Indigent Legal Services

Decisions of Interest

NOVEMBER 27, 2023

CRIMINAL

COURT OF APPEALS

People v Cabrera | November 21, 2023

BRUEN UNPRESERVED | *MIRANDA* VIOLATION | REVERSED

The appellant appealed from a First Department order affirming his 2nd degree CPW conviction. The Court of Appeals reversed and remitted, with two judges dissenting. The appellant was arrested based on information that he was traveling with firearms licensed only in Florida. While handcuffed, he admitted to having firearms and let an officer open the trunk of his car, where a rifle was visible. His handcuffs were removed at the precinct, and he signed *Miranda* warnings and a consent to search form. A search uncovered a disassembled rifle, three handguns, and ammunition. The appellant's Second Amendment claims were unpreserved. Although *Bruen* dramatically changed states' regulation of public gun possession, the high bar for excusing preservation based on an intervening SCOTUS decision was not met here. The claims were not foreclosed by controlling caselaw, unanticipated at the time of trial, or addressed in *Bruen*, and the record was insufficiently developed. However, reversal was warranted under *Miranda*; the appellant was in custody when he admitted to having guns. While the use of handcuffs is not custodial per se, it merits substantial weight. His written consent to search—signed 90 minutes later under less intimidating circumstances—was not tainted. In the dissent's view, anyone in handcuffs is entitled to *Miranda* warnings and the appellant's written consent to search was involuntary. There was no reason for the appellant to doubt the officer's misleading statements that his written consent was a mere formality. The Center for Appellate Litigation (Barbara Zolot, of counsel) represented the appellant.
People v Cabrera (2023 NY Slip Op 05968)

People v Telfair | November 21, 2023

BRUEN UNPRESERVED | *MOLINEUX* ERROR | REVERSED

The appellant appealed from a Second Department order affirming his 2nd degree CPW conviction. The Court of Appeals held that his *Bruen* arguments were unpreserved (*see Cabrera*) but reversed and remitted based on a *Molineux* error. Three judges dissented. Officers stopped the appellant's truck, smelled marijuana as they approached and saw a lit joint. A loaded .45 handgun, three other handguns and ammunition were found during an inventory search of the truck. Each firearm was licensed and registered in Florida, but not New York. The appellant claimed that he did not know the guns were there because he had recently moved and someone else packed the truck. The trial court erroneously allowed the People to admit evidence of two prior incidents where the appellant denied knowing that he had guns in his possession. These incidents were remote in time and

irrelevant to any issue other than propensity. The error was not harmless; the appellant's knowledge of the guns was the primary focus at trial. Barry Krinsky represented the appellant.
[People v Telfair (2023 NY Slip Op 05965)]

People v David | November 21, 2023

BRUEN UNPRESERVED | VALID INVENTORY SEARCH | AFFIRMED

The appellant appealed from a Fourth Department order affirming his 2nd degree CPW conviction. The Court of Appeals affirmed, with one judge dissenting. The appellant was pulled over for driving without headlights. The car was registered to someone not present. Because the appellant had a learner's permit and parked partially in a bike lane, the car was towed. An inventory search uncovered two handguns and a large amount of cash. Appellate counsel "raise[d] significant questions about whether, in light of *Bruen*, lack of licensure is an essential element" of CPW and must be charged to the jury. However, those arguments were not preserved (*see Cabrera*). The appellant further argued that the inventory search was invalid because protocol required the officer to ask if the car's owner was available before having it towed. The officer was not required to ask about alternative options that were not readily apparent; the appellant did not tell him that the car's owner was nearby and could retrieve the vehicle.
[People v David (2023 NY Slip Op 05970)]

People v Garcia | November 21, 2023

BRUEN UNPRESERVED | VOIR DIRE | NO ABUSE OF DISCRETION

The appellant appealed from a First Department order affirming his 2nd degree CPW convictions. The Court of Appeals held that his *Bruen* arguments were unpreserved (*see Cabrera*) and affirmed, with one judge dissenting. The trial court did not abuse its discretion by curtailing defense counsel's questioning of prospective jurors about their views of gun ownership and justification in the final round of voir dire. Counsel was permitted to elicit jurors' views on gun policy generally and whether they could be fair to a defendant accused of illegally possessing a firearm. In the dissent's view, an exception to the preservation requirement applied because the *Bruen* decision upended established law, and the Penal Law § 265.03 presumption that unlicensed possession is proof of intent to use the weapon unlawfully is facially unconstitutional. Further, the trial court abused its discretion by restricting defense counsel's voir dire of prospective jurors; similar questions in earlier rounds resulted in successful for-cause challenges.
[People v Garcia (2023 NY Slip Op 05969)]

