

# Decisions of Interest

DECEMBER 26, 2023

## CRIMINAL

### COURT OF APPEALS

#### ***People v Butler*** | December 19, 2023

CANINE SNIFF SEARCH | *LAFONTAINE* | REVERSED AND REMITTED

The appellant appealed from a Third Department order affirming his 3<sup>rd</sup> degree CPCS and tampering with physical evidence convictions. The Court of Appeals reversed and remitted. Following a traffic stop, a police canine sniffed and alerted to drugs on the appellant's body. He fled and discarded a bag of heroin. The trial court denied suppression, concluding that the canine sniff did not constitute a search under the Fourth Amendment. The appellate court correctly held that it was a search, but exceeded its jurisdiction by holding that the search was justified under a reasonable suspicion standard—a ground not decided adversely to the appellant by the suppression court (see CPL 470.15 [1]; *People v LaFontaine*, 92 NY2d 470 [1998]). Remittal was required for the trial court to determine the standard governing a canine sniff search of a person, whether the standard was met here, and the issue of abandonment. Clea Weiss represented the appellant.

[People v Butler \(2023 NY Slip Op 06468\)](#)

### THIRD DEPARTMENT

#### ***People v Brenda WW.*** | December 21, 2023

DVSJA | RESENTENCE GRANTED

The appellant appealed from a Madison County Court order denying her application to be resentenced under the DVSJA (CPL 440.47). The Third Department reversed and reduced her 20-year sentence to 8 years, plus 5 years of PRS, making her eligible for immediate release. The appellant killed her abusive partner by stabbing him in the back. She was convicted of 1<sup>st</sup> degree manslaughter, 1<sup>st</sup> degree assault, and 3<sup>rd</sup> degree CPW. A “mutually abusive” relationship does not preclude DVSJA relief; a dynamic of mutual abuse is typical of people suffering from battered person syndrome. A history of abuse must be considered cumulatively; the appellant was a witness to and a victim of DV throughout her life. The unavailability of a justification defense does not foreclose DVSJA relief (see Penal Law § 60.12 [1]; [4]). Nor does an “extensive criminal history”; the appellant's prior convictions were attributable to her struggles with substance abuse, something common for DV survivors. Finally, a prior denial of an excessive sentence

claim on direct appeal is not determinative; the DVSJA involves a different analysis. Veronica Reed represented the appellant.

[People v Brenda WW. \(2023 NY Slip Op 06564\)](#)

***People v Munise*** | December 21, 2023

CRIMINAL NEGLIGENCE | FAILURE TO BRAKE | LEGALLY INSUFFICIENT

The appellant appealed from a Montgomery County Court judgment convicting him of criminally negligent homicide. The Third Department reversed and dismissed the indictment. The evidence was legally insufficient. The appellant was driving a box truck at 60 mph in a 55-mph zone when he struck the rear of the decedent's vehicle, causing a fatal collision. The parties' experts agreed that the accident was caused by his inattentiveness. But a failure to brake, without more, does not constitute criminal negligence. Paul Skip Laisure represented the appellant.

[People v Munise \(2023 NY Slip Op 06562\)](#)

***People v Smith*** | December 21, 2023

A-II FELONY | SCI DISMISSED | REMITTED

The appellant appealed from a Madison County Court judgment convicting him of 1<sup>st</sup> and 2<sup>nd</sup> degree rape based on his guilty plea. The Third Department reversed, dismissed the SCI, and remitted. The waiver of indictment and SCI were jurisdictionally defective. A defendant cannot waive indictment and proceed by SCI if he is charged with a class A felony punishable by life imprisonment. Here, the appellant was held for grand jury action upon a felony complaint charging him with, among other things, predatory sexual assault of a child, a class A-II felony punishable by an indeterminate sentence with a mandatory maximum of life. Stephen G. Cox represented the appellant.

[People v Smith \(2023 NY Slip Op 06563\)](#)

***People v Thaxton*** | December 21, 2023

INTEREST OF JUSTICE | SENTENCE REDUCED

The appellant appealed from Albany County Supreme Court judgments convicting him of: (1) 1<sup>st</sup> and 2<sup>nd</sup> degree robbery, after a jury trial; and (2) 2<sup>nd</sup> degree burglary (two counts), based on his guilty plea. He was sentenced to an aggregate 25-year prison term. The Third Department reduced his sentence in the interest of justice to an aggregate 20-years, and otherwise affirmed. The trial court did not abuse its discretion by denying the appellant youthful offender status—he did not take responsibility or show remorse for his violent “crime wave.” But the sentence was unduly harsh; he was 18 years old, had been placed in foster care at the age of two, and had a family history of substance abuse, trauma, domestic violence, and mental illness. Carolyn B. George represented the appellant.

[People v Thaxton \(2023 NY Slip Op 06560\)](#)

[People v Thaxton \(2023 NY Slip Op 06561\)](#)

## FOURTH DEPARTMENT

### ***People v Nathan*** | December 22, 2023

MANSLAUGHTER | YO ELIGIBLE | HELD AND REMITTED

The appellant appealed from a Monroe County Supreme Court judgment convicting him of 1<sup>st</sup> degree manslaughter. The Fourth Department held the appeal and remitted. Because 1<sup>st</sup> degree manslaughter is not an armed felony for purposes of CPL 720.10, the court was required to make a discretionary YO determination before imposing sentence. The Monroe County Conflict Defender (Kathleen P. Reardon, of counsel) represented the appellant.

[People v Nathan \(2023 NY Slip Op 06659\)](#)

### ***People v Stagles*** | December 22, 2023

SORA | CHILD PORN | MODIFIED

The appellant appealed from a Cayuga County Court order adjudicating him a level two sex offender. The Fourth Department modified by reducing to level one. County Court erred in applying a clear and convincing standard and denying a downward departure. The appellant, who was convicted of possessing child pornography, established by a preponderance of the evidence that there were mitigating factors not adequately accounted for by the guidelines. The court's assessment of 90 points under factors 3 and 7 overestimated his risk of re-offense and danger to the public (*see People v Gillotti*, 23 NY3d 841, 860 [2014]). He was 19, had no prior criminal record, was never accused of sex abuse, was cooperative and readily admitted guilt, never shared the relatively few images he possessed, deleted the files months before being contacted by police, and received a probationary sentence. Cambareri & Brenneck, PLLC (Kenneth H. Tyler, Jr., of counsel) represented the appellant.

[People v Stagles \(2023 NY Slip Op 06613\)](#)

### ***People v Ocasio*** | December 22, 2023

SUPPRESSION | STANDING NOT CHALLENGED | HELD AND REMITTED

The appellant appealed from a Monroe County Supreme Court judgment convicting him of 1<sup>st</sup> degree CPCS and attempted 2<sup>nd</sup> degree CPW based on his guilty plea. The Fourth Department held the appeal and remitted. The appellant's waiver of appeal was invalid, and the trial court erred in denying his suppression motion based on lack of standing. The appellant failed to allege his standing to challenge the eavesdropping warrants at issue, but the People did not object. Rather, they conceded the appellant's standing to challenge the warrants relating to the phone numbers he utilized. The Monroe County Public Defender (Tonya Plank, of counsel) represented the appellant.

[People v Ocasio \(2023 NY Slip Op 06623\)](#)

### ***People v Brown*** | December 22, 2023

DISCLOSURE | DISCIPLINARY RECORDS | AFFIRMED

The appellant appealed from an Onondaga County Court judgment convicting him of 1<sup>st</sup> degree rape after a jury trial. The Fourth Department affirmed. The People did not disclose disciplinary records for every police officer they intended to call as a trial witness before

filing their initial COC. However, at that time law enforcement disciplinary records were shielded from disclosure by former Civil Rights Law § 50-a. The People's disclosure of certain disciplinary records and filing of a supplemental COC after the repeal of Civil Rights Law § 50-a did not invalidate their original COC.

[People v Brown \(2023 NY Slip Op 06622\)](#)

## APPELLATE TERM

***People v Croce*** | 2023 WL 8827849

CIVIL LIABILITY | STOPPED SCHOOL BUS | DISMISSED

The appellant appealed from a Suffolk County District Court judgment that imposed a \$250 civil liability for failing to stop for a stopped school bus after a nonjury trial. The Appellate Term, Second Department reversed and dismissed the notice of liability. At trial, the People entered a video of the violation and a technician's certification of the alleged violation. But the People failed to prove that the bus was properly marked and equipped with the required signs and flashing lights, or that the bus was a school bus within the meaning of the statute.

[People v Croce \(2023 NY Slip Op 23399\)](#)

## TRIAL COURTS

***People v Smith*** | 2023 WL 8818373

DVJSA | CPL 440.47 | VIRTUAL TESTIMONY

Smith sought to present virtual testimony at his DVSJA resentencing hearing. Kings County Supreme Court denied the request. Smith argued that long-distance travel would be extremely costly and burdensome for his out-of-state witnesses with young children and medical considerations, and that their sworn statements were inadequate substitutes for live testimony. In light of the People's opposition and the circumstances of this particular case—a postconviction evidentiary hearing where reliable hearsay testimony is permitted—the defense did not establish an exceptional circumstance or necessity to warrant the exceptional procedure of virtual testimony.

[People v Smith \(2023 NY Slip Op 23406\)](#)

## FAMILY

## SECOND DEPARTMENT

***Matter of Luke v Erskine*** | December 20, 2023

CUSTODY MODIFICATION | PARENTAL INTERFERENCE | REMANDED

The father appealed from a Queens County Family Court order that denied his modification petition. The Second Department reversed and remitted for a hearing before a different Court Attorney Referee. The father sought sole custody after the mother moved from Queens to New Jersey and refused to produce the child for his parenting time. The mother did not appear at the modification hearing and inquest, and ACS could not locate

her or interview the child. The AFC did not know the child's position and said only that she "seemed happy" with the custodial arrangement. Family Court correctly found a change in circumstances but erred in finding that it was not in the child's best interests to modify custody. The mother's failure to appear and her repeated interference with the father's relationship with the child raised significant concerns about her fitness. But the record was insufficient to make a fully informed best-interests determination. Steven P. Forbes represented the appellant.

[Matter of Luke v Erskine \(2023 NY Slip Op 06525\)](#)

## THIRD DEPARTMENT

***Matter of Matthew TT. v Erin TT.*** | December 21, 2023

CUSTODY MODIFICATION | VIOLATION | REVERSED

The father appealed from a Greene County Family Court order that dismissed his custody modification and violation petitions. The Third Department reversed and remanded. The father alleged that the mother had unreasonably refused to allow him additional parenting time, deprived him of scheduled parenting time, interfered with his relationship with the children, and failed to communicate on co-parenting issues. These allegations were sufficient to warrant modification and violation hearings; the custody order provided for the father to have additional parenting time as the parties could agree, *and* that consent could not be unreasonably withheld (*compare Matter of Thomas KK. v Anne JJ.*, 176 AD3d 1354 [3d Dept 2019] [custody order merely provided for additional visitation as the parties could agree]). Gordon, Tepper & DeCoursey, LLP (Jennifer Powers Rutkey, of counsel) represented the appellant.

[Matter of Matthew TT. v Erin TT. \(2023 NY Slip Op 06577\)](#)

## FOURTH DEPARTMENT

***Matter of Clarissa F. (Rex O.)*** | December 22, 2023

NEGLECT | SUMMARY JUDGMENT | REVERSED

The appellant appealed from an Allegany County Family Court order that granted the petitioner's summary judgment motion as to the appellant's neglect of the children and placed the children with their mother. The Fourth Department reversed and remitted. The petition alleged that the appellant inappropriately touched the children on certain dates. But a certificate of conviction filed with the motion did not specify the dates of offense, and the transcript of the appellant's plea allocution was not included in the record. Thus, the petitioner failed to establish the identity of the issues in the present litigation and the prior determination. Veronica Reed represented the appellant.

[Matter of Clarissa F. \(Rex O.\) \(2023 NY Slip Op 06680\)](#)

***Matter of Collichio v Bishop*** | December 22, 2023

NEGLECT | SUMMARY JUDGMENT | HELD AND REMITTED

The father appealed from an Orleans County Family Court order that denied his request for expanded visitation. The Fourth Department reserved decision and remitted. The father initially sought expanded, unsupervised visitation but withdrew his request to

remove the supervision requirement before the hearing. He did not forgo his request for expanded visitation, yet Family Court did not expressly decide if he showed a change in circumstances warranting a best-interests inquiry. Veronica Reed represented the appellant.

[Matter of Collichio v Bishop \(2023 NY Slip Op 06618\)](#)

***Matter of Brandon P. v Jennifer M.C.*** | December 22, 2023

PATERNITY | NOT AN AGGRIEVED PARTY | APPEAL DISMISSED

The mother appealed from a Steuben Family Court order dismissing the amended paternity petition. The Fourth Department dismissed the appeal. The petitioner, who purportedly had sex with the mother during her marriage, sought to establish paternity of the subject child. The mother was not aggrieved by Family Court's determination that it was not in the child's best interests to order genetic testing. The mother did not join the amended petition or file her own petition seeking to establish paternity. While she may have been disappointed with the outcome, her rights remained unchanged.

[Matter of Brandon P. v Jennifer M.C. \(2023 NY Slip Op 06677\)](#)

## CIVIL

## FOURTH DEPARTMENT

***Matter of Kesel v Holtz*** | December 22, 2023

ERPO | CONSTITUTIONAL CHALLENGE | DISMISSAL REVERSED

The petitioner appealed from an Ontario County Supreme Court order that dismissed the ERPO petition. The Fourth Department reversed, reinstated the petition, and remitted. Supreme Court issued a TERPO, but the respondent challenged the constitutionality of the statute before the hearing. The court held that CPLR article 63-A is unconstitutional and dismissed the application without a hearing. However, Supreme Court was prohibited from considering the constitutional challenge because the respondent did not notify the attorney general.

[Matter of Kesel v Holtz \(2023 NY Slip Op 06639\)](#)

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