeal.
Sloma v Saya (2022 NY Slip Op 06587)

Wagner v Wagner | Nov. 18, 2022

TRANSCRIPT | GAPS

The husband appealed from an order of Monroe County Supreme Court, which denied his motion for a reconstruction hearing in a matrimonial action. The Fourth Department reversed and remitted. A hearing had been sought to reconstruct portions of the parties' testimony that could not be transcribed due to malfunctions of the audio-recording system. Denial of such application was an abuse of discretion. Significant missing portions of testimony, including sections relating to child custody, precluded meaningful appellate review of such issue. David Tennant represented the appellant.
Wagner v Wagner (2022 NY Slip Op 06600)