Indigent Legal Services

Decisions of Interest

FEBRUARY 5, 2024

CRIMINAL

FIRST DEPARTMENT

People v Benbow | January 30, 2024

CATU ERROR | PLEA VACATED

The appellant appealed from a New York County Supreme Court judgment convicting him of 3rd degree CPCS and imposing a 5-year sentence based on his guilty plea. The First Department reversed, vacated the plea, and remanded. Supreme Court's failure to advise the appellant that any enhanced sentence imposed upon a violation of his plea agreement would include PRS rendered the plea invalid. Joseph F. DeFelice represented the appellant.

People v Benbow (2024 NY Slip Op 00384)

People v Herrera | January 30, 2024

WEIGHT OF THE EVIDENCE | DRUG PARAPHERNALIA | MODIFIED

The appellant appealed from a New York County Supreme Court judgment convicting him of 3rd degree CPCS, 2nd degree criminally using drug paraphernalia (three counts), and unlawful possession of marijuana after a jury trial. The First Department vacated one of the drug paraphernalia convictions and otherwise affirmed. The vacated conviction – based on the appellant's possession of four digital scales—was against the weight of the evidence. The jury was not justified in finding that the appellant intended to use the scales to weigh and package narcotics at the time they were recovered; the scales were inoperable and there was no evidence explaining why. The Office of the Appellate Defender (Gwendolyn Parrish, of counsel) represented the appellant.

People v Herrera (2024 NY Slip Op 00388)

People v Ramirez | January 30, 2024

WEIGHT OF THE EVIDENCE | CPW | MODIFIED

The appellant appealed from a New York County Supreme Court judgment convicting him of 2nd degree CPW and tampering with physical evidence after a jury trial. The First Department vacated the CPW conviction as against the weight of the evidence and otherwise affirmed. The appellant's possession of the weapon was incidental, temporary, and lawful, and he did not use it in a dangerous manner. He obtained the gun by disarming a friend in the midst of an altercation between the friend and the friend's wife. The appellant only kept the gun long enough to deescalate the dispute and prevent greater harm to the wife. He did not turn the gun over to police because the friend took the gun

away from him and later hid it—but he was not required to physically resist his larger friend to establish that his possession was innocent. The Center for Appellate Litigation (Mark W. Zeno and Carl S. Kaplan, of counsel) represented the appellant.
People v Ramirez (2024 NY Slip Op 00390)

People v Williams | January 30, 2024

SORA | FAILURE TO ACCEPT RESPONSIBILITY | MODIFIED

The appellant appealed from a Bronx County Supreme Court order adjudicating him a level two sexually violent offender. The First Department reduced the adjudication to a level one. Supreme Court improperly assessed 10 points under risk factor 12 for failure to accept responsibility. The appellant denied guilt while his appeal from his underlying convictions was pending. Acceptance of responsibility at that time could have resulted in his admissions being used against him in any retrial, violating his Fifth Amendment right against self-incrimination. The Center for Appellate Litigation (Shaina R. Watrous, of counsel) represented the appellant.
People v Williams (2024 NY Slip Op 00386)

People v Reynoso | February 1, 2024

SORA | NOT SEXUAL MISCONDUCT | REMITTED

The appellant appealed from a Bronx County Supreme Court order adjudicating him a level three sexually violent offender. The First Department reversed and remanded. Supreme Court improperly assessed 20 points on factor 13 for unsatisfactory conduct, including sexual misconduct, while confined. DOCCS determined that the appellant stalked a female teacher at his facility based on a note he sent her. While DOCCS classifies stalking as a sex offense, the infraction did not involve sexually inappropriate behavior justifying the assessment of points on factor 13. The 20-point reduction rendered the appellant a presumptive level two. The case was remitted to determine whether an upward departure was warranted, even though one had not been requested by the People. The Legal Aid Society of NYC (Nathan R. Brown, of counsel) represented the appellant.
People v Reynoso (2024 NY Slip Op 00463)

