Indigent Legal Services

Decisions of Interest

DECEMBER 27, 2022

CRIMINAL

FIRST DEPARTMENT

People v Bonilla | Dec. 22, 2022

FLAWED APPEAL WAIVER | SEARCH WARRANT | STANDING

The defendant appealed from a judgment of New York County Supreme Court convicting him of 3rd degree CPCS. The First Department reversed and remanded. The defendant did not validly waive his right to appeal. Thus, the appellate court could reach the merits regarding his motion to controvert the search warrant. Supreme Court erred in denying the motion based on the defendant's lack of standing to challenge the warrant—a ground not raised by the People. Further, *People v LaFontaine* (92 NY2d 470), precluded consideration of alternative prosecution arguments raised upon appeal. Legal Aid Society, NYC (Paul Wiener) represented the appellant.
People v Bonilla (2022 NY Slip Op 07304)

People v Gay | Dec. 20, 2022

SUPPRESSION | UNPRESERVED

The defendant appealed from a Bronx County Supreme Court judgment convicting him of 2nd degree murder and 2nd degree CPW, following a jury trial. The First Department affirmed. The defendant's argument that the police did not have probable cause to arrest him before a lineup was conducted was unpreserved; the suppression court did not decide the issue in response to "a protest by a party." *See* CPL 470.05 (2) (question of law presented when protest was timely registered by party claiming error and, in response, court expressly decided question raised on appeal). The defendant's contention was waived by his failure to address it at the hearing, which would have allowed the People to develop the record on the issue. [***NOTE:*** *cf. People v Rivera*, 210 AD3d 805 (2d Dept 2022) (issue preserved where suppression court "expressly decided" it—even though defendant did not raise it).]
People v Gay (2022 NY Slip Op 07202)

People v DeLaRosa | Dec. 20, 2022

NO IAC | IMMIGRATION CONSEQUENCES

The defendant appealed from an order of NY County Supreme Court denying his CPL 440.10 motion. The First Department affirmed. The defendant's representation was effective where counsel achieved vacatur of the drug sales conviction—an aggravated felony that would have resulted in mandatory deportation—and its replacement with a drug possession conviction based on the weight of the drugs possessed. The possession crime did not result in mandatory deportation, and the defendant could apply for the cancellation of deportation proceedings.
People v DeLaRosa (2022 NY Slip Op 07201)

SECOND DEPARTMENT

People v Brissett | Dec. 21, 2022

BATSON | RACE-NEUTRAL

The defendant appealed from a judgment of Richmond County Supreme Court convicting him of 5th degree criminal possession of stolen property. The Second Department affirmed. The appellate court previously held that the defendant made a prima facie *Batson* challenge and that Supreme Court erred by failing to proceed with the second step of the inquiry. The appeal was held in abeyance pending remand for an inquiry and report. Because of statements by the initial trial judge during jury selection—such as "[t]here was no reason for starting this black thing"—the inquiry was to take place before a different judge. On remand, Supreme Court properly found that the People proffered race-neutral, non-pretextual explanations for their peremptory challenges.

People v Brissett (2022 NY Slip Op 07244)

THIRD DEPARTMENT

People v Odu | Dec. 22, 2022

SCI | JURISDICTIONALLY DEFECTIVE

The defendant appealed from a Cortland County Court judgment convicting him of 3rd degree rape and 1st degree criminal contempt, upon his plea of guilty. The Third Department reversed and remitted. The SCI accusing the defendant of 3rd degree rape was jurisdictionally defective because it did not charge him with a crime for which he had been held for the action of the Grand Jury or a lesser included offense of such a crime. A felony complaint charged the defendant with 1st degree rape based on the use of forcible compulsion. But the SCI charged 3rd degree rape based on the complainant's clearly expressed non-consent, which was not necessarily committed by rape by forcible compulsion. The criminal contempt conviction was part of a global disposition involving concurrent sentences; since such bargain could not be fulfilled once the SCI was dismissed, that conviction was also reversed. The Rural Law Center of NY (Keith Schockmel, of counsel) represented the appellant.