People v Rivera | November 21, 2023

BRUEN UNPRESERVED | YO NOT WARRANTED | AFFIRMED

The appellant appealed from a Fourth Department order affirming his resentencing on a 2nd degree CPW conviction. The Court of Appeals affirmed, with one judge dissenting. The appellant's *Bruen* challenges were unpreserved (*see Cabrera)* and the sentencing court properly exercised its discretion in making the required youthful offender eligibility determination. While the court did not artfully articulate the relevant standards, it applied the correct statutory framework and properly denied the appellant YO status. There were insufficient mitigating circumstances to support YO adjudication, given the threatening way the appellant used the gun. In the dissent's view, the *Bruen* arguments were

preserved (*see Garcia*), but those claims would fail here because the minor appellant had no unrestricted right to possess an unlicensed weapon in public.
People v Rivera (2023 NY Slip Op 05967)

People v Pastrana | November 21, 2023

BRUEN UNPRESERVED | PERMISSIBLE ROADBLOCK | MRTA

The appellant appealed from a First Department order affirming his 2nd degree CPW conviction. The Court of Appeals affirmed, with three judges dissenting. The appellant's *Bruen* challenges were unpreserved (*see Cabrera).* His vehicle was stopped at a police roadblock set up the same day as the Puerto Rican Day Parade. Officers smelled marijuana, searched the car, and found a loaded firearm. A detective testified that the purpose of the roadblock was vehicle safety, the roadblock was marked by cones and two vans, every third car was stopped, and the appellant's car was stopped pursuant to that procedure. The People's showing of authorization for the roadblock was sufficient, albeit barely. The appellant's challenge was largely to the detective's credibility—a factual finding over which the Court has no jurisdiction—and his claim that the roadblock was discriminatory was unsupported by the record. The Marihuana Regulation and Taxation Act (MRTA) did not apply retroactively to render the vehicle search unlawful.
People v Pastrana (2023 NY Slip Op 05966)

People v Jordan | November 20, 2023

DNA ANALYST | CONFRONTATION CLAUSE | REVERSED

The appellant appealed from a Second Department order affirming her 2nd degree robbery conviction. The Court of Appeals reversed based on a Confrontation Clause violation. The appellant was charged with robbery after her DNA was found on a cellphone left behind by the robbers. A criminalist testified about laboratory procedures generally, but he did not explain who performed specific tasks for the relevant DNA profiles. His level of involvement in the crucial final stage of generating the DNA profiles was not discernable. His imprecise and conclusory statements failed to establish that he used his independent analysis on the raw data and was not merely proffering the conclusions of others. The error was not harmless. Sarah B. Cohen represented the appellant.
People v Jordan (2023 NY Slip Op 05957)

People v Espinosa | November 21, 2023

IAC | DNA ANALYST| CONFRONTATION CLAUSE | AFFIRMED

The appellant appealed from a Second Department order affirming his 2nd degree burglary conviction. The Court of Appeals affirmed, with one judge dissenting. The appellant was not deprived of the effective assistance of counsel by his attorney's failure to assert a Confrontation Clause objection to the admission of DNA reports through testimony of an analyst who did not perform, witness, or supervision the testing or independently analyze the raw data. Even if counsel failed to assert a meritorious challenge, the issue was not so clear-cut and dispositive that no reasonable attorney would have failed to assert it. The appellant did not demonstrate that the alleged error was not a legitimate trial strategy.
People v Espinosa (2023 NY Slip Op 05971)

