

Decisions of Interest

DECEMBER 19, 2022

CRIMINAL

COURT OF APPEALS

People v Kaval | Dec. 13, 2022

PEOPLE'S APPEAL | PERSISTENT VFO | DISSENT

The People appealed from a Second Department order that vacated the defendant's resentencing as a persistent violent felony offender and ordered his resentencing as a second VFO. The Court of Appeals reversed in a memorandum decision. Although the People provided insufficient proof of tolling at the initial sentencing, new evidence presented upon remittal was sufficient and should have been considered. The court had inherent authority to correct illegal sentences. Judge Wilson dissented. Given the absence of good cause for the People's failure to present all their proof at the first sentencing, fundamental fairness dictated that the defendant should have been sentenced as a second VFO.

[People v Kaval \(2022 NY Slip Op 07022\)](#)

People v Talluto | Dec. 13, 2022

SORA | OUT-OF-STATE NON-VIOLENT CRIME | DISSENT

The defendant appealed from a Fourth Department order affirming an Oswego County Court adjudication that he was a sexually violent sex offender. The COA affirmed. The statutory definition of a "sexually violent offense" encompassed a "conviction of a felony in any other jurisdiction for which the offender is required to register as a sex offender" in that jurisdiction. The defendant was convicted of a non-violent felony sex offense in Michigan, where he would have to register as a sex offender. Judge Troutman authored the majority opinion. In dissent, Judge Wilson observed that statutory language gave the SORA court discretion in designating a defendant a sexually violent offender and opined that the case should have been remitted to allow the lower court to exercise discretion.

[People v Talluto \(2022 NY Slip Op 07025\)](#)

People v Heiserman | Dec. 13, 2022

PEOPLE'S APPEAL | JUSTIFICATION CHARGE | UNWARRANTED

The People appealed from a Third Department order, which reversed the defendant's conviction, based on a finding that the trial court erred in denying his request for a justification instruction. In a unanimous memorandum opinion, the COA reversed. No reasonable view of the evidence supported a finding that it was excessive for an officer to pepper-spray the defendant to make him remove his shoes while being processed for arrest. The defendant had been directed many times to comply with the routine procedure, and he was warned of consequences for defiance. Since the officer's force was not excessive, the defendant's assault on him was not justified.

[People v Heiserman \(2022 NY Slip Op 07024\)](#)

***People v Ruiz* | Dec. 15, 2022**

PEOPLE'S APPEAL | TEMPORARY POSSESSION CHARGE | UNWARRANTED

The People appealed from a Fourth Department order reversing a judgment convicting her of 2nd degree CPW and granting a new trial. In a unanimous memorandum opinion, the COA reversed. The defendant testified that she shot at her boyfriend in the mistaken belief that he was her estranged husband. She requested an instruction on temporary and lawful possession of a weapon, based on her belief at the time of the crime that her life and her children's lives were under threat. County Court properly denied the request. The defendant used the weapon in a reckless and dangerous manner when she fired blindly through a closed, windowless door. She endangered anyone who might have been on the other side; killed the victim; and created a risk that the bullet would ricochet off the metal door and injure her children.

[People v Ruiz \(2022 NY Slip Op 07092\)](#)

***People ex rel. Molinaro v Warden* | Dec. 15, 2022**

PEOPLE'S APPEAL | CUSTODY | COMPETENCY

The COA declared that, when a defendant was not in custody, a court could not remand him into custody solely because a CPL Article 730 examination had been ordered. Various measures were available to ensure the completion of a competency exam for a defendant who was at liberty. After Kings County Supreme Court denied the defendant's habeas corpus petition, the Second Department had reversed and ordered his immediate release. Psychiatric evaluators then found him unfit to stand trial, and the charges against him were dismissed. The appeal was academic, but the mootness exception applied. Judge Rivera wrote for a unanimous court.

[Molinaro v Warden \(2022 NY Slip Op 07093\)](#)

***People v Lagano* | Dec. 13, 2022**

PEOPLE'S APPEAL | HARASSMENT | THREATS

The People appealed from an Appellate Term–Second Department order, which reversed the defendant's 2nd degree harassment conviction based on legally insufficient evidence. The COA reversed. A rational factfinder could have concluded that the defendant's statements—that he would kill the complainant's family, firebomb her home, and shoot her children in the head—were serious threats, not mere angry words. He was an armed police officer who believed that the complainant had betrayed him. Judge Rivera authored the unanimous opinion.

