Indigent Legal Services

Decisions of Interest

DECEMBER 9, 2022

CRIMINAL

FIRST DEPARTMENT

People v Bennett | Dec. 8, 2022

LINEUP | COUNSEL

The defendant appealed from a judgment of New York County Supreme Court convicting him of 2nd degree CPW. The First Department reversed. The defendant was deprived of his right to have counsel present at a post-indictment lineup conducted when he already had representation. Although his attorney was notified of the lineup and did not attend, a paralegal tried to do so but was turned away by the police. By failing to appear, the attorney did not waive his client's right to counsel. The police should have paused this non-exigent lineup, conducted long after the crime, to advise the attorney that he needed to attend personally. The error was not harmless. Thus, the defendant was entitled to suppression of the lineup ID and a new trial, preceded by an independent source hearing regarding the witness who identified him at that lineup. The Office of the Appellate Defender (David Bernstein, of counsel) represented the appellant.

People v Bennett (2022 NY Slip Op 07007)

People v Henderson | Dec. 8, 2022

SANDOVAL MODIFICATION | UNWARRANTED

The defendant appealed from a judgment of New York County Supreme Court convicting him of 3rd degree robbery. The First Department reversed in the interest of justice and ordered a new trial. Supreme Court erred when it modified its pretrial *Sandoval* ruling based on the defendant's testimony, which was not so misleading as to allow the revised ruling. The error was not harmless because the credibility contest between the defendant and the complainant was central to the trial. The Office of the Appellate Defender (Kameron Johnston, of counsel) represented the appellant.

People v Henderson (2022 NY Slip Op 07009)

People v Sosa | Dec. 8, 2022

VICTIM FEE | VACATED

The defendant appealed from a judgment of New York County Supreme Court convicting him of sex trafficking upon his plea of guilty. The First Department modified. The supplemental sex offender victim fee had to be vacated because sex trafficking was not

an enumerated offense for which that fee could be imposed. The Center for Appellate Litigation (Lena Janoda, of counsel) represented the appellant.
People v Sosa (2022 NY Slip Op 07004)

THIRD DEPARTMENT

People v Hayes | Dec. 8, 2022
PREDICATE FELONY | RAISED FOR FIRST TIME ON APPEAL

The defendant appealed from an Essex County Court judgment, which resentenced her following her conviction of 4th degree conspiracy. The Third Department reversed and remitted. County Court erred in sentencing the defendant as a second felony offender based upon a predicate offense for which she was sentenced on the same day as the instant offense. The sentence upon a predicate conviction must have been imposed before the commission of the present felony. The defendant's argument implicated the legality of the sentence and thus was not precluded by the appeal waiver. Further, because the unlawfulness of the sentence was clear on the face of the record, it could be raised for the first time on appeal. Lisa Burgess represented the appellant.
People v Hayes (2022 NY Slip Op 06965)

People v Faulkner | Dec. 8, 2022
PREDICATE VIOLENT FELONY | RAISED FOR FIRST TIME ON APPEAL

The defendant appealed from an Albany County Court judgment convicting him of 2nd degree CPW. The Third Department vacated the sentence and remitted. The defendant's sentence as a second violent felony offender may have been illegal. Neither the predicate statement nor the presentence report established his periods of incarceration between the two violent felonies so as to toll the 10-year look-back period. County Court failed to make a finding that the tolling provision applied. The defendant's argument implicated the legality of the sentence and thus survived his unchallenged appeal waiver. Further, the issue was clear on the face of the record and therefore could be raised for the first time on appeal. Mitchell Kessler represented the appellant.
People v Faulkner (2022 NY Slip Op 06957)

People v Blauvelt | Dec. 8, 2022
PRS | ILLEGAL

The defendant appealed from an Ulster County Court order convicting him of attempted 1st degree criminal sexual act. The Third Department modified. Since the defendant pleaded guilty to a class C violent felony sex offense, the maximum period that could be imposed was 15 years. *See* Penal Law § 70.45 (2-a) (e). Given that County Court indicated its intent to impose the maximum duration of PRS, the appellate court reduced the period from 20 to 15 years. Marshall Nadan represented the appellant.
People v Blauvelt (2022 NY Slip Op 06959)

People v Howland | Dec. 8, 2022
SORA | DOWNWARD DEPARTURE

The defendant appealed from a Warren County Court order that adjudicated him a level-three sex offender. At the SORA hearing, the defendant requested a downward departure, but County Court failed to address the request or make a record of any findings related to it. The Third Department affirmed the assessment of points that resulted in a presumptive level-three classification but reversed and remitted for a determination as to whether a downward departure was warranted. The Rural Law Center of New York (Kelly Egan, of counsel) represented the appellant.
People v Howland (2022 NY Slip Op 06967)

FAMILY

FIRST DEPARTMENT

Matter of Daleena Q.T. | Dec. 7, 2022
TPR | NEW DEVELOPMENTS | *MICHAEL B.* INVOKED
The mother appealed from an order of New York County Family Court terminating her parental rights. The First Department modified, vacating the order as to child D. and remanding the matter for a new dispositional hearing. Circumstances had changed with respect to such child since the entry of the challenged order. *See Matter of Michael B.*, 80 NY2d 299. The AFC had advised the court that the child was no longer in the same pre-adoptive foster home, was now 15 years old, and did not consent to being adopted. Bruce Young represented the appellant. Legal Aid Society, NYC (Judith Stern, of counsel) represented the child.
Matter of Daleena Q.T. (2022 NY Slip Op 07016)

SECOND DEPARTMENT

Colin M. v Panna B. | Dec. 7, 2022
CUSTODY | NEW DEVELOPMENTS | *MICHAEL B.* INVOKED
The child appealed by permission (*see* Family Ct Act § 1112 [a]) from an order of Suffolk County Family Court, which temporarily transferred residential custody to the father during the pendency of this custody modification proceeding. The Second Department reversed and remitted for an expedited hearing and a final determination on custody. The appellate court further directed that, in the meantime, the child would remain with the mother. Since the issuance of the order appealed from, new developments had arisen and were brought to the attention of the appellate court by the AFC, including via updates during oral argument. New facts included ongoing allegations that the father abused the child, who continued to reside with the mother. Changed circumstances could have particular significance in custody matters and render a record insufficient to resolve the issue of the best interests of the child. *See Matter of Michael B.*, 80 NY2d 299. Francine Moss represented the nonparty appellant child.
Colin M. v Panna B. (2022 NY Slip Op 06928)

Matter of Mia S. | Dec. 7, 2022

CANNIBIS | NEGLECT | RETROACTIVITY

The mother appealed from an order of Suffolk County Family Court finding that she neglected her child, based on part on her misuse of marihuana. The Second Department affirmed but declared the retroactive application of an amendment Family Ct Act § 1046 (a) (iii) (eff. March 31, 2021). That amendment, which was part of the MRTA, provided that the sole fact that an individual consumed cannabis was not sufficient to constitute prima facie evidence of neglect. Two factors favored retroactive effect. First, the amendment constituted remedial legislation. Second, by declaring the act effective immediately, the Legislature evinced a sense of urgency. Here Family Court properly relied on the statutory presumption that proof of repeated misuse of a drug—to the extent that it would ordinarily substantially impair judgment—was prima facie proof of neglect. The amendment did not preclude reliance on marihuana misuse, no matter how extensive or debilitating.

Matter of Mia S. (2022 NY Slip Op 06932)

Matter of Divine K. M. | Dec. 7, 2022

NEGLECT | REVERSED

The father appealed from orders of Kings County Family Court finding that he neglected the subject children. The Second Department modified, holding that the father did not neglect four subject children by throwing an object at the mother. There was no evidence that the children witnessed that event or were impaired or placed in imminent danger of impairment. Family Court also erred in determining that the father neglected his children by verbally abusing the mother in their presence. While his conduct was inappropriate, the evidence did not establish any harm. Linda Braunsberg represented the father.

Matter of Divine K. M. (2022 NY Slip Op 06929)

THIRD DEPARTMENT

Virginia HH. v Elijah II. | Dec. 8, 2022

GRANDPARENT VISITATION | REVERSED

The parents appealed from an order of Broome County Family Court, which granted the maternal grandparents' petition for visitation with two children. The Third Department reversed. The grandparents did establish standing as to their granddaughter. During her infancy, the grandparents saw her every other Sunday and on holidays. Moreover, when the parents terminated the visits, the grandmother made many attempts to contact the children. However, the award of visitation lacked a sound and substantial basis in the record. The parents testified that their son, who was autistic, had meltdowns and other negative effects due to grandparent visitation. Further, there was significant tension between the parents and the grandparents. Family Court did not consider the animosity and its potential impact on cooperative care for the children. The appellate AFC opposed court-ordered visitation. No AFC was assigned to represent the children at the hearing, and 19 months had ensued since entry of the challenged order. Thus, the appellate court remitted for a new hearing before a different judge, with the appointment of an AFC

Virginia HH. v Elijah II. (2022 NY Slip Op 06970)