People v Ortega | November 20, 2023

AUTOPSY REPORTS | CONFRONTATION CLAUSE | HARMLESS ERROR

The appellant appealed from a First Department order affirming her murder convictions. The Court of Appeals affirmed. The appellant admitted to stabbing and killing two children in her care but claimed she was not guilty by reason of insanity. Autopsy reports were admitted at trial through the testimony of a medical examiner (ME) who was not present during the autopsies. The autopsy reports were testimonial because: (1) they were made to establish some fact; (2) they contained indicia of formality; and (3) they were created under circumstances leading to an objective, reasonable belief that the statements would be used at trial. An ME may offer conclusions as to the cause and manner of death and surrounding circumstances where that person observed the autopsy or independently analyzed the primary data. Here, it was not clear if the testifying ME's conclusions were based on her independent review of primary data. But the appellant's admission to the murders rendered the error was harmless.
People v Ortega (2023 NY Slip Op 05956)

People v Brown | November 21, 2023

SORA | NO SEXUAL CONDUCT OR MOTIVATION | REVERSED

The appellant appealed from a Second Department order affirming his level one sex offender designation. The Court of Appeals reversed and vacated the sex offender designation, with three judges dissenting. The appellant pleaded guilty to 1st degree unlawful imprisonment and other charges after restraining his minor cousin while robbing his aunt. Unlawful imprisonment of a minor by a non-parent is a SORA-eligible crime. *People v Knox* (12 NY3d 60 [2009]) did not control because the SORA court found that the appellant posed no sexual threat and his crime was not sexual. SORA mandatory registration was unconstitutional as applied here. It was not rationally related to SORA's purpose of protecting the public from sex offenders, and the stigma of a sex offender designation did not rationally fit the appellant's conduct. Two judges would have held automatic registration facially unconstitutional if the crime involves no sexual motivation and the offender presents no sexual threat to children. To the extent *Knox* held otherwise, they would overrule it. Appellate Advocates (Ava C. Page, of counsel) represented the appellant.
People v Brown (2023 NY Slip Op 05973)

People v Rodriguez | November 21, 2023

BICYCLE STOP | EQUIVALENT TO TRAFFIC STOP | REVERSED

The appellant appealed from a Second Department order affirming his attempted 2nd degree CPW conviction. The Court of Appeals reversed, granted suppression, and dismissed the indictment. Three judges dissented. The appellant was riding his bicycle in the middle of a road when several officers drove alongside him, directed him to stop, and asked what he had on him. The appellant admitted to carrying a loaded gun. Because there is no meaningful constitutional distinction between stopping a vehicle and stopping a bicycle, interference with a bicyclist is a seizure requiring reasonable suspicion of an offense or probable cause of a VTL violation. There was no suspected VTL violation and the officers' observation that the appellant was holding a bulky object in his waistband did not establish reasonable suspicion of criminality. Appellate Advocates (Hannah Kon, of counsel) represented the appellant.
People v Rodriguez (2023 NY Slip Op 05972)

People v Debellis | November 21, 2023

IAC | FAILURE TO REQUEST JURY CHARGE | REVERSED

The appellant appealed from a First Department order affirming his 2nd degree CPW conviction. The Court of Appeals reversed and remitted for a new trial, with three judges dissenting. Trial counsel was ineffective for failing to request a jury charge on the only defense supported by the evidence. After a traffic stop, the appellant—whose firearm license had been suspended a year prior—was found to be in possession of a gun and ammunition. He claimed that his wife had thrown him out of the house after an argument about finances, so he was bringing the gun and ammunition to a local police department for a gun buyback program. Defense counsel failed to request a charge for voluntary surrender under Penal Law § 265.20 (a) (1)—the only charge that would have given his proffered defense any legal weight. The Center for Appellate Litigation (Matthew Bova, of counsel) represented the appellant.

[People v Debellis (2023 NY Slip Op 05964)]

People v Cuencas | November 21, 2023

WARRANTLESS ENTRY | THIRD PARTY CONSENT | NO APPARENT AUTHORITY

The appellant appealed from a Second Department order affirming his 2nd degree murder convictions. The Court of Appeals reversed and remitted, with three judges dissenting. Police sought to arrest the appellant in relation to a murder. They repeatedly knocked on the exterior door and a first-floor window of a two-story, two-family residence where they thought he could be found. A man looked out the window, then opened the exterior door. The officers identified themselves and he moved aside, allowing them to enter. The officers saw the appellant through the open door of the downstairs apartment, entered the apartment, and arrested him. The appellant later confessed. The appellant's warrantless arrest was illegal. The officers' belief that the man came from the first-floor apartment of a multi-family building to answer the door did not establish his apparent authority without an affirmative statement or demonstration of authority. Remittal was required to determine whether evidence resulting from "the illegal search [wa]s sufficiently attenuated from the illegal arrest." Appellate Advocates (Yvonne Shivers, of counsel) represented the appellant.

[People v Cuencas (2023 NY Slip Op 05974)]

People v Medina | November 21, 2023

TRAFFIC STOP | *DE BOUR* | AFFIRMED

The appellant appealed from a Third Department order affirming his 2nd degree CPW conviction. The Court of Appeals affirmed. Following a lawful traffic stop, the appellant was observed sitting in an unnatural and contorted position, attempting to shield the right side of this body from view, and he gave inconsistent statements about where he was coming from. The issue on appeal, whether the officer's subsequent request to search conformed with *DeBour,* presented a mixed question of fact and law. The record was sufficient to support a holding of founded suspicion to request consent to search the vehicle.

[People v Medina (2023 NY Slip Op 05963)]

FIRST DEPARTMENT

People v Anonymous **|** November 21, 2023

SENTENCE VACATED | REMANDED

The appellant appealed from a New York County Supreme Court judgment convicting him of 1st degree manslaughter and 2nd degree CPW (two counts) and sentencing him to an aggregate 32 years. The First Department invoked its interest of justice jurisdiction, vacated the sentences, and remanding for resentencing. The trial court improperly based the 25-year sentence on the manslaughter conviction on its stated belief that the appellant intended to kill the victim. Intent to kill is an element of 2nd degree murder, of which the appellant was acquitted. Further, the imposition of consecutive sentences on the manslaughter and simple CPW was improper; there was no evidence the appellant possessed the firearm before shooting the victim. The Legal Aid Society of NYC (Katherine M.A. Pecore, of counsel) represented the appellant.

People v Anonymous (2023 NY Slip Op 05990)

SECOND DEPARTMENT

People v Godwin **|** November 22, 2023

SORA | RISK LEVEL REDUCED

The appellant appealed from a Richmond County Supreme Court order designating him a level two sex offender. The Second Department reversed and reduced his designation to a level one. Points were improperly assessed on factor 4 because the People did not prove that the offense was a continuing course of conduct. Further, no points should have been assessed on factor 12 because the People failed to show that the appellant did not accept responsibility for his conduct. The Legal Aid Society of NYC (Elizabeth B. Emmons, of counsel) represented the appellant

People v Godwin (2023 NY Slip Op 06064)

THIRD DEPARTMENT

People v Kelly **|** November 22, 2023

PROMOTING PRISON CONTRABAND | *MIRANDA* | REVERSED

The appellant appealed from a Washington County Court judgment convicting her of 1st degree promoting prison contraband, 5th degree CPCS, and 2nd degree promoting prison contraband (two counts). The Third Department reversed, vacated the appellant's plea, suppressed her statements, and remitted. After going through prison security, a dog alerted to the presence of narcotics on the appellant's person. She was brought to a separate, administrative wing, where she admitted to carrying drugs. After being *Mirandized,* she gave a written statement. A reasonable, innocent person would not feel free to leave under these circumstances, and the investigator's inquiry as to why she thought the canine alerted was designed to elicit an incriminating response. The appellant's subsequent written statement was tainted by the improper custodial interrogation. John A. Cirando represented the appellant.

People v Kelly (2023 NY Slip Op 06003)

People v Hoffman | November 22, 2023

CPL 440.10 | *BRADY* | REVERSED

The appellant appealed from a Rensselaer County Court order denying his CPL 440.10 motion after a hearing. The Third Department reversed and granted a new trial. The appellant was convicted of 1st degree vehicular manslaughter and other related counts. The car the appellant and the decedent were traveling in lost control, flipped several times and landed on its roof, ejecting the decedent. In his 440 motion the appellant submitted evidence that the People were aware and failed to disclose that officers who operated a Total Work Station mistook shadows from overhead utility lines as tire marks. Because the defense expert used this erroneous data in his analysis, his standard formulas for calculating speed returned illogical results—which the People used to discredit his testimony about speed and his conclusion that the decedent was the driver. This information would have undoubtedly changed the defense trial strategy; accident reconstruction was a material issue in this case. Aaron M. Rubin represented the appellant.
[People v Hoffman (2023 NY Slip Op 06004)]

