Indigent Legal Services

Decisions of Interest

FEBRUARY 14, 2023

CRIMINAL

COURT OF APPEALS

People v Myers | Feb. 9, 2023

WIRETAP | JAIL CALL | CPL 700.70 | REVERSED

The defendant appealed from a Fourth Department order affirming his conviction of leaving the scene of an incident resulting in death without reporting. The Court of Appeals reversed in a unanimous memorandum opinion. At issue was whether a communication intercepted by a wiretap was exempted from CPL 700.70 notice requirements because it was incidentally captured on a separate, jail call recording. While monitoring a wiretap unrelated to this case, police intercepted a jail call during which the defendant made incriminating statements. Police obtained the recording from the jail and the People produced it in discovery, but they did not disclose a copy of the wiretap warrant and underlying application within the 15-day statutory period. Because the jail call recording was "derived" from the intercepted wiretap communication, the People's failure to comply with CPL 700.70 precluded admission of the recording into evidence at trial. Hiscock Legal Aid Society (Philip Rothschild, of counsel) represented the appellant.
People v Myers (2023 NY Slip Op 00691)

People v Sanders | Feb. 9, 2023

HANDCUFFED DEFENDANT | POLLING JURY | REVERSED

The defendant appealed from a First Department order affirming his convictions of attempted 1st degree assault and related charges. The Court of Appeals reversed in a unanimous memorandum opinion. At issue was whether the trial court erred by ordering that the defendant be handcuffed when the jury returned with its verdict without providing an on-the-record, individualized explanation for the restraints. The prohibition against visible shackles during the guilt phase of a trial in the absence of a special need applies during the jury's reading of its verdict and the court's polling of jurors. The trial court violated the defendant's due process rights; the error was not harmless. The Legal Aid Society of NYC (David Crow, of counsel) and Davis Polk & Wardwell LLP (Chase McReynolds, of counsel) represented the appellant.
People v Sanders (2023 NY Slip Op 00692)

FIRST DEPARTMENT

People v Weathers | Feb. 9, 2023

WEIGHT OF EVIDENCE | CPL 710.30 | REVERSED

The defendant appealed from a New York County Supreme Court judgment convicting him of 1st degree robbery (two counts), 2nd degree robbery, and 1st degree assault. The First Department reversed, dismissed the 1st degree robbery and assault convictions as against the weight of the evidence, and remanded for a new trial on the 2nd degree robbery count only. On that charge, the People should not have been permitted to submit evidence of the defendant's statement to police because it was not properly noticed under CPL 710.30 (1) (a). The People had disclosed the interview generally, but this specific statement was first revealed during trial testimony. The error was not harmless. The Office of the Appellate Defender (Stephanie Sonsino, of counsel) represented the appellant.
People v Weathers (2023 NY Slip Op 00741)

People v Watkins | Feb. 9, 2023

SUPPRESSION | POST-ARREST STATEMENT | REVERSED

The defendant appealed from a Bronx County Supreme Court order convicting him after trial of 2nd degree robbery and 3rd degree assault. The First Department reversed and remanded. The defendant's post-arrest statement should have been suppressed. At the hearing, a detective testified that he interviewed the codefendant, who implicated and identified the defendant. The detective thereafter interviewed the defendant, who confessed. There was no direct evidence that the codefendant's statement was communicated to the arresting officers. The People failed to establish that information constituting probable cause was transmitted to the arresting officers to support a legal arrest. The Center for Appellate Litigation (V. Marika Meis, of counsel) represented the appellant.
People v Watkins (2023 NY Slip Op 00742)

SECOND DEPARTMENT

People v Rodriguez | Feb. 8, 2023

GUILTY PLEA | DURESS | REVERSED

The defendant appealed from a Suffolk County Court judgment convicting him of attempted 2nd degree robbery. The Second Department reversed. The defendant did not move to vacate his plea or otherwise preserve a challenge to the validity of his plea. But where, as here, the defendant's allocution raised issues of duress and County Court failed to inquire into the validity of the plea, reversal was warranted. Michael Miller represented the appellant.
People v Rodriguez (2023 NY Slip Op 00678)

People v Mentor | Feb. 8, 2023

SLEEPY JUROR | GROSSLY UNQUALIFIED | REVERSED

The defendant appealed from a Queens County Supreme Court judgment convicting him of 1st degree robbery and related charges. The Second Department reversed and remanded for a new trial. At trial, defense counsel twice moved to have a juror removed

as grossly unqualified because the juror had fallen asleep or was "extremely sleepy" through the trial. The trial court did not conduct a sufficiently probing and tactful inquiry of the juror, and its determination that the juror was not grossly unqualified was based on speculation. The error was not subject to harmless error analysis. Appellate Advocates (Sean Murray, of counsel) represented the appellant.
People v Mentor (2023 Slip Op 00677)

THIRD DEPARTMENT

People v Green | Feb. 9, 2023

CONDITIONAL SEALING | DENIED

The defendant appealed from a Washington County Court order that summarily denied his application for conditional sealing of his criminal record. The Third Department affirmed. The defendant had been convicted of an eligible offense, successfully completed a qualifying drug treatment court program, was successfully discharged from probation, had no prior criminal history, and had not been arrested following his discharge from probation. Despite these mitigating factors, denial of his application was warranted because of the seriousness of the underlying offense; the lack of proof related to the defendant's character, career or educational plans, or plans to continue his rehabilitation; and the short period of time (five months) between his discharge from probation and his sealing application.
People v Green (2023 NY Slip Op 00703)

People v Kimball | Feb. 9, 2023

BOYKIN RIGHTS | FAILURE TO ENUMERATE NOT ERROR

The defendant appealed from a Saratoga County Court judgment convicting him of attempted 1st degree sexual abuse, and from an order of the same court that denied his CPL 440.10 motion. The Third Department affirmed. The defendant did not file a motion to withdraw his plea, and his claim that his plea was rendered involuntary by County Court's failure to expressly advise him that he would forfeit his right against self-incrimination by pleading guilty was not preserved. Regardless of preservation, County Court was not required to enumerate all the constitutional trial-related rights that would be waived by entering a guilty plea [NOTE: *cf. People v Demkovich*, 168 AD3d 1221 (3d Dept 2019) and *People v Glover*, 174 AD3d 1044 (3d Dept 2019) (vacating pleas, in the interest of justice, because the trial court failed to ensure that the defendants understood they were waiving their rights to jury trials and their rights against self-incrimination)].
People v Kimball (2023 NY Slip Op 00694)

FOURTH DEPARTMENT

People v Everson | Feb. 10, 2023

CPL 440 | DENIAL REVERSED | IAOC

The defendant appealed from an Onondaga County Court judgment convicting him, after a jury trial, of two counts of 1st degree assault, two counts of attempted 1st degree robbery, and one count of 2nd degree CPW, and from an order of the same court that denied his

CPL 440.10 motion after a hearing. The Fourth Department reversed the order denying the CPL 440 motion, vacated the conviction and granted a new trial. Defense counsel's failure to investigate one of the complainants as a potential defense witness deprived the defendant of the effective assistance of counsel. This complainant gave an initial description of the assailants to the police that did not match the defendant's appearance at the time of his arrest. The complainant later became uncooperative, said he did not remember anything from the incident, and did not testify at trial. At the 440 hearing, the complainant testified that the defendant was not present during the incident, he had told this to prosecutors, and would have testified as such if he had been called at trial. There was no tactical reason for defense counsel's failure to investigate the second complainant as a defense witness. The Hiscock Legal Aid Society (Thomas M. Leith, of counsel) represented the appellant.
People v Everson (2023 NY Slip Op 00761)

People v Kemp | Feb. 10, 2023

CPL 440 | DENIAL REVERSED

The defendant appealed from an Onondaga County Court judgment convicting him of two counts of 2nd degree murder, two counts of 2nd degree CPW, and two counts of attempted 1st degree robbery. The Fourth Department reversed, suppressed certain statements, and granted a new trial. A parent-child privilege arose when the 15-year-old defendant made statements to his father in a police interview room after officers left following the defendant's request for a lawyer. The officers said nothing about recording devices in the room, and a recording showed that the defendant had tried to talk to his father in confidence for support and guidance. While most of the defendant's statements were not audible, the error was not harmless—particularly since the jury requested a play-back of the statements during deliberations. The Hiscock Legal Aid Society (Sara A. Goldfarb, of counsel) represented the appellant.
People v Kemp (2023 NY Slip Op 00776)

People v Rayford | Feb. 10, 2023

UNINTENTIONAL STABBING | JUSTIFICATION | REVERSED

The defendant appealed from a Monroe County Supreme Court judgment convicting him of 1st degree assault and aggravated criminal contempt after trial. The Fourth Department reversed. The trial court erred in determining that a justification charge is unavailable where there is an unintentional stabbing. According to the defendant, when the complainant swung a knife at him, he twisted her arms behind her back and pinned the knife there. Based on the defendant's version of events, the jury could have reasonably found that the complainant was the initial aggressor and the defendant's actions were justified, even if the resulting injuries were unintended. Thus, harmless error analysis did not apply. The Monroe County Public Defender's Office (Tonya Plank, of counsel) represented the appellant.
People v Rayford (2023 NY Slip Op 00786)

People v Vanwuyckhuyse | Feb. 10, 2023

INVALID GUILTY PLEA | FACTUALLY INSUFFICIENT| REVERSED

The defendant appealed from a Monroe County Supreme Court judgment convicting him of aggravated family offense and from a judgment of the same court convicting him of DWI, both based on guilty pleas. The Fourth Department reversed the aggravated family offense conviction and affirmed the DWI conviction. In pleading guilty to the aggravated family offense, the defendant's factual recitation negated the essential mens rea element of the crime. The trial court made no further inquiry to ensure that the defendant understood the nature of the charge and that the plea was voluntarily entered. However, vacatur of this plea did not warrant reversal of his DWI plea, which occurred under a SCI with the express understanding that the sentences would run consecutively. Even though the two pleas arose from a single plea deal, they were severable. The Monroe County Public Defender's Office (David Juergens, of counsel) represented the appellant.
People v Vanwuyckhuyse (2023 NY Slip Op 00754)

People v Messano | Feb. 10, 2023

REASONABLE SUSPICION | HAND-T0-HAND | SUPPRESSION

The defendant appealed from an Onondaga County Court judgment convicting him of 2nd degree CPW based on his guilty plea. The Fourth Department affirmed, with two justices dissenting. In the dissenters' view, County Court erred in denying the defendant's motion to suppress the firearm found in his vehicle, and the facts were "indistinguishable from" *People v Hernandez* (187 AD3d 1502, 1504-1505 [4th Dept 2020]). Police lacked reasonable suspicion to detain the defendant. The detective saw no hand-to-hand transaction of drugs or money, and the defendant's actions were readily susceptible of an innocent interpretation. Thus, police action was not justified from its inception. A deputy sheriff's later observation—which occurred while the defendant was detained at the rear of the vehicle—of a rolled-up dollar bill and white powdery substance on the driver's seat was not independent of or attenuated from the unlawful seizure of the defendant.
People v Messano (2023 NY Slip Op 00769)

TRIAL COURTS

People v Anderson | 2023 WL 1490142

CPL 730.40 | NOT IN CUSTODY

The defendant sought dismissal of felony complaints against him because he was in custody at a psychiatric facility when the temporary court order of observation expired. New York City Criminal Court denied the application. The facility filed a "Notification of Fitness to Proceed" before the observation order expired. The dismissal provision of CPL 730.40 (2) is only triggered when the facility files a certificate of custody, which did not happen here. The defendant's detention at the facility beyond the expiration of the temporary order was precautionary, allowed time to arrange for his transfer to DOCCS, and did not constitute custody for statutory purposes.
People v Anderson (2023 NY Slip Op 23029)

People v Taveras | 2023 WL 1490245

DISCOVERY | INVALID COC AND SOR

The defendant moved to invalidate the People's COC and SOR based on their failure to disclose allegations of misconduct filed with the NYC Civilian Complaint Review Board ("CCRB"), court rulings, and officer testimony in a prior case where he was found to be incredible. Bronx County Criminal Court invalidated the COC and SOR, finding that while the CCRB and court records were not in the People's actual or constructive possession, the People did not make the required diligent, good faith efforts to verify the existence of these records and make them available to the defendant. But because only 78 days of delay were chargeable to the People, the 30.30 motion was denied. The Bronx Defenders (Marissa Balonon-Rosen, of counsel) represented the defendant.
People v Taveras (2023 NY Slip Op 50074[U])

People v Rafoel | 2023 WL 1772355

DISCOVERY | INVALID COC AND SOR | 30.30 MOTION GRANTED

The defendant moved to invalidate the People's COC and SOR and dismiss because the People failed to make diligent, good faith efforts to ascertain the existence of police reports and a controlled call until seven weeks after discovery was due. Queens County Criminal Court found that the COC and SOR were invalid. The People improperly withheld police disciplinary records and provided only summary letters. The CPL 30.30 motion was granted because 152 days of delay were chargeable to the People. The Legal Aid Society of NYC (Alisha Babar, of counsel) represented the defendant.
People v Rafoel (2023 NY Slip Op 50076[U])

FAMILY

SECOND DEPARTMENT

Matter of Parascondola v Romano | Feb. 8, 2023

CUSTODY | VEXATIOUS LITIGATION | MODIFIED

The father appealed from a Kings County Family Court order that denied, without a hearing, his custody modification petition and prohibited him from filing any petitions, writs, or motions without counsel review and prior court approval. The Second Department modified by striking the review and approval provision. Nothing in the record demonstrated that the father had filed frivolous petitions or filed petitions out of ill will or spite. The Edelsteins, Faegenburg & Brown (Adam Edelstein, of counsel) represented the father.
Matter of Parascondola v Romano (2023 NY Slip Op 00666)

