Indigent Legal Services

Decisions of Interest

FEBRUARY 6, 2023

CRIMINAL

FIRST DEPARTMENT

People v Allen | Feb. 2, 2023

SORA | FAILURE VERIFY | UNCONSTITUTIONAL

The defendant appealed from a New York County Supreme Court judgment convicting him of 3rd degree CPW and failure to verify address information based on his guilty plea. The First Department reversed, dismissed the failure to verify charge, vacated the plea to the CPW charge, and remanded. Correction Law § 168-f (3) is unconstitutionally vague as applied to a homeless individual who, like the defendant, does not have an address to report or verify. The defendant's plea was in exchange for concurrent sentences, and he may not have pled guilty to the CPW charge had it not been for the failure to verify charge. Therefore, the plea to the CPW charge must be vacated. The Center for Appellate Litigation (Matthew W. Christiana, of counsel) represented the appellant.

People v Allen (2023 NY Slip Op 00496)

People v McCray | Feb. 2, 2023

440.10 | DENIAL REVERSED

The defendant appealed from a Bronx County Supreme Court order that denied his CPL 440.10 motion after a hearing. The First Department reversed the order, vacated the conviction, and remanded. The defendant was deprived of his right to the effective assistance of counsel by several highly prejudicial decisions made by trial counsel, which were neither strategic nor objectively reasonable. Among other things, counsel waived preclusion of an unnoticed identification made by the only eyewitness to the shooting; untimely sought preclusion of that identification after cross-examining the witness; introduced a mug shot at trial that was used during a suppressed identification procedure with the same witness; did not seek removal of the word "shooter" from the photo; and did not redact the defendant's criminal history from the mug shot. The Office of the Appellate Defender (Julia L. Burke, of counsel) represented the appellant.

People v McCray (2023 NY Slip Op 00502)

People v Greene | Feb. 2, 2023

MULTIPLICITOUS COUNTS | HARMLESS ERROR

The defendant appealed from a New York County Supreme Court judgment convicting him of 4th degree grand larceny and two counts of 1st degree perjury following a jury trial. The First Department affirmed. The motion court erred when it held that the two perjury counts were not multiplicitous. Both counts were based on the defendant's grand jury testimony about the same incident. However, the error was harmless because concurrent sentences were imposed on those

counts. The Office of the Appellate Defender (Margaret E. Knight, of counsel) represented the appellant.
People v Greene (2023 NY Slip Op 00497)

People v Guzman | Jan. 31, 2023

WITNESS UNAVAILABILITY | AFFIRMED

The defendant appealed from a New York County Supreme Court judgment convicting him of 1st degree assault after a retrial. The First Department affirmed. The trial court properly introduced the victim's testimony from the first trial: the People reported that the victim was totally uncooperative, they had lost all means of contact with him, and further efforts to locate him would have been futile. An evidentiary hearing with sworn testimony is not an absolute prerequisite to finding that a witness is unavailable.
People v Guzman (2023 NY Slip Op 00398)

SECOND DEPARTMENT

People v Hernandez | Feb. 1, 2023

SORA | REVERSED | DOWNWARD DEPARTURE

The defendant appealed from a Suffolk County Court order that adjudicated him a risk level three sex offender. The Second Department reversed the order and designated the defendant a level one sex offender. The defendant's risk assessment instrument score indicated a presumptive level one classification, but his prior felony conviction for a sex offense triggered the automatic override provision to a level three. The defendant requested a downward departure to a level one. The prior conviction was for 3rd degree rape based solely on the complainant's age. The subsequent conviction was for possession of a sexual performance of a child—a video of the same underaged complainant made during the ongoing relationship that formed the basis of the rape conviction. In these circumstances, strict application of the override provision would result in an overassessment of the defendant's risk to public safety. Stacy E. Albin-Leone represented the appellant.
People v Hernandez (2023 NY Slip Op 00451)

People v Shearer | Feb. 1, 2023

CPL 440.20 | NEW PSI

The defendant appealed from a Westchester County Court order that summarily denied his CPL 440.20 motion. The Second Department reversed the order, vacated the sentence, and remitted the case to County Court for resentencing. County Court was required to order a new presentence investigation in connection with the defendant's 2nd degree murder conviction. The court's reliance on a PSI prepared in relation to the defendant's 3rd degree attempted CPCS conviction less than one year before the murder conviction was error. The PSI for the drug offense relied on facts and circumstances unrelated to the murder conviction, and the defendant could not waive compliance with CPL 390.20 in these circumstances. Matthew Hug represented the appellant.
People v Shearer (2023 NY Slip Op 00445)

People v Carson | Feb. 1, 2023

ENHANCED SENTENCE | EXCESSIVE

The defendant appealed from an Orange County Court judgment convicting him of two counts of attempted 3rd degree CSCS based on his guilty plea and sentencing him to consecutive determinate 9-year prison terms to be followed by 3 years of PRS. The Second Department

modified the judgment and reduced the sentences to concurrent 7-year prison terms to be followed by 3 years of PRS. The defendant pled guilty in exchange for capped sentences of 5 years with 2 years of PRS on each count, to run concurrently. After finding that he had violated certain specified conditions prior to sentencing, the court enhanced the sentence to consecutive 9-year terms followed by 3 years of PRS. While County Court had a sufficient basis to enhance the sentence, the enhanced sentence was excessive. Alex Smith represented the appellant.
People v Carson (2023 NY Slip Op 00435)

