Indigent Legal Services

Decisions of Interest

FEBRUARY 18, 2022

CRIMINAL

COURT OF APPEALS

People v Duarte | Feb. 15, 2022

"I WOULD LOVE TO GO PRO SE" | UNCLEAR MEANING

The defendant appealed from an Appellate Term, First Department order, dismissing a judgment convicting him of forcible touching and 2nd degree sexual abuse after a bench trial. The Court of Appeals affirmed in a memorandum decision, finding that the defendant's statements did not trigger the trial court's duty to conduct a searching inquiry. Judge Rivera dissented, joined by Judge Wilson. The defendant's constitutional right to represent himself was denied. During a suppression hearing, the defendant asserted that counsel was ineffective, and he did not want counsel to represent him. After the court denied the application to relieve counsel, the defendant said, "I would love to go pro se." That clear, unequivocal statement required an inquiry, Judge Rivera opined, and then quipped, "In case there is any intent as to *my* intent, let me repeat: I dissent, unequivocally and without hesitation." That the defendant's request was made in expressing displeasure with counsel did not suggest equivocation. Quite the opposite. Often a pro se defendant was motivated by dissatisfaction with defense counsel's trial strategy or by a lack of confidence in counsel, as held in *People v McIntyre*, 36 NY2d 10.

People v Duarte (2022 NY Slip Op 00960) (nycourts.gov)

M/O Endara-Caicedo v NYS DMV | Feb. 15, 2022

"SUCH CHEMICAL TEST" | TWO MEANINGS

The defendant appealed from a First Department order affirming the dismissal of his CPLR Article 78 petition. The Court of Appeals affirmed. In an administrative license-revocation hearing, the refusal of a motorist arrested for DUI to submit to a chemical test could be used against him—even if such refusal occurred more than two hours after arrest. *See* VTL § 1194 (2) (a) (1) (motorists deemed to consent to test under two-hour rule). The Chief Judge authored the majority opinion. Judge Rivera dissented. The chemical test authorized in § 1194 (2) (a) was the test cross-referenced in paragraphs (c) and (f) regarding administrative hearings and criminal proceedings, respectively. There was no textual basis to conclude that the "such chemical test" meant something different in those paragraphs. For decades, New York courts and the DMV found that the term had the same meaning in both provisions.

Matter of Endara-Caicedo v Vehicles (2022 NY Slip Op 00959) (nycourts.gov)

FIRST DEPARTMENT

People v Perez | Feb. 17, 2022

REDUCED CHARGE | INTEREST OF JUSTICE

The defendant appealed from a judgment of New York County Supreme Court, convicting him of 2nd and 3rd degree assault and EWC. The First Department reduced the 2nd degree offense to 3rd degree assault in the interest of justice. Under the plea agreement, if the defendant had completed a 12-week anger management program and satisfied other conditions, the People were to allow her to withdraw her guilty plea to 2nd degree assault, and she would be sentenced to conditional discharges on the two misdemeanors. Despite the defendant's diligent efforts, for legitimate reasons, she could not complete the course. Legal Aid Society, NYC (Laura Boyd of counsel) represented the appellant
https://nycourts.gov/reporter/3dseries/2022/2022_01104.htm

People v Blue | Feb. 15, 2022

30 MONTHS | SPEEDY TRIAL

The defendant appealed from a judgment of New York County Supreme Court, convicting him of 2nd degree burglary (five counts). The First Department affirmed. The defendant's constitutional right to a speedy trial was not denied. A substantial portion of the 30-month delay between arraignment and trial was caused by (1) the defendant's voluminous motion practice or other reasons not attributable to the People; and (2) the People's reasonable efforts to prepare and coordinate the prosecution of six separate serious felonies. Further, the defendant did not establish specific prejudice or that the delay was so egregious as to warrant dismissal, regardless of prejudice. The defendant, who represented himself and was ROR'd six months before trial, did not show that his defense was impaired by his 24 months of incarceration.
People v Blue (2022 NY Slip Op 00977) (nycourts.gov)

SECOND DEPARTMENT

People v Manzano | Feb. 16, 2022

JURY NOTE | INADEQUATE RESPONSE

The defendant appealed from a judgment of Nassau County Court, convicting her of 1st degree offering a false instrument for filing, upon a jury verdict. The Second Department reversed and ordered a new trial. During jury deliberations, County Court failed to meaningfully respond to a jury note. Simply rereading the original instructions may sometimes constitute a meaningful response, but here it was error to do so in response to the jury's last question about the elements of one charge. The jury had previously sent a note about that charge, thus indicating initial confusion. At a minimum, the court should have asked the jurors to clarify their request. Since this error bore on an element of the charge, the defendant was prejudiced by it. Matthew Tuohy represented the appellant.
https://nycourts.gov/reporter/3dseries/2022/2022_01040.htm