People v Liz L. | November 22, 2023

DVSJA | TEMPORAL NEXUS | RESENTENCING GRANTED

The appellant appealed from a Broome County Court order that denied her CPL 440.47 resentencing motion after a hearing. The Third Department reversed, granted the motion, and reduced her sentence of 10 years' incarceration and 5 years of PRS by half, resulting in her immediate release. The hearing court erred as to each of the DVSJA's three prongs. First, the requirement that an applicant was a victim of substantial abuse "at the time of the offense" does not mean that the abuse and the offense must occur contemporaneously, which would implicate the defenses of justification or duress and is not required by the statute. Second, the court failed to determine whether the abuse was a "significant contributing factor" to the offense. Third, that the plea bargain already considered the domestic violence history, or that the sentence was relatively favorable, are not relevant to whether the original sentence is unduly harsh—all relevant factors must be considered, including the nature of the crime, the history of abuse, her prior record, prison programming, family support, and expressions of remorse. Gibson, Dunn & Crutcher LLP (Karin Portlock, of counsel), the Broome County Public Defender, and Brooklyn Law School Legal Services Corp. represented the appellant.
[People v Liz L. (2023 NY Slip Op 06008)]

People v Jones | November 22, 2023

WEIGHT OF THE EVIDENCE | DRIVER'S IDENTITY | REVERSED

The appellant appealed from a Rensselaer County Court judgment convicting him of 1st degree manslaughter. The Third Department reversed and dismissed the indictment. The verdict was against the weight of the evidence on the issue of identity. Video footage showed a driver exiting a vehicle and shooting the victim. An officer pursued and stopped the vehicle and saw three individuals exit the passenger side of the car. The appellant was later found hiding nearby in the grass. The circumstantial proof failed to exclude beyond a reasonable doubt the possibility that one of the other occupants was the driver. The officer never saw the driver's door open, the video footage was pixelated, and another occupant of the vehicle wore similar clothing. Matthew C. Hug represented the appellant.
[People v Jones (2023 NY Slip Op 06007)]

People v Pittman **|** November 22, 2023

SPEEDY TRIAL | HEARING REQUIRED | HELD AND REMITTED

The appellant appealed from a Cortland County Court judgment convicting her of 2nd degree CPW, 2nd degree assault, and 1st degree reckless endangerment. The Third Department held the appeal and remitted for a hearing. The appellant fled to Virginia after a witness identified her as the perpetrator in a 2013 shooting. She was charged by felony complaint in September 2013 and by sealed indictment in November 2014. She was arrested in August 2018, returned on the warrant, and arraigned on the indictment in October 2018. The trial court erred in denying the appellant's speedy trial motion without a hearing. The appellant alleged that the People were aware of her whereabouts for a good portion of the time that she was in VA and, despite her repeated detention, they failed to secure her presence in NY for five years. The Rural Law Center (Kristin A. Bluvas, of counsel) represented the appellant.
People v Pittman (2023 NY Slip Op 06001)

TRIAL COURTS

People v A.O. **|** 2023 WL 8010864

TERPO | NOT A SEARCH WARRANT | SUPPRESSION GRANTED

A.O. was charged with 3rd degree CPCS and sought, among other things, suppression of physical evidence. Erie County Court granted the suppression motion. Police searched A.O.'s home while executing a Temporary Extreme Risk Protection Order (TERPO) and found certain evidence. While a TERPO court can direct police to search a respondent's home for firearms in a manner consistent with CPL 690, the purpose of a TERPO and a search warrant are different. Further, the TERPO application and order here were overly broad and lacked sufficient particularity to satisfy CPL 690 and constitutional requirements for a search warrant. Therefore, the order, as a civil remedy, could not form the basis of this criminal prosecution. Robert Ross Fogg represented A.O.
People v A.O. (2023 NY Slip Op 23356)

The ILS Decisions of Interest summaries are for informational purposes only and are not intended to provide legal advice to any individual or entity. While every effort has been made to ensure their accuracy, the summaries are provided on an "as is" basis with no express or implied guarantees of completeness, accuracy, or timeliness.

Statewide Appellate Support Center
New York State Office of Indigent Legal Services
80 S Swan St, Ste 1147, Albany, NY 12210 | www.ils.ny.gov
(518) 486-6602 | SASC@ils.ny.gov