Indigent Legal Services

Decisions of Interest

FEBRUARY 20, 2024

CRIMINAL

FIRST DEPARTMENT

People v Ortiz | February 13, 2024

SUPPRESSION | IMPROPER SEARCH | REVERSED

The appellant appealed from a New York County Supreme Court judgment convicting him of attempted 3rd degree CPCS based on his guilty plea. The First Department reversed, granted suppression, vacated the plea, and dismissed the indictment upon the People's consent. The vehicle search could not be justified as a search incident to arrest. The appellant and the driver were already handcuffed outside of the car; items inside the car were no longer in their grabbable area or immediate control. Although the count to which the appellant pleaded guilty was based on cocaine recovered from his person, the guilty plea "covered the entire indictment" and suppression of the PCP found in his car warranted vacatur of the plea. The Office of the Appellate Defender (Samuel Steinbock-Pratt, of counsel) represented the appellant.

People v Ortiz (2024 NY Slip Op 00745)

People v Davis | February 13, 2024

CONSOLIDATED TRIAL | NO LIMITING INSTRUCTION | REVERSED

The appellant appealed from a New York County Supreme Court judgment convicting him of attempted 2nd degree murder, attempted 1st degree assault, and 2nd degree CPW (three counts) after a consolidated trial. The First Department reversed and remanded for a new trial of each of the two indictments. The first indictment arose from a confrontation between the appellant and two other men during which a gun discharged. The second indictment related to the appellant's possession of a firearm recovered from his companion's person. The incidents occurred six months apart, at different locations, and involved different guns. The undue prejudice and risk of propensity inference created by the cumulative evidence outweighed any probative value, especially given the weak evidence as to each, the absence of a limiting instruction, and the limited benefit to public or judicial economy. The Office of the Appellate Defender (Margaret E. Knight, of counsel), and Cravath, Swaine & Moore LLP (Scott B. Cohen, of counsel) represented the appellant.

People v Davis (2024 NY Slip Op 00746)

SECOND DEPARTMENT

People v Parker | February 14, 2024

INVOLUNTARY STATEMENT | *BATSON* | NEW TRIAL

The appellant appealed from a Queens County Supreme Court judgment convicting him of 2nd degree CPW. The Second Department reversed, suppressed the appellant's statements, and ordered a new trial. The appellant's admission was involuntary. A detective questioned him in the intensive care unit, two days after he emerged from a medically induced coma and just hours after surgery. One arm was handcuffed to his bed and the other was immobilized. When the appellant asked the detective to get a nurse to lower his bed because he was in pain, the detective said that he would call a nurse after they finished talking. He then read the appellant his *Miranda* rights, and the appellant agreed to talk. Supreme Court further erred by not instructing the jury to disregard the appellant's statement if they deemed it involuntary, and by denying his *Batson* challenge to the People's use of peremptory challenges on Black male prospective jurors. Appellate Advocates (Brian Perbix, of counsel) represented the appellant.
People v Parker (2024 NY Slip Op 00783)

People v Cotugno | February 14, 2024

SUPPLEMENTAL SEX OFFENDER VICTIM FEE | VACATED

The appellant appealed from a Nassau County Supreme Court judgment convicting him of 2nd degree unlawful surveillance and 3rd degree criminal trespass (two counts) based on his guilty plea, certifying him as a sex offender pursuant to SORA, and imposing a $1,000 supplemental sex offender victim fee. The Second Department vacated the $1,000 fee in the interest of justice and otherwise affirmed. Unlawful surveillance is not an enumerated offense for which a supplemental sex offender victim fee may be imposed. The Legal Aid Society of Nassau County (Tammy Feman and Dori Cohen, of counsel) represented the appellant.
People v Cotugno (2024 NY Slip Op 00778)

