

CRIMINAL

COURT OF APPEALS

People v Bay | December 14, 2023

DISCOVERY | SPEEDY TRIAL | NO DUE DILIGENCE | DISMISSED

The appellant appealed from a Cortland County Court order affirming his 2nd degree harassment conviction. The Court of Appeals reversed and dismissed the charge. The trial court should have granted the appellant's speedy trial motion based on the People's failure to comply with their discovery obligations. When a defendant challenges the validity of a COC, the People must show that they exercised due diligence and made reasonable inquiries before filing the COC. Prejudice need not be shown to obtain a speedy trial dismissal. Here, the belated disclosure consisted of routinely produced materials, the absence of which was readily noticed by defense counsel. The prosecutor merely speculated that the items did not exist and made no mention of any efforts to ascertain their existence. The Cortland County Public Defender (Kayla Hardesty, of counsel) represented the appellant. Amicus briefs were submitted by the NYS Association of Criminal Defense Lawyers (Drew DuBrin, of counsel); the Albany County Public Defender (James Bartosik, Jr., of counsel); the Albany County ACP Program (Hon. William A. Carter, of counsel); and the Legal Aid Society NYC (John Schoeffel, of counsel).

[People v Bay \(2023 NY Slip Op 06407\)](#)

People v Perdue | December 14, 2023

FIRST-TIME IN-COURT IDENTIFICATION | AFFIRMED

The appellant appealed from a Fourth Department order affirming his conviction for 2nd degree assault and 2nd degree CPW (two counts). The Court of Appeals affirmed, with one judge dissenting. When the People plan to call a witness who will make a first-time, in-court identification, they must inform the defendant as early as practicable. Upon the defendant's request, the trial court may fashion a pre-trial procedure to reduce the risk of misidentification, after weighing the probative value of the identification against the prejudice to the defendant. Here, the appellant was aware that a witness might make a first-time, in-court identification, the witness's testimony and pretrial statements established the reliability of the identification, and the appellant was not significantly prejudiced. The dissent would adopt a rule requiring a pre-trial procedure when

identification is at issue, the witness is a stranger, and the witness's memory of the crime is the only basis for the identification.

[People v Perdue \(2023 NY Slip Op 06404\)](#)

FIRST DEPARTMENT

People v Murray | December 14, 2023

ASSAULT | INSUFFICIENT INJURY | MODIFIED

The appellant appealed from a New York County Court judgment convicting him of 1st degree assault, attempted 1st degree assault, 2nd degree assault (two counts), and 3rd degree CPW. The First Department modified by dismissing the 1st degree assault charge, reducing the 2nd degree assault to a 3rd degree assault conviction, and remanding for resentencing. The victim's two-to-three-centimeter forehead laceration did not constitute serious disfigurement or serious physical injury. The Office of the Appellate Defender (Katrina Jean Myers, of counsel) represented the appellant.

[People v Murray \(2023 NY Slip Op 06454\)](#)

People v Castro | December 14, 2023

AUO | DLSRA | NOT RETROACTIVE

The appellant appealed from a Bronx County Supreme Court judgment convicting him of 2nd degree AUO based on his guilty plea. The First Department affirmed. The appellant argued that his conviction should be vacated based on a retroactive application of the 2021 Driver's License Suspension Reform Act (DLSRA), which amended VTL § 510 (4-a) to remove failure to pay a fine as a basis for license suspensions. Nothing in the statutory language suggested a legislative intent to authorize retroactive vacatur of AUO convictions arising from suspensions based on failures to pay fines.

[People v Castro \(2023 NY Slip Op 06452\)](#)

THIRD DEPARTMENT

People v Dibble | December 14, 2023

OUTLEY | HEARING REQUIRED | REMANDED

The appellant appealed from an Ulster County Court judgment convicting her of 3rd degree CSCS and criminally negligent homicide based on her guilty plea. The Third Department vacated the sentence and remitted for an *Outley* hearing. As part of her plea bargain, the appellant was informed that County Court would not be bound by its sentencing commitment if she failed to truthfully answer the probation department's questions during the presentence investigation. At sentencing, the court found that the appellant's statement to probation conflicted with her plea allocution and constituted a denial of guilt as to the negligent homicide charge. The court denied the appellant's request for a hearing on the alleged violation of the plea agreement and imposed an enhanced sentence. G. Scott Walling represented the appellant.

[People v Dibble \(2023 NY Slip Op 06411\)](#)

People v Berry | December 14, 2023

WAIVER OF INDICTMENT | INVALID | SCI DISMISSED

The appellant appealed from a Schenectady County Court judgment convicting him of failure to register as a sex offender based on his guilty plea. The Third Department reversed and dismissed the SCI. The appellant's waiver of indictment was invalid. He orally agreed to waive indictment in open court, but the signed written waiver bore a different date. The minutes did not show that the appellant signed the written waiver in open court, as constitutionally required. Sandra M. Colatosti represented the appellant.

[People v Berry \(2023 NY Slip Op 06410\)](#)

TRIAL COURTS

People v Dunmeyer | 2023 WL 8535207

CPL 30.30 | INVALID COC | DISMISSED

Dunmeyer moved to dismiss attempted 2nd degree murder and other related charges on speedy trial grounds. New York County Supreme Court granted the motion. The People failed to disclose any information related to the prosecution of the complaining witness. The complainant was not a mere tangential witness; he was prosecuted for an assault on Dunmeyer, which led to the retaliatory shooting that gave rise to Dunmeyer's charges. The People failed to act with due diligence to satisfy their discovery obligations, rendering their COC and supplemental COCs invalid. Robert Gross represented Dunmeyer.

[People v Dunmeyer \(2023 NY Slip Op 51334\[U\]\)](#)

People v Evans | 2023 WL 8613799

MAPP/HUNTLEY | REFUSAL | EVIDENCE SUPPRESSED

Evans sought suppression of statements and evidence in relation to DWI charges filed against him. Queens County Criminal Court granted the motion to the extent of precluding liquor bottles found in his pockets, his statements at the scene, and his alleged refusal to submit to a chemical test. Evans was in custody when officers frisked and questioned him. Unlike ordinary traffic stops, which do not usually constitute custodial interrogations, here one officer restricted Evans' movement by holding the back of his jacket while another officer questioned him. Police may not frisk a detained individual simply because they are "always concerned" for their safety. The search of Evans' pockets was not incident to lawful arrest; the officer had not yet decided to arrest him. Lastly, Evans agreed to take a chemical test only a minute after his initial "no"; he did not persist in his refusal as required by VTL § 1194 [2] [f]. The Legal Aid Society of NYC (James Neville, of counsel) represented Evans.

[People v Evans \(2023 NY Slip Op 51352\[U\]\)](#)

FIRST DEPARTMENT

Matter of E.R. v S.C. | December 12, 2023

TRAVERSE HEARING | SERVICE BY TEXT MESSAGE | AFFIRMED

The child's paternal grandmother appealed from a Bronx County Family Court order which granted the mother's motion to vacate a custody order entered on her default. The First Department affirmed. Family Court permitted the grandmother to serve the mother by text message. At a traverse hearing, the paternal grandfather, who acted as process server, was unable to produce the text he purportedly sent to the mother with the summons and petition and his recollection of the service was "kind of fuzzy." The court's determination turned, in large part, on witness credibility. There was no basis for disturbing its conclusion that service was not effectuated on the mother.

[Matter of E.R. v S.C. \(2023 NY Slip Op 06330\)](#)

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