[People v Lagano \(2022 NY Slip Op 07021\)](#)

FIRST DEPARTMENT

***People v McBride* | Dec. 13, 2022**

INSUFFICIENT EVIDENCE | SERIOUS PHYSICAL INJURY

The defendant appealed from a judgment of New York County Supreme Court convicting him of two counts of 1st degree assault. The First Department reduced the convictions to attempted assaults. The evidence of serious physical injury was legally insufficient. However, in slashing the complainant in the face with a sharp object, the defendant had showed an intent to cause serious physical injury and permanent disfigurement. The Office of the Appellate Defender (Rosemary Herbert) represented the appellant.

[People v McBride \(2022 NY Slip Op 07034\)](#)

***People v Outlaw* | Dec. 13, 2022**

PRESERVATION | GENERAL OBJECTION

The defendant appealed from a judgment of NY County Supreme Court convicting him of various drug sale and possession charges. The First Department affirmed. The codefendant's conviction was reversed because the trial court had improperly excluded family members from the courtroom. See *People v Moore*, 145 AD3d 552. However, a statement by this defendant's counsel to join in the codefendant's application—without noting the presence of the defendant's family or stating that he wished to have certain relatives present during testimony—did not preserve the issue.

[People v Outlaw \(2022 NY Slip Op 07035\)](#)

SECOND DEPARTMENT

People v Rodriguez | Dec. 14, 2022

SEIZURE | NOT PLAIN VIEW

The defendant appealed from a judgment of Queens County Supreme Court convicting him of various crimes. The Second Department dismissed one count of 7th degree CPCS. Supreme Court should have suppressed a Ziploc bag of pills. The People did not claim that the pills were found during the search of the car, pursuant to the automobile exception to the warrant requirement. Instead, they argued that the officer saw the baggie in the car door. That, combined with the smell of marijuana and crumbs of pot on the defendant's shirt, purportedly provided probable cause. However, the People did not explain how they came to seize the pills, and the incriminating nature of the baggie's contents was not readily apparent. Appellate Advocates (Caitlyn Carpenter) represented the appellant.

[People v Rodriguez \(2022 NY Slip Op 07080\)](#)

APPELLATE TERM

People v Notice | 2022 NY Slip Op 51263 (U)

AG & MARKETS LAW | NEW THEORY | REVERSED

The defendant appealed from a judgment of Kings County Criminal Court, convicting him of violating Agriculture & Markets Law § 353, based on his mistreatment of a dog. Appellate Term—Second Department reversed. The factual allegations in the information concerned inadequate sustenance of the animal. But at trial, the People changed the theory of the case and relied on *Molineux* evidence concerning the inadequate veterinary care purportedly provided to the dog for ear infections and knee pain. The People were bound by the theory set forth in an accusatory instrument, given an accused's right to notice of the specifics of the criminal conduct charged. Since the defendant had completed his sentence and no penological purpose would be served by reinstating proceedings, all charges were dismissed. Appellate Advocates (Chelsea Lopez, of counsel) represented the appellant.

[People v Notice \(2022 NY Slip Op 51263\(U\)\)](#)

THIRD DEPARTMENT

People v Hatcher | Dec. 15, 2022

SEIZURE | NOT PLAIN VIEW

The defendant appealed from a Greene County Court judgment convicting him of attempted 2nd degree assault and from an order denying his CPL 440.10 motion. The Third Department affirmed.

As to the judgment, the plea was not involuntary. The defendant did not retain veto power over counsel's professional judgments. The mere fact that they disagreed as to the import of discovery documents and as to viable defenses did not deprive the defendant of decision-making power or render the plea involuntary. Regarding mixed claims of ineffective assistance, the defendant's failure to include either an affirmation from defense counsel, or an explanation for the affirmation's absence, warranted summary denial of the post-conviction motion. Counsel secured a favorable plea deal, and a simple disagreement on tactics did not support the IAC claim.

[People v Hatcher \(2022 NY Slip Op 07099\)](#)



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