People v Richards | February 14, 2024

WOA INVALID | SCOPE MISCHARACTERIZED | NOT ABSOLUTE BAR

The appellant appealed from Kings County Supreme Court sentences imposed based on his guilty plea. The Second Department affirmed but found the waiver of appeal was invalid. Supreme Court mischaracterized the waiver as an absolute bar to an appeal, explaining it meant that "no one will provide you with counsel, transcripts or any other help to appeal these convictions," and "no judge, [or] group of judges will review anything any other judges have done in these cases." The court further failed to ensure that the appellant understood the contents of the written waiver, which did not overcome the court's erroneous explanation of the scope of the waiver. Appellate Advocates (Elizabeth R. Calcaterra, of counsel) represented the appellant.
People v Richards (2024 NY Slip Op 00784)

People v Hall | February 14, 2024

WOA INVALID | FIRST MENTION AFTER PLEA

The appellant appealed from a Kings County Supreme Court sentence imposed based on his guilty plea. The Second Department affirmed but found the waiver of appeal was invalid. Supreme Court did not discuss the waiver until after the appellant admitted guilt.

The court did not make it clear that the right to appeal was separate and distinct from the rights he would forfeit automatically by pleading guilty or ensure that the appellant was aware of the contents of the written waiver. Appellate Advocates (Sarah B. Cohen, of counsel) represented the appellant.
People v Hall (2024 NY Slip Op 00781)

People v Linares | February 14, 2024

WOA INVALID | BELATED DISCUSSION | NOT ABSOLUTE BAR

The appellant appealed from a Richmond County Supreme Court sentence imposed based on his guilty plea. The Second Department affirmed but found the waiver of appeal was invalid. Supreme Court mischaracterized the rights being waived as including any challenge to the legality of the sentence. Further, the court and the written waiver suggested that the waiver was an absolute bar to an appeal, and the court did not discuss the waiver until after the appellant had admitted guilt. Appellate Advocates (Denise A. Corsi, of counsel) represented the appellant.
People v Linares (2024 NY Slip Op 00782)

People v Smith | February 14, 2024

WOA INVALID | FIRST MENTION AFTER PLEA

The appellant appealed from a Queens County Supreme Court sentence imposed based on his guilty plea. The Second Department affirmed but found the waiver of appeal was invalid. Supreme Court did not discuss the waiver until after the appellant admitted guilt. Appellate Advocates (Victoria L. Benton, of counsel) represented the appellant.
People v Smith (2024 NY Slip Op 00787)

TRIAL COURTS

People v Davis | 2024 WL 632543

MAPP/DUNAWAY | TINTED WINDOWS | IMPROPER INVENTORY SEARCH

Queens County Criminal Court partially granted Davis' suppression motion. Officers approached Davis' car because it had "excessively dark window tints" and was parked near a fire hydrant. After Davis refused to roll down his window or open the door, the officers forced him out of the car and arrested him. An inventory search uncovered a copied NYPD parking placard in the glove box. The court felt constrained to find Davis' detention lawful based on *People v Nektalov* (78 Misc 3d 1 [App Term, 2d Dept 2022]) and the officers' subjective, conclusory testimony that the windows were excessively tinted. But the People failed to establish that the officers lawfully impounded and searched the vehicle pursuant to a standardized police inventory procedure; the record was insufficient to show that the officers were not merely rummaging for incriminating evidence. The Legal Aid Society of NYC (Robert Flink, of counsel) represented Davis. (NOTE: The Court of Appeals granted leave in *People v Nektalov* [39 NY3d 1156 (2023)]. Oral argument is scheduled for April 17, 2024).
People v Davis (2024 NY Slip Op 24041)

People v Viafara | 2024 WL 650749

COC/SOR ILLUSORY | DISCOVERY OBLIGATIONS | DISMISSED

Viafara moved to dismiss misdemeanor charges on speedy trial grounds. New York Criminal Court granted the motion. Almost two years after Viafara's arraignment, defense counsel notified the People that she never received certain items enumerated in their

discovery list. Because these items were automatically deleted in accordance with the NYPD's 365-day retention policy, they were no longer available. The People were obligated to request, preserve, and disclose these obvious pieces of discovery expeditiously after arraignment, regardless of Viafara's warrant status. The People failed to describe any efforts to obtain the records prior to the filing of their COC, rendering the COC invalid and the SOR illusory. The Legal Aid Society of NYC (Marcia Seckler, of counsel) represented Viafara.
People v Viafara (2024 NY Slip Op 24042)

People v Hoskins | 2024 WL 607596

COC ILLUSORY | NO DUE DILIGENCE | DISMISSED

Hoskins moved to dismiss felony gun charges on speedy trial grounds. Monroe County Court granted the motion and dismissed the indictment. The People filed their first COC 210 days after arraignment and filed three additional SCOCs—after disclosure of 911 materials, DNA testing results, and body worn camera footage—within one month of the trial date. This was not a complex case with voluminous discovery. The People should have realized that the 911 call was missing, and they made no reasonable efforts to timely obtain the body worn footage. Their claim that they have unfettered discretion to test items for DNA any time before trial did not demonstrate good faith, nor was it reasonable under the circumstances. Michael F. Geraci represented Hoskins.
People v Hoskins (2024 NY Slip Op 50133[U])

People v Polanco | 2024 WL 564050

BAIL REFORM | PRELIMINARY HEARING | RELEASED ON ELECTRONIC MONITOR

Polanco was arraigned on 3rd and 4th degree CPCS and 2nd degree CPW charges. At the preliminary hearing, the People proved up the drug charges but not the weapon charge. Polanco moved to dismiss the weapon charge and for an order releasing him. Cohoes City Court granted the motion and released him with an electronic monitor. Polanco could not be held in jail pending action by the grand jury on the non-qualifying drug charges. Rather, the court was required to order Polanco "held for action of the grand jury" by fixing an appropriate non-carceral securing order (*see* CPL 180.70 [1]; CPL 510.40 [4] [d]). The Albany County Public Defender (Ryan Larose and Kelly Vidur, of counsel) represented Polanco.
People v Polanco (2024 NY Slip Op 24037)

FAMILY

SECOND DEPARTMENT

Matter of Huasco v Chimborazo | February 14, 2024

CUSTODY HEARING REQUIRED | RIGHT TO COUNSEL | REMITTED

The maternal uncle appealed from a Rockland County Family Court order that summarily granted the father's petition for sole legal and physical custody of the child. The Second Department reversed and remitted for a hearing. Any indigent respondent in a child custody proceeding has a statutory right to assigned counsel—yet Family Court told the respondent-uncle that he had the right to retain counsel but was not entitled to assigned

counsel. The court further erred by failing to conduct a hearing before deciding the merits of the petition. Jeffrey Schonbrun represented the uncle.
Matter of Huasco v Chimborazo (2024 NY Slip Op 00767)

Matter of Nieves v Medina | February 14, 2024
CUSTODY | NO HEARING REQUIRED | UNDISPUTED FACTS
The father appealed from a Nassau County Family Court order that summarily granted the mother's petition for sole legal and physical custody of the child. The Second Department affirmed. Generally, parental access determinations should be made after a full evidentiary hearing—but a hearing is not required if the relevant facts are not disputed. The undisputed terms of the father's probation prohibited him from being in the child's presence until 2028, which permitted Family Court to determine custody and parental access without a hearing.
Matter of Nieves v Medina (2024 NY Slip Op 00768)

TRIAL COURTS

S.G. v K.W. | 2024 WL 9610270
EVIDENCE | RECORDED CONVERSATION | ADMISSIBLE
The AFC sought to admit at a best interests hearing a recorded conversation between the father and the 11-year-old child. Kings County Family Court admitted the recording as impeachment evidence and evidence in chief. The child had recorded the conversation without her parents' knowledge and wanted the court to hear and consider it in making its determination. The father's cross-examination testimony laid a sufficient foundation for its introduction for impeachment purposes, and the court had assessed the child's maturity during two in camera interviews and found her fully able to consent to recording the conversation.
S.G. v K.W. (2024 NY Slip Op 51478[U])

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