THIRD DEPARTMENT

People v Appiah | February 1, 2024

INVALID WOA | SENTENCE NOT EXCESSIVE

On remittal from the Court of Appeals, the Third Department affirmed the appellant's 2nd degree assault conviction and seven-year sentence, with two justices dissenting. In its prior decision, two of the three-Justice majority found the appellant's appeal waiver to be invalid and declined to reduce his sentence. The third Justice found the waiver to be valid but did not reach the merits of the appellant's excessive sentence challenge. The Court of Appeals held that the waiver was invalid and remitted for a majority determination on the excessive sentence claim. On remittal, the third Justice joined the majority and declined to reduce the sentence; the appellant intentionally caused a head-on collision, seriously injuring the victim. In the dissents view, the sentence was harsh and excessive. The appellant's conduct resulted from profound mental illness; he was 26 years old, had

no criminal history, and was a productive member of society until his mental illness became unmanageable.
People v Appiah (2024 NY Slip Op 00470)

FOURTH DEPARTMENT

People v Heverly | February 2, 2024

FOR-CAUSE CHALLENGE | ERRONEOUS DENIAL | REMANDED

The appellant appealed from a Steuben County Court judgment convicting him of 2nd degree bail jumping after a jury trial. The Fourth Department reversed and ordered a new trial. County Court erroneously denied the appellant's for-cause challenge to a prospective juror who said that her family obligations would make it difficult for her to concentrate on the trial. Her affirmative answer when asked if she thought she could do what was required to be a juror was not an unequivocal assurance of impartiality. Further, the People did not comply with their discovery obligations and belatedly disclosed *Rosario* material, which included several transcripts in their possession. Even if the transcripts were available to defense counsel, the People were required to provide them because they were actually in their possession. On remand, the court should impose any sanctions deemed appropriate for the violation. Piotr Banasiak represented the appellant.
People v Heverly (2024 NY Slip Op 00524)

People v Crawford | February 2, 2024

PARAPHRASED JURY NOTE | MODE OF PROCEEDINGS ERROR | NEW TRIAL

The appellant appealed from a Monroe County Court judgment convicting him of 2nd degree murder and 2nd degree CPW (two counts) after a jury trial. The Fourth Department reversed and ordered a new trial. County Court committed a mode of proceedings error when it failed to read the exact text of a jury note to counsel before counsel and the court agreed on a response. The court improperly paraphrased the note which deprived the parties of meaningful notice as required by CPL 310.30. Bridget L. Field represented the appellant.
People v Crawford (2024 NY Slip Op 00528)

People v Moorhead | February 2, 204

RAPE | NO EVIDENCE OF PENETRATION | CONVICTION REDUCED

The appellant appealed from a Monroe County Supreme Court judgment convicting him of 1st degree rape. The Fourth Department reduced the conviction to attempted 1st degree rape and remitted for resentencing. There was no evidence that penetration occurred. The child victim testified that the appellant's penis touched her vagina but, when asked if he penetrated her, she stated that she either forgot or was not sure what had happened. The Monroe County Public Defender (Bradley E. Keem, of counsel) represented the appellant.
People v Moorhead (2024 NY Slip Op 00502)

People v Rojas-Aponte | February 2, 2024

DISCOVERY | PREMATURE DECISION | HELD AND REMITTED

The appellant appealed from an Onondaga County Court judgment convicting him of predatory sexual assault of a child (two counts). The Fourth Department held the appeal and remitted for further proceedings. County Court erred in denying the appellant's CPL 30.30 motion based on the People's failure to comply with their discovery obligations by withholding a police witness' disciplinary records. County Court denied the motion before the People responded, concluding that the People's method of having a group of ADAs review disciplinary records for disclosure was not improper. CPL 245.20 does not authorize the use of a screening panel to decide what should be disclosed, or to otherwise act as a substitute to disclosure. However, remittal was required to allow the People a chance to respond and for the court to consider remaining, outstanding issues. The Rennie Law Office (Bradley E. Keem, of counsel) represented the appellant.
People v Rojas-Aponte (2024 NY Slip Op 00534)

People v Scott | February 2, 2024

ENHANCED SENTENCE | HARSH AND EXCESSIVE | MODIFIED

The appellant appealed from an Erie County Supreme Court judgment convicting him of 2nd degree burglary (three counts) and imposing an aggregate 15-year sentence. The Fourth Department reduced the aggregate sentence to 10½ years, and otherwise affirmed. The appellant's waiver of appeal was invalid because the court mischaracterized it as a total bar to the taking of an appeal. While the court did not err in imposing an enhanced sentence after the appellant denied having committed the burglaries during the presentence interview, the enhanced sentence was unduly harsh and severe. The appellant pleaded guilty based on a promised sentence of between six and eight years, with a possible reduction to 3½ years with the People's recommendation. The imposed sentence was nearly double the maximum of the original sentence promised. The Legal Aid Society of Buffalo (Nicholas P. DiFonzo, of counsel) represented the appellant.
People v Scott (2024 NY Slip Op 00522)

TRIAL COURTS

People v Henry | 2024 WL 334571

"NOTICE OF NON-DISCLOSURE" | COC INVALID

Henry moved to dismiss misdemeanor charges on speedy trial grounds. Queens County Criminal Court granted the motion. The COC filed by the prosecution, despite their knowledge of outstanding discoverable material—the memo books of three police witnesses—was improper and not made in good faith. The People's so-called "notice of non-disclosure," wherein they acknowledged that they had not disclosed the memo books but were prepared to proceed to trial without them and accept any sanction that the court wished to impose, did not render the COC valid. The People cannot file a general "notice of non-disclosure" when there are outstanding discoverable materials. Such a notice is simply an admission that the accompanying COC is false. The Legal Aid Society of NYC (Sarah Wohlsdorf, of counsel) represented Henry.
People v Henry (2024 NY Slip Op 24025)

People v Grant | 2024 WL 334569

SINGER | UNREASONABLE DELAY | DISMISSED

Grant moved to dismiss an indictment charging him with 2nd degree murder based on unconstitutional pre-indictment delay. Kings County Supreme Court granted the motion. Grant was developed as a person of interest in a homicide in 1992, but no police action was taken at that time. Grant's DNA profile was uploaded to the state DNA database and became available for comparison in 2004. In 2018, police requested a DNA analysis of the semen-positive oral swab collected from the decedent in 1992. The People's unreasonable 14-year delay in testing Grant's DNA and commencing prosecution was not excused by their claim of a lack of resources at the NYPD and the OCME. Brooklyn Defender Services (Andrea Moletteri and Clinton Hughes, of counsel)- represented Grant.
People v Grant (2024 NY Slip Op 24026)

People v Moss | 2022 WL 22328745

SORA | UNCONSTITUTIONAL PRIOR CONVICTION | OVERRIDE APPLIED

Monroe County Court adjudicated Moss a level three sexually violent predicate sex offender, applying the automatic override to a level three based on his 2006 prior felony sex crime conviction. Moss was sentenced in 2016 as a second child sexual assault felony offender but the case was remanded after his appeal for a hearing as to whether his plea in the 2006 predicate conviction was coerced. After the hearing, County Court determined that the 2006 conviction was unconstitutionally obtained and sentenced him as a first-time felony offender. However, the 2006 conviction was never vacated and its existence triggered the automatic override. County Court did not consider a downward departure because Moss did not request one if the court decided to apply the override.
People v Moss (2022 NY Slip Op 51427[U])

FAMILY

FIRST DEPARTMENT

Matter of Celinette H.H. v Michelle R. | February 1, 2024

HABEAS CORPUS | CONVERTED TO CUSTODY PROCEEDING | REMITTED

The mother appealed from a New York County Family Court order that denied her writ of habeas corpus and dismissed her custody petition. The First Department reversed, converted the writ to a custody petition, and remanded. The mother could not file a custody petition in 2020 because of Family Court's COVID-19 moratorium on all non-essential matters—but petitioning for a writ of habeas corpus seeking to have the father return the children to New York was an available option. Once the moratorium was lifted, the children had been out of state for over six months and Family Court had no jurisdiction over them, resulting in the dismissal of her subsequently-filed custody petition. The court should have converted the habeas proceeding to a custody proceeding. Carol Kahn represented the mother.
Matter of Celinette H.H. v Michelle R. (2024 NY Slip Op 00456)