People v Shelton | Feb. 16, 2022

YO | NOT CONSIDERED

The defendant appealed from two judgments of Nassau County Supreme Court, convicting him of 1st degree robbery, attempted 1st degree assault, and 2nd degree CPW, upon his plea of guilty. The Second Department vacated the sentences. CPL 720.20 (1) required a youthful offender determination in every case where the defendant was eligible, even where he/she failed to request it, or agreed to forgo it as part of a plea bargain. *See People v Rudolph*, 21 NY3d 497. The instant convictions constituted armed felonies for which the Supreme Court was required to consider statutory factors to determine whether the defendant was an eligible youth and, if so, whether he should be afforded YO. The lower court did not do so. The defendant also appealed from a judgment convicting him of 2nd degree murder. The appellate court vacated the conviction and dismissed such count. Supreme Court was not authorized to accept a plea of guilty to this count. As a juvenile offender, the defendant could not be held criminally responsible for felony murder where the underlying felony, attempted robbery, was a crime for which he could not be held criminally responsible. Andrew MacAskill represented the appellant.
https://nycourts.gov/reporter/3dseries/2022/2022_01050.htm

People v Smith | Feb. 16, 2022

MISSING WITNESS | CHILD

The defendant appealed from a judgment of Westchester County Supreme Court, convicting him of 2nd degree assault. The Second Department affirmed. The trial court properly denied the defendant's request for a missing witness charge as to a 12-year-old child eyewitness. The People made diligent efforts to locate the witness and explained the family's refusal to allow the child to speak to the prosecution or testify.
https://nycourts.gov/reporter/3dseries/2022/2022_01051.htm

People v Ortiz | Feb. 16, 2022

ANDERS BRIEF | NEW COUNSEL

The defendant appealed from an order of Suffolk County Supreme Court, designating him a level-three sex offender. Appellate counsel submitted an *Anders* brief. The Second Department assigned new counsel. Nonfrivolous issues existed, including whether points were properly assessed under risk factors 9 and 12 and whether the request for a downward departure from the presumptive risk level was properly denied.
https://nycourts.gov/reporter/3dseries/2022/2022_01054.htm

THIRD DEPARTMENT

People v Jones | Feb. 17, 2022

JURY ROOM | MODE OF PROCEEDINGS

The defendant appealed from a Broome County Court judgment, convicting him of 2nd degree robbery (two counts). The Third Department reversed and ordered a new trial. The defendant was deprived of a fair trial when the trial court directed the People's investigator to enter the jury room to show the jurors how to operate a digital recorder. The violation of CPL 310.10 (1) constituted a mode-of-proceedings error that did not

require preservation. A deliberating jury must be under the supervision of a court officer or "an *appropriate* public servant." Except when authorized by the court or performing administerial duties with respect to the jurors, such court officer or public servant may not communicate with the jurors or permit any other person to do so. The investigator here was not an appropriate public servant. It was troubling that there was no record of what transpired while he/she was in the deliberation room. The error was fundamental, and the entire trial was irreparably tainted. Marlene Tuczinski represented the appellant.
https://nycourts.gov/reporter/3dseries/2022/2022_01069.htm

People v VonRapacki | Feb. 17, 2022

SORA | IAC

The defendant appealed from a Chemung County Court order, which classified him as a level-two sex offender. The Third Department reversed. The challenged order did not set forth findings of fact/conclusions of law, so remittal was required. At the new hearing, the defendant would be entitled to different assigned counsel, given the ineffective assistance he had received. SORA defendants had a due process right to effective assistance. A fundamental aspect of the attorney-client relationship was communication, but counsel acknowledged that he had had no contact with the defendant. He made no arguments, agreed to the Board's recommendation, and failed to require the People to admit any proof. Clea Weiss represented the appellant.
https://nycourts.gov/reporter/3dseries/2022/2022_01071.htm

FAMILY

SECOND DEPARTMENT

Mansour v Mahgoub **|** Feb. 16, 2022

FAMILY OFFENSE | MODIFICATION

The respondent appealed from an order of Queens County Family Court, which found that he committed multiple family offenses and issued a five-year order of protection. The Second Department modified. The commission of the family offense of disorderly conduct was not established. There was no evidence that the respondent acted with the intent to cause, or recklessly posed a risk of causing, public inconvenience, annoyance or alarm. Allan Shafter represented the respondent.
https://nycourts.gov/reporter/3dseries/2022/2022_01024.htm

THIRD DEPARTMENT

M/O Damon v Amanda C. **|** Feb. 16, 2022

VISITATION VIOLATION | NOT WILLFUL

The mother appealed from an order of Otsego County Family Court, which found her in willful violation of a visitation order. The Third Department reversed. Family Court erred

in finding that the mother willfully violated the order. Any violation was not willful. Both parties testified to difficulties involved in having parenting time in a public venue during the pandemic; they shared confusion as to which order was in effect at the time; and the mother relied on her attorney's advice, which had a sound basis. Harpremjeet Kaur represented the appellant.
https://nycourts.gov/reporter/3dseries/2022/2022_01082.htm

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