People v Hairston | Feb. 1, 2023

OUT-OF-STATE CONVICTION | NOT EQUIVALENT

The defendant appealed from a Kings County Supreme Court judgment convicting him of several felony sex offenses after a jury trial and sentencing him as a persistent violent felony offender. The Second Department modified the judgment in the interest of justice, vacated the defendant's adjudication as a persistent violent felony offender and remitted the case for resentencing. An out-of-state felony conviction may serve as a predicate violent felony conviction only if it involves all the essential elements of a NY violent felony. Patricia Pazner (Sean H. Murray, of counsel) represented the appellant.
People v Hairston (2023 NY Slip Op 00439)

THIRD DEPARTMENT

People v Thornton | Feb. 2, 2023

CPL 440.10 | RECUSAL | REVERSED

The defendant appealed from a St. Lawrence County Court order summarily denying his CPL 440.10 motion. The Third Department reversed in the interest of justice. The County Court Judge's law clerk was the former District Attorney responsible for the defendant's indictment, prosecution, and conviction. It was an improvident exercise of discretion for County Court to rule on the motion; judges must appear neutral. The Rural Law Center (Keith Schockmel, of counsel) represented the appellant.
People v Thornton (2023 NY Slip Op 00460)

People v Hayward | Feb. 2, 2023

DISSENT | IAOC | UNANNOUNCED ENTRY

The defendant appealed from a Fulton County Court judgment convicting him after trial of 3rd degree CPCS and 7th degree CPCS. The Third Department affirmed. Two justices dissented. Defense counsel's failure to seek suppression based on police officers' unannounced entry into the apartment in which drugs were found constituted ineffective assistance of counsel. The police neither applied for nor obtained a no-knock warrant. Failure to abide by the knock-and-announce rule is not a mere technical violation. The inherent danger of forcibly entering a home, and the constitutional rights implicated, require a judicial determination regarding whether an unannounced entry is warranted. The entry here—made with a battery ram, without any prior announcement of purpose or authority—was not reasonable under the Fourth Amendment. Defense counsel sought suppression on other grounds, and there was no apparent strategy or explanation for not challenging the unauthorized entry.
People v Hayward (2023 NY Slip Op 00461)

FOURTH DEPARTMENT

People v Bell | Feb. 3, 2023

CATU ERROR | VOP ADMISSION

The defendant appealed from a Monroe County Court judgment that revoked his probation based on his admission to a probation violation and resentenced him to a term of imprisonment and PRS. The Fourth Department reversed, vacated the admission and remanded. The defendant's admission was involuntary because County Court never informed him that a term of PRS would be imposed if the court sentenced him to prison. The defendant could challenge the court's failure to advise of the PRS term even though he did not file a motion to withdraw the admission. The Monroe County Public Defender (Shirley A. Gorman, of counsel) represented the appellant.
People v Bell (2023 NY Slip Op 00594)

People v Morgan | Feb. 3, 2023

SORA | PA CONVICTION | REVERSED

The defendant appealed from a Livingston County Court order that designated him a sexually violent offender pursuant to SORA. The Fourth Department reversed and vacated the sexually violent designation. The defendant's Pennsylvania conviction covered the same conduct as the New York offense of 2nd degree sexual abuse, which is not a sexually violent offense pursuant to SORA. The SORA court's analysis should have stopped there. The Livingston County Conflict Defender (Bradley E. Keem, of counsel) represented the appellant.
People v Morgan (2023 NY Slip Op 00569)

People v Osman | Feb. 3, 2023

PL § 265.15 PRESUMPTION | RIGHT TO CALL WITNESS

The defendant appealed from an Oneida County Court judgment that convicted him after trial of attempted 2nd degree CPW, 5th degree arson, and resisting arrest, arising from an incident where he threw and burned miniature American flags staked in the ground. The Fourth Department reversed. County Court erred in instructing the jury pursuant to Penal Law § 265.15 (4) that possession of any weapon is presumptive evidence of intent to use it unlawfully against another, because the People never pursued a theory that the defendant possessed the weapon at issue. County Court also erred by precluding the defendant from calling his psychiatric nurse practitioner as a witness. The NP would have provided relevant defense testimony, the defendant showed good cause for his delay in noticing the witness, and the People established no prejudice. Further, County Court abused its discretion by denying the defendant's application for $1,800 in expert fees on the sole ground that he had a retained attorney. Rebecca L. Wittman represented the appellant.
People v Osman (2023 NY Slip Op 00581)