SECOND DEPARTMENT

Matter of Mazo v Volpert | January 31, 2024

CONDITIONS | FUTURE PARENTAL ACCESS | IMPERMISSIBLE

The father appealed from a Kings County Family Court order that denied his petition to enforce the parenting time provisions incorporated into a judgment of divorce and granted the mother's petition seeking to suspend the father's parenting time and condition his filing of any future petition on, among other things, his completion of a parenting skills class. The Second Department modified by eliminating the conditions the father was required to meet before he could file another petition. While Family Court's decision to suspend the father's parenting time is supported by the record, the court cannot require a parent to undergo counseling or treatment as a condition of future parental access or application for parental access. Austin I. Idehen represented the father.
Matter of Mazo v Volpert (2024 NY Slip Op 00426)

FOURTH DEPARTMENT

Matter of Anthony J. (Siobvan M.) | February 2, 2024

JUDICIAL BIAS | REMANDED | DIFFERENT JUDGE

The mother appealed from an Onondaga County Family Court order that terminated her parental rights. The Fourth Department reversed in the interest of justice and ordered a new hearing before a different judge. Family Court's bias against the mother denied her due process. The record showed that the court was annoyed by the mother's refusal to surrender her parental rights. During a discussion about voluntary surrender after the first witness' direct testimony, the mother said she would not give up her child and the court responded: "Then I'm going to do it." This amounted to a threat to terminate her parental rights if she continued with the fact-finding hearing and established that the court had predetermined the outcome of the hearing. The Hiscock Legal Aid Society (Thomas R. Babilon, of counsel) represented the father. [NOTE: the same judge presided in *Matter of Zyion B. (Fredisha B.)*]
Matter of Anthony J. (Siobvan M.) (2024 NY Slip Op 00574)

Matter of Zyion B. (Fredisha B.) | February 2, 2024

APPEAL MOOT | JUDGE CAUTIONED

The mother appealed from an Onondaga County Family Court order that placed the child with the petitioner in an article 10 proceeding. The Fourth Department dismissed the appeal as moot but expressed concern with the Family Court judge's conduct at a sua sponte removal hearing and recommended the judge consider recusal. The judge chose what witnesses to call and extensively participated in direct and cross-examination with "a clear intention of strengthening the case for removal," taking on the function and appearance of an advocate. The judge also repeatedly questioned the mother about personal matters irrelevant to the removal, apparently to upset and embarrass the mother.

The function of the judge is to protect the record, not to make it. Veronica Reed represented the mother. [NOTE: the same judge presided in *Matter of Anthony J. (Siobvan M.)*]
Matter of Zyion B. (Fredisha B.) (2024 NY Slip Op 00550)

Matter of Dhir v Winslow | February 2, 2024

FAMILY OFFENSE | SUFFICIENT ALLEGATIONS | PETITION REINSTATED

The appellant appealed from an Erie County Family Court order that granted the respondent's motion and dismissed her family offense with prejudice. The Fourth Department modified by partially denying the motion and reinstating the petition. The petition sufficiently alleged conduct by the respondent that would constitute 2nd degree harassment, 2nd degree aggravated harassment, and 4th degree stalking. The appellant alleged several instances where the respondent remotely controlled her laptop through spyware that he installed and communicated with her by phone and text messages in an alarming manner. David J. Pajak represented the appellant.
Matter of Dhir v Winslow (2024 NY Slip Op 00531)

Matter of Dinoff v Knechtel | February 2, 2024

CUSTODY | PARENT v. NON-PARENT | REMITTED

The appellant appealed from an Oswego County Family Court order that awarded her and the mother joint custody with the goal of ultimately granting the mother primary physical custody. The Fourth Department reversed, reinstated and granted the appellant's petition seeking sole legal and physical custody, and remitted for a determination of a visitation schedule for the mother. The mother left the child in the appellant's care when the child was six months old. She only visited the child once in the several years that followed and the child continued to live with the appellant, her husband, and their five children. Family Court erroneously focused on the mother's current parental fitness and failed to address the child's need for continuity and stability. Notably, the mother said that, if granted custody, she intended to cease all communication with the appellant and her children. Thomas L. Pelych represented the appellant.
Matter of Dinoff v Knechtel (2024 NY Slip Op 00551)

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