People v Odu (2022 NY Slip Op 07266)

People v Williams | Dec. 22, 2022

FLAWED APPEAL WAIVER | PLEA | IAC

The defendant appealed from a Clinton County Court judgment convicting him of 1st degree promoting prison contraband. The Third Department modified. The waiver of appeal was invalid where the plea court did not explain that some appellate review survived. The defendant challenged the voluntariness of his plea, but the record was insufficient to review allegations as to first counsel's conduct. Second counsel failed to support the defendant's CPL 220.60 (3) motion to withdraw the guilty plea with affidavits from the defendant or first counsel and to incorporate allegations the defendant made in the PSI. Instead, second counsel relied on his own "information and belief" and submitted a general pro forma motion. Such representation was not meaningful. The matter was

remitted to a different judge to allow the defendant, with the assistance of new counsel, to move to withdraw his plea or proceed with sentencing. Edward Graves represented the appellant.
People v Williams (2022 NY Slip Op 07265)

People v Thomas | Dec. 22, 2022
SUPPRESSION | DISSENT
The defendant appealed from a Chemung County Court judgment convicting him of 3rd degree CPCS, upon his plea of guilty. The Third Department affirmed. The defendant was pulled over for rolling through a stop sign. The officer knew that the defendant was on parole and, after verifying that his driving privileges were valid, the officer questioned the defendant about his curfew and activities that evening. The defendant gave inconsistent answers, and the officer saw wrappers in the car from restaurants that were not nearby. The officer asked to search the vehicle, and the defendant refused. After a lengthy detention, the parole officer was contacted, came, searched the car, and found heroin. His decision to search the vehicle was reasonable and substantially related to the performance of his duties. Two justices dissented. Once the police officer verified that the defendant's driving privileges were valid, he was only justified in issuing a ticket—he did not have cause to further question the defendant.
People v Thomas (2022 NY Slip Op 07263)

PLSNY v DOCCS | Dec. 22, 2022
FOIL | COUNSEL FEES
The petitioner appealed from a judgment of Albany County Supreme Court in an Article 78 proceeding to review the respondent's determination denying a FOIL request. The Third Department modified and remitted. Supreme Court partially granted the petition, ordering the release of video footage of an incident in prison, but denying a request for counsel fees. In denying the initial FOIL request, the respondent merely quoted the statutory language and gave no factual explanation. The affirmation failed to detail how the release of the video would interfere with investigations or to articulate how the video could potentially endanger correction officers. Since the respondent failed to establish a reasonable basis for denying access under any claimed exemption, Supreme Court erred in denying counsel fees. Katherine Seifert represented the appellant.
PLSNY V DOCCS (2022 NY Slip Op 07277)

FOURTH DEPARTMENT

People v Reedy | Dec. 23, 2022
SUPPRESSION | TRAFFIC | DISMISSED
The defendant appealed from a Steuben County Court judgment convicting him of aggravated DWI as a class E felony, upon his plea of guilty. The Fourth Department reversed and dismissed the indictment. County Court erred in denying suppression. The stop of the defendant's vehicle was unlawful; there was no probable cause to believe that the defendant committed a traffic violation. The officer stopped the vehicle after visually estimating the speed at 82 mph in a 65 mph zone. There was no testimony about the

officer's training and qualifications to support the estimate or about use of a radar gun. Craig Cordes represented the appellant.
People v Reedy (2022 NY Slip Op 07397)

People v Tubbins | Dec. 23, 2022

SUPPRESSION | OBSTRUCTING | DISMISSED

The defendant appealed from a judgment of Erie County Supreme Court convicting him of 2nd degree CPW and 5th degree CPCS, upon his plea of guilty. The Fourth Department reversed and dismissed the indictment. Supreme Court erred in denying suppression. Police officers did not have probable cause to arrest the defendant for obstructing governmental administration on the ground that, when he jumped up from a table and began to run away, he interfered with their ability to issue citations for violations. There was no evidence that the officers were in the process of issuing citations or had directed the defendant to remain in place. Legal Aid Bureau of Buffalo (Nicholas Di Fonzo, of counsel) represented the appellant.
People v Tubbins (2022 NY Slip Op 07317)

People v Singletary | Dec. 23, 2022

SUPPRESSION | SUSPICION | DISMISSED

The defendant appealed from an Onondaga County Court judgment convicting him of 2nd and 3rd degree CPW, upon his plea of guilty. The Fourth Department reversed and dismissed the indictment. The police lacked reasonable suspicion to justify the initial seizure of the defendant's vehicle, effected by stopping their patrol car directly behind his vehicle parked at a gas station. The officers were responding to multiple gunshots at or near the gas station—a high-crime area. But they did not see any shots emanating from where the defendant's vehicle was parked. Hiscock Legal Aid Society (J. Scott Porter, of counsel) represented the appellant.
People v Singletary (2022 NY Slip Op 07392)

People v Robles | Dec. 23, 2022

SUPPRESSION | STATEMENT | HARMLESS

The defendant appealed from a judgment of Onondaga County Supreme Court, convicting him of attempted 2nd degree CPW, upon his plea of guilty. The Fourth Department affirmed. The lower court should have suppressed the statement defendant made when he was in custody but waived his *Miranda* rights. After the defendant was handcuffed, an officer asked, "What's going on? Are you all right? Are you okay?" The defendant responded, "You saw what I had on me. I was going to do what I had to do." The officer's questions were likely to elicit evidence of a crime. However, the error was harmless where Supreme Court properly refused to suppress the firearm found on the defendant. One justice dissented. Defendant said nothing on the record from which the reviewing court could conclude that he would have pleaded guilty without regard to the suppression error. Thus, this was not a rare case in which the harmless error rule applied to a suppression denial and a guilty plea.
People v Robles (2022 NY Slip Op 07336)

People v Godzdiak | Dec. 23, 2022

FLORIDA SEX CRIME | NO NY EQUIVALENT

The defendant appealed from an Erie County Court judgment convicting him of attempted 1st degree rape, upon his plea of guilty. The Fourth Department modified. County Court erred in sentencing the defendant as a second child sexual assault felony offender. The defendant committed lewd or lascivious battery in Florida. The closest New York analog appeared to be the misdemeanor of sexual misconduct. It was possible to violate the foreign statute without engaging in conduct that was a felony here. Consideration of the facts of the underlying Florida conviction was impermissible in this case. The matter was remitted for resentencing. Paul Dell represented the appellant.
People v Gozdziak (2022 NY Slip Op 07377)

People v Colon | Dec. 23, 2022

SENTENCE CUT | DISPARITY | PLEA OFFER

The defendant appealed from an Erie County Court judgment convicting him of six counts of 2nd degree burglary, upon a jury verdict. The Fourth Department modified. The aggregate sentence was unduly harsh and severe, considering the disparity between the plea offer and the sentence imposed following trial. In the interest of justice, the appellate court directed that the sentences on the first and second counts would run consecutively to each other and concurrently with the sentences imposed on the remaining counts. Legal Aid Bureau of Buffalo (Nicholas DiFonzo, of counsel) represented the appellant.
People v Colon (2022 NY Slip Op 07381)

People v Torres | Dec. 23, 2022

ASSAULT WEAPON | PROVISO

The defendant appealed from an Ontario County Court judgment rendered upon a jury verdict. The Fourth Department affirmed, rejecting the contention that the indictment was jurisdictionally defective as to the count of 2nd degree CPW. The exemptions from the definition of an assault weapon operated as provisos that did not need to be affirmatively pleaded by the People in the indictment but could be raised by the accused.
People v Torres (2022 NY Slip Op 07359)

FAMILY

SECOND DEPARTMENT

Matter of Fatuma I. | Dec. 21, 2022

ARTICLE 10 | OPPORTUNITY TO BE HEARD

In Article 10 proceedings, the father appealed from an order of Kings County Family Court, directing that: (1) he must not be present with the subject children unsupervised; (2) the mother or maternal grandfather must supervise his parental access; and (3) the father must not reside in, or spend the night in, the children's home while they were present. The Second Department reversed. Family Court did not give the father a chance

to be heard regarding the parental access provisions. The matter was remitted for a new permanency hearing. Carol Kahn represented the appellant.
Matter of Fatuma I. (2022 NY Slip Op 07234)

THIRD DEPARTMENT

Anthony T. v Melissa U. | Dec. 22, 2022
ARTICLE 6 | INCARCERATED DAD'S CALLS
The incarcerated father appealed from an order of Albany County Family Court, which dismissed his petition seeking to modify a prior order allowing him to write letters to his child, born in 2011, and receive photos. The Third Department reversed and remitted for a new hearing. In Family Court, the father sought in-person visitation and phone contact. Upon appeal, he requested only monthly calls. The challenged decision contained no factual findings; and the record did not allow the appellate court to make an independent determination. There was little or no evidence that the requested phone contact would be detrimental to the child. Although the AFC argued for affirmance, such position was but one factor to be considered. Matthew Hug represented the appellant.
Anthony T. v Melissa U. (2022 NY Slip Op 07287)

Matter of Christian VV. | Dec. 22, 2022
JD | FLAWED ALLOCUTION
The respondent appealed from an order of Warren County Family Court, which granted the petitioner's application to adjudicate him a juvenile delinquent. The Third Department reversed. The argument that the plea allocution did not comply with Family Ct Act § 321.3 was not moot, despite the expiration of the respondent's placement—the delinquency determination implicated possible collateral legal consequences. Further, preservation of such a claim was not required. Although the respondent's mother was present at the allocution, Family Court only asked her whether she had had sufficient time to speak to the respondent about the proceedings. The court failed to question her regarding the acts her son admitted, his waiver of the fact-finding hearing, or her awareness of the possible dispositional options. As a result, the allocution violated the statutory mandate. Sandra Colatosti represented the appellant.
Matter of Christian VV. (2022 NY Slip Op 07275)

FOURTH DEPARTMENT

Matter of Gina R. | Dec. 23, 2022
MARIHUANA | NEGLECT
The mother appealed from an order of Monroe County Family Court, which held that she neglected the subject children. The Fourth Department modified. Given the MRTA's amendment of Family Ct Act 1046 (a) (iii), Family Court erred in determining that the petitioner established a prima facie case that the children were neglected based solely on the mother's use of marihuana—without presenting evidence of their impairment or imminent risk of impairment. Since the petitioner's presentation of evidence was based

on the law at the time of the hearing, the agency may not have fully explored the issue of impairment. Thus, the matter was remitted to reopen the fact-finding hearing. Gary Muldoon represented the appellant.
Matter of Gina R. (2022 NY Slip Op 07321)

Wells v Freeland | Dec. 23, 2022

NONPARENT v PARENT | CHANGE IN CIRCUMSTANCES

The father appealed from an order of Seneca County Family Court granting the motion of the grandmother to dismiss his custody modification petition. The Fourth Department modified and remitted. Family Court erred in requiring the father to prove that there had been a change in circumstances prior to deciding if extraordinary circumstances existed. In a contest between a parent and nonparent, it was only after a court found extraordinary circumstances that the issue of a change in circumstances was presented. There was no indication that the court previously found extraordinary circumstances, thus divesting the father of his superior right to custody. Charles Greenberg represented the appellant.
Wells v Freeland (2022 NY Slip Op 07375)

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