Matter of Glaudin v Glaudin | Feb. 8, 2023

CHILD SUPPORT | DOUBLE SHELTER | MODIFIED

The father appealed from a Suffolk County Family Court order that denied his objections and directed him to pay basic child support of $211 per week. The Second Department modified and remitted. The father testified without contradiction that he paid the mortgage

and utility bills for the house where the mother and child resided. Failure to award him credit for expenses incurred during the mother's exclusive occupancy of the marital residence resulted in double shelter payments. Beth Swedsen Dowd (Margaret Stanton, of counsel) represented the father.
Matter of Glaudin v Glaudin (2023 NY Slip Op 00662)

Matter of M. (Lucia M.) | Feb. 8, 2023
ARTICLE 10 | RECORDS ACADEMIC | APPEAL DISMISSED
The AFC appealed from orders of Richmond County Family Court which denied motions to produce certain medical records. The Second Department dismissed the appeal as academic. The fact-finding and dispositional hearings had been completed; there was no pending proceeding in which the appellate court might have directed the production of the requested documents. [NOTE: An appeal from the order of disposition would have brought up for review prior nonfinal orders that affected the final order. *See* CPLR 5501 (a) (1); *Matter of Ameillia RR.*, 95 AD3d 1525, 1526 (3d Dept 2012) (challenged discovery order only reviewable in conjunction with appeal of final order, where record as a whole could be evaluated to determine propriety of that nonfinal order)].
Matter of M. (Lucia M.) (2023 NY Slip Op 00663)

FOURTH DEPARTMENT

Matter of Ianello v Colonomos | Feb. 10, 2023
CUSTODY | NO FACTUAL FINDINGS | REVERSED
The father appealed from a Genesee County Family Court order that awarded the parents joint legal custody and granted primary physical custody to the mother. The Fourth Department reversed and remitted. Family Court failed to make any factual findings supporting the custody award, and it made no findings about the factors relevant to the child's best interest. Charles J. Greenberg represented the father.
Matter of Ianello v Colonomos (2023 NY Slip Op 00767)

Matter of Bonilla-Wright v Wright | Feb. 10, 2023
COUNSELING | VISITATION | MODIFIED
The father appealed from a Monroe County Family Court order that modified his visitation with the children. The Fourth Department modified by vacating provisions that made participation in therapeutic counseling a prerequisite to the resumption of unsupervised overnight weekend visitation. A court may order counseling as a component of custody or visitation but may not make it a prerequisite to custody or visitation. The Monroe County Public Defender's Office (Janet C. Somes, of counsel) represented the father.
Matter of Bonilla-Wright v Wright (2023 NY Slip Op 00756)

Matter of Bailey v Bailey | Feb. 10, 2023
ATTORNEY PRESENT | NO DEFAULT | MODIFIED
The father appealed from an Ontario County Family Court order that, among other things, directed the father to stay away from the mother. The Fourth Department modified the order by vacating the language stating that the order was entered upon the father's

default, and otherwise affirmed. Although the father did not appear in court, he did not default because he was represented by counsel and counsel was present. [NOTE: *cf. Matter of Irelynn*, 188 AD3d 1744 (4th Dept 2020), *affd* 38 NY3d 933 (2022, Rivera, J. dissenting) (upholding Family Court's determination that a party's refusal to appear constituted a default even though counsel was present, because counsel did not participate in proceedings, where counsel's decision not to participate was tactical)].
Matter of Bailey v Bailey (2023 NY Slip Op 00781)

TRIAL COURTS

Matter of Anonymous II. (Kimberly D.) | 2022 WL 18587894

PERMANENT NEGLECT | DISMISSED

Following a trial in this permanent neglect proceeding, Sullivan County Family Court found that Department of Family Services (DFS) had failed to make diligent efforts to strengthen the parent-child relationship and dismissed the petition. DFS did not demonstrate its efforts to assist the mother with housing. She had "consistently availed herself of the meager visitation offered;" participated in mental health counseling; substance abuse treatment, and DV counseling; and was employed. DFS seemed "unreasonably focused" on the mother completing long-term DV counseling. "However, requiring victims of domestic violence to complete counseling to prevent further abuse reinforces the victim-blaming stereotype that victims are somehow responsible for their own abuse." Jane Bloom represented the mother.
Matter of Anonymous II. (Kimberly D.) (2023 NY Slip Op 51336[U])

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