

Decisions of Interest

FEBRUARY 11, 2022

CRIMINAL

COURT OF APPEALS

People v Johnson | Feb. 10, 2022

WAIVER OF APPEAL | INVALID

The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 2nd degree criminal possession of a forged instrument (three counts), upon his plea of guilty. The appeal brought up for review the denial of a motion to suppress. The Second Department affirmed, rejecting the contention that the waiver of appeal was invalid. The Court of Appeals reversed. The plea court conflated the right to appeal with rights automatically forfeited by a guilty plea, so consideration of the suppression claim was not foreclosed. The case was remitted to the Second Department. Appellate Advocates (Alice Cullina, of counsel) represented the appellant. *NOTE: S1281, would amend CPL 710.70 to provide that an order finally denying a motion to suppress evidence shall be reviewed upon appeal from the judgment of conviction—notwithstanding an otherwise enforceable waiver of appeal.*

[People v Johnson \(2022 NY Slip Op 00909\) \(nycourts.gov\)](#)

[NY State Senate Bill S1281 \(nysenate.gov\)](#)

FIRST DEPARTMENT

People v Seignious | Feb. 10, 2022

LESSER INCLUDED | NO NOTICE

The defendant appealed from a judgment of New York County Supreme Court, convicting him of multiple crimes. The First Department dismissed the count of 2nd degree burglary. The indictment charged the defendant with the burglary as a sexually motivated crime, and the People consistently pursued such theory and presented proof that the defendant sexually assaulted two female students in the vicinity of NYU and then entered a school dormitory in pursuit of a third student. Yet at the charge conference in the middle of the People's case, the prosecution requested that ordinary 2nd degree burglary be charged as a lesser included offense. Supreme Court's grant of such request was error. The defendant had no notice of such alternative theory of guilt—raised after defense counsel had finished cross-examining an NYU public safety officer and a complainant. The Center for Appellate Litigation (John Vang, of counsel) represented the appellant.

[People v Seignious \(2022 NY Slip Op 00948\) \(nycourts.gov\)](#)

People v Herrera | Feb. 10, 2022

DEPRAVED INDIFFERENCE | VEHICLE

The defendant appealed from a judgment of NY County Supreme Court, convicting him of multiple crimes. The First Department affirmed. The verdict of guilty as to 2nd degree murder (depraved indifference) was supported by the evidence. While fleeing police, the defendant drove against oncoming traffic on a major roadway, ran red lights, and steered onto the sidewalk—despite having opportunities to pull off the road and avoid a collision with an oncoming vehicle. He crashed into another car, killing one person and injuring two others. His actions demonstrated a lack of regard for the risk of death to others.

[People v Herrera \(2022 NY Slip Op 00949\) \(nycourts.gov\)](#)

People v Bah | Feb. 8, 2022

INTOXICATION | NO INQUIRY

The defendant appealed from a judgment of New York County Supreme Court, convicting him of 3rd degree burglary. The First Department affirmed. The defendant asserted that his statements to police and in the presentence report pointed to an intoxication defense, triggering Supreme Court's duty to inquire. However, there was no such duty where the defendant did not also make such statements during the plea allocution.

[People v Bah \(2022 NY Slip Op 00823\) \(nycourts.gov\)](#)

People v Cosme | Feb. 10, 2022

ANDERS | NEW COUNSEL

The defendant appealed from a judgment of Bronx County Supreme Court, convicting him of 1st degree reckless endangerment. The First Department held the appeal in abeyance and assigned new counsel. The *Anders* brief did not recite underlying facts or analyze relevant issues as to the defendant's mental health. Counsel's letter to defendant about the brief was in English, even though the client had been aided by an interpreter at the plea proceedings and had signed a waiver of appeal that was in Spanish.

[People v Cosme \(2022 NY Slip Op 00952\) \(nycourts.gov\)](#)

SECOND DEPARTMENT

People v Mayo | Feb. 9, 2022

PHOTO | NO FOUNDATION

The defendant appealed from a judgment of Kings County Supreme Court, convicting him of attempted 1st degree assault and another crime. The Second Department reversed and ordered a new trial. Supreme Court erred in admitting a photograph, downloaded from a Facebook account allegedly belonging to the defendant, showing him wearing clothing like the perpetrator's. The People did not offer proof that the photo was a fair, accurate representation; that the defendant controlled the web page; and that the photo was created or posted on a specified date. The error was not harmless. The case hinged on the testimony of a complainant whose credibility had been seriously impeached. Legal Aid Society of NYC (David Crow and Michael Brodlieb) represented the appellant.

[People v Mayo \(2022 NY Slip Op 00881\) \(nycourts.gov\)](#)

People v Tindley | Feb. 9, 2022

CPL 440.10 | IAC

The defendant appealed from an order of Queens County Supreme Court, denying his CPL 440.10 motion to set aside a judgment, convicting him of 1st degree CPCS and 2nd degree CPW. The Second Department reversed. The defendant was entitled to a hearing to explore whether defense counsel was ineffective in failing to: (1) investigate to determine whether pretrial motions as to search warrants should be made; and (2) advise the client of such potential challenges before he pleaded guilty to counts based on evidence recovered. The matter was remitted for a hearing before which the People were to provide the defense with the warrant materials at issue. Appellate Advocates (Ava Page, of counsel) represented the appellant.

[People v Tindley \(2022 NY Slip Op 00886\) \(nycourts.gov\)](#)

People v Jones | Feb. 9, 2022

SUPPRESSION | REVERSED

The defendant appealed from a judgment of Suffolk County Supreme Court, convicting him of 3rd degree CPCS and 1st degree loitering, upon a jury verdict. The appeal brought up for review the denial of suppression. The Second Department reversed, suppressed, and remitted. At the suppression hearing, a detective testified that the defendant was arrested based on loitering, but there was no testimony that he remained in any place with others. Further, the detective did not see *any physical property* or cash exchanged. Observations of several brief, nondescript interactions involving the defendant at an address known for prior drug activity did not provide probable cause. Suffolk County Legal Aid Society (Edward Smith and Lisa Marcoccia, of counsel) represented the appellant.

[People v Jones \(2022 NY Slip Op 00878\) \(nycourts.gov\)](#)

People v Martinez | Feb. 9, 2022

ENHANCED SENTENCE | ERROR

The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 2nd degree burglary and another crime. The Second Department vacated the sentences. Supreme Court erred in imposing an enhanced sentence based on the defendant's violation of a condition of the plea. He completed the in-patient residential program—the only specific program identified by the plea court. The court did not state that the defendant would be subject to open-ended treatment or that a single positive drug test would constitute a violation. Only failure to comply with explicit conditions constituted a violation. The disposition promised at the plea proceedings would be imposed. Legal Aid Society of NYC (Jonathan Garelick, of counsel) represented the appellant.

[People v Martinez \(2022 NY Slip Op 00880\) \(nycourts.gov\)](#)

People v Merisier | Feb. 9, 2022

PREDICATE | NOT EQUIVALENT

The defendant appealed from judgments of Kings County Supreme Court. The Second Department modified in the interest of justice. The adjudication as a second felony offender was improper. See *People v Ramos*, 19 NY3d 417 (federal drug conspiracy statute did not require proof that conspirator committed overt act in furtherance of

conspiracy, as NY did). Since the defendant had served the terms of imprisonment, the periods of post-release supervision were reduced to the maximum for a first-time felony offender. Appellate Advocates (Lynn W. L. Fahey, of counsel) represented the appellant. [People v Merisier \(2022 NY Slip Op 00883\) \(nycourts.gov\)](#)

People v Castro | Feb. 9, 2022

MANSLAUGHTER | VEHICLE

The People appealed from a Rockland County Court order, granting the defendant's motion to dismiss the indictment on the ground that the evidence presented to the grand jury was legally insufficient. The Second Department reversed. The evidence was legally sufficient to support the charges of 2nd degree manslaughter (recklessly causing the death of another). The defendant purportedly traveled at 90 mph while his vehicle and a Porsche weaved through traffic without braking or signaling. As the vehicles approached a sharp bend, they were traveling side-by-side, the Porsche on the left. While entering the left lane, the defendant's vehicle struck the other vehicle, causing it to hit the curb and fly 200' before coming to rest. Two passengers in the Porsche died. The defendant told police he had been racing with the other car. The indictment was reinstated.

[People v Castro \(2022 NY Slip Op 00874\) \(nycourts.gov\)](#)

People v Jones | Feb. 9, 2022

ANDERS | NEW COUNSEL

The defendant appealed from a judgment of Nassau County Supreme Court, convicting him of 2nd degree criminal sale of a firearm and other crimes. The Second Department assigned new counsel. The *Anders* brief submitted did not adequately analyze whether the plea was knowing, intelligent, and voluntary; the defendant was deprived of effective assistance impacting the validity of his plea; or the sentence was excessive.

[People v Jones \(2022 NY Slip Op 00879\) \(nycourts.gov\)](#)

FAMILY

FIRST DEPARTMENT

Saymone N. v Joshua A. | Feb. 10, 2022

VIRTUAL HEARING | SURLY COUNSEL

The father appealed from an order of Bronx County Family Court, which granted the mother's custody modification application. The First Department affirmed. Family Court had the authority to alter hearing procedures. The proceedings adhered to the parties' due process rights. Given the case's long pendency, the court soundly decided to hold a virtual hearing, not wait until court operations returned to normal, and kept counsel focused on disputed issues, not irrelevant evidence. A change in circumstances was proven by the father's assault against a third party and his incarceration for several months, when the mother cared for the child. For myriad reasons, granting custody to her advanced the child's best interests. Counsel displayed vitriol and the disdain for Family

Court and was admonished for such untoward behavior. Ethical rules demanding dignified and courteous conduct remained important in the face of frustration at being constrained to adopt to new court procedures arising from Covid-19.

[Matter of Saymone N. v Joshua A. \(2022 NY Slip Op 00944\) \(nycourts.gov\)](#)

SECOND DEPARTMENT

Paige v Paige | Feb. 9, 2022

CUSTODY MOD. REVERSED | DIVIDED COURT

The mother appealed from an order of Queens County Family Court, which transferred custody to the father. The Second Department reversed. Although the child had been removed from the mother's care during a neglect proceeding, the mother successfully completed required services and had a positive, nurturing relationship with the child. Indeed, Family Court found that the child was well cared for by both parents and yet placed great weight on the mother's suicide attempt predating the prior custody award. The challenged order contravened the wishes of the child to reside with the mother and the half-siblings. Two justices dissented. Salvatore Adamo represented the appellant.

[Matter of Paige v Paige \(2022 NY Slip Op 00866\) \(nycourts.gov\)](#)

LaPera v Restivo | Feb. 9, 2022

CUSTODY MOD. REVERSED | HEARING

The father appealed from an order of Nassau County Family Court, which dismissed his petition to modify a prior order of custody. The Second Department reversed, reinstated the petition, and remitted. The father asserted that, when he consented to the terms of the prior order, he was a probationary employee with an inconsistent work schedule. Now his schedule was more consistent, and he was off from work on weekends. Given such change, the father sought expanded parental access. Such allegations warranted a hearing on best interests. The father represented himself.

[Matter of LaPera v Restivo \(2022 NY Slip Op 00863\) \(nycourts.gov\)](#)



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