TRIAL COURTS

People v Baldner | Feb. 2, 2023

HIGH-SPEED PURSUIT | MURDER DISMISSED

Ulster County Supreme Court granted the defendant's motion to dismiss the top count of an indictment charging him with 2nd degree murder (depraved indifference). According to grand jury proof, the defendant—a State trooper—stopped a vehicle on the Thruway for speeding. During the ensuing interview, the trooper pepper-sprayed the confrontational driver. The driver sped

away and a chase ensued, with both vehicles speeding at more than 120 mph. Allegedly, the defendant twice rammed the fleeing vehicle. After the first impact and just before the second impact, the defendant applied a hard brake. The fleeing vehicle rolled over, and the driver's 11-year-old daughter was partially ejected and killed. Supreme Court stated that the defendant acted with extremely poor judgment in engaging in high-speed pursuit and having contact with the vehicle—actions that contravened agency protocols. However, the grand jury proof did not demonstrate that the trooper acted with wantonness akin to a desire to kill the decedent or the other occupants of the vehicle so as to support the murder charge. John Ingrassia represented the defendant.

People v Gutierrez | 2023 WL 1153849

INVALID COC | SHOTSPOTTER RECORDS

The defendant moved to invalidate the People's COC and dismiss the charges because the People failed to disclose materials related to a ShotSpotter activation. Bronx County Supreme Court granted the motion. The People argued that ShotSpotter materials are not automatically discoverable because they are generated and maintained by an agency not under their control. However, the NYPD has wide access to ShotSpotter records—making them within the People's custody and control and automatically discoverable. The Legal Aid Society of NYC (Kyla Wells, of counsel) represented the defendant.
People v Gutierrez (2023 NY Slip Op 23022)

People v Rugierio-Rivera | 2023 WL 1426817

DISCOVERY | POLICE RECORDS

The defendant moved to invalidate the People's COC and SOR and to dismiss the charges because the People provided letters summarizing police disciplinary records instead of the records themselves. Queens County Criminal Court granted the motion, deemed the COC invalid and dismissed the charges. The term "summary" is used in the automatic discovery statute in two places—but not in CPL 245 (1) (k), which requires, among other things, the disclosure of "[a]ll evidence and information" that tends to impeach a prosecution witness's credibility. Whether information is potential impeachment material is for defense counsel to determine, not the People, NYPD or the CCRB. Summaries of police disciplinary records do not fulfill the People's discovery obligation. The Legal Aid Society of NYC (Estefania P. Taranto, of counsel) represented the defendant.
People v Rugierio-Rivera (2023 NY Slip Op 50069[U])

People v Uraga | 2022 WL 18492147

DISCOVERY | INVALID COC

The defendant moved to invalidate the People's COC and SOR because they failed to disclose the disciplinary records of one of their police witnesses. The People provided only a letter stating that the officer was the subject of unsubstantiated allegations. Queens County Criminal Court found that the People knowingly failed to disclose discoverable material in their possession without leave of the court or a protective order and invalidated the COC. The charge was dismissed because more than 90 days of time chargeable to the People had elapsed without a valid COC or SOR. The Legal Aid Society of NYC (Ronald W. Popo, of counsel) represented the defendant.
People v Uraga (2022 NY Slip Op 51332 [U])

People v Ventura | 2023 WL 496309

DISCOVERY | FACIAL INSUFFICIENCY

The defendant moved to invalidate the People's entire COC and SOR on multiple accusatory instruments after some of the accusatory instruments were deemed facially insufficient. Suffolk County District Court denied the motion. The facial insufficiency of some of the accusatory instruments did not render the COC and SOR invalid as to the sufficient accusatory instruments. The People were therefore not required to file a supplemental COC and SOR as to the remaining charges. [NOTE: *cf. People v Matos*, 2023 NY Slip Op 23006 (Crim Ct, Kings County 2023) ("it is a pre-requisite to a valid statement of readiness that an accusatory instrument is facially sufficient as to all charges not dismissed by the People")].

People v Ventura (2023 NY Slip Op 23021)

FAMILY

SECOND DEPARTMENT

Matter of Morgan v Morgan | Feb. 1, 2023

CHILD SUPPORT | SUSPENSION

The mother appealed from a Kings County Family Court order that suspended the father's child support obligation based on parental alienation. The Second Department affirmed. The evidence showed that the mother encouraged the children to have a negative view of the father, failed to foster the father's relationship with the children, and refused to produce the children for the father's visitation numerous times. Her actions deliberately and unjustifiably frustrated the father's visitation rights.

Matter of Morgan v Morgan (2023 NY Slip Op 00424)

THIRD DEPARTMENT

Matter of Proechel v Bensman | Feb. 2, 2023

CHILD SUPPORT | NO OBJECTIONS

The mother appealed from a Columbia County Family Court order that denied the father's objections to a Support Magistrate's order. The Third Department dismissed the appeal. Only an aggrieved party has standing to appeal, and the mother was not aggrieved by Family Court's order. Family Court was constrained to review only the provisions challenged by the father in the absence of objections by the mother, and the court's decision on these issues was in the mother's favor. Further, the mother's challenges to the magistrate's order were precluded by her failure to file objections.

Matter of Proechel v Bensman (2023 NY Slip Op 00467)

FOURTH DEPARTMENT

Matter of Sharlow v Hughes | Feb. 3, 2023

SUPERVISED VISITATