

Decisions of Interest

NOVEMBER 4, 2022

CRIMINAL

FIRST DEPARTMENT

People v Pawaroo | Nov. 3, 2022

RESTITUTION | \$382K PROPER

The defendant appealed from a judgment rendered by New York Supreme Court, which revoked probation, imposed a resentencing, and ordered restitution. The First Department affirmed. The defendant failed to preserve her challenge to restitution. In any event, the award was proper. The defendant had stolen \$587,000 from her former employer by depositing insurance checks in her own bank accounts. In imposing restitution as a condition of probation, the court had properly considered the defendant's ability to pay. When probation was revoked, the court reissued the order in the amount of \$382,000 to reflect payments already made.

[People v Pawaroo \(2022 NY Slip Op 06176\)](#)

SECOND DEPARTMENT

People v Marcial | Nov. 3, 2022

SUPPRESSION THEORY | AUTO EXCEPTION

The defendant appealed from a judgment of the Kings County Supreme Court, convicting him of multiple counts of 2nd degree burglary and 5th degree criminal possession of stolen property, following a jury trial. The Second Department reversed the judgment, granted the defendant's motion to suppress the physical evidence, and remitted. Under the circumstances presented, it was not improper for Supreme Court to rely on a theory not argued by the People in denying suppression. This case could be distinguished from *People v Tate*, 189 AD3d 1088 (2d Dept 2020), because here the People did not "affirmatively concede" that there was insufficient probable cause for the search. However, the proof did not support the automobile exception to the search warrant requirement—the theory applied by Supreme Court. The evidence in question was located within a closed backpack that was inside the car the defendant had been driving. The facts did not give rise to probable cause to believe that evidence of burglaries that occurred at least one day before would be found in the car; and the defendant had been taken into police custody before the car was searched. Appellate Advocates (Alexis Ascher, of counsel) represented the appellant.

[People v Marcial \(2022 NY Slip Op 06142\)](#)

***People v Lynch* | Nov. 3, 2022**

SENTENCING | SVFO | VACATED

The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 1st degree gang assault, upon his plea of guilty. The Second Department modified, vacating the defendant's adjudication as a second violent felony offender, since he committed the instant offense before he was sentenced on the prior conviction. The issue was not subject to the preservation rule. Appellate Advocates (Tammy Lin, of counsel) represented the appellant.

[People v Lynch \(2022 NY Slip Op 06141\)](#)

THIRD DEPARTMENT

***People v Witherspoon* | Nov. 3, 2022**

VIRTUAL SENTENCING | AFFIRMED

The defendant appealed from a Schenectady County Court judgment, convicting him of attempted 2nd degree assault. The Third Department affirmed, rejecting the defendant's argument that County Court improperly sentenced him via an electronic appearance without his consent. The issue was unpreserved, and the appellate court declined to expand the mode-of-proceedings doctrine to find that preservation was not required here. Also without merit was the defendant's contention that the plea was not valid because County Court did not advise him of deportation consequences. He was a U.S. citizen.

[People v Witherspoon \(2022 NY Slip Op 06196\)](#)

FAMILY

SECOND DEPARTMENT

***Matter of Adoptive Child A.* | 2022 NY Slip Op 51069(U)**

ADOPTION DENIED | EGREGIOUS BEHAVIOR

The petitioner, who was unrelated to the child, filed a petition for adoption, alleging that the biological mother had abandoned the child so her consent was not needed under DRL § 111(2)(a). Rockland County Family Court denied the petition. During the statutory six-month period, the petitioner begged the grandmother/legal guardian to allow her to have contact with the child, age 3. Even while in a hospital recovery program, the mother tried to call the grandmother about the child. A nurse told the mother that the grandmother would not speak with her but the mother could write letters to the grandmother—which she did, to no avail. (The petitioner's attorneys failed to object to such hearsay testimony, so Family Court considered it.) The petitioner and grandmother had apparently colluded to bar mother-child contact. They disingenuously blamed the mother for failing to visit, made a permanent plan for the child behind her back, and led the child to believe that the petitioner was her mother.

https://nycourts.gov/reporter/3dseries/2022/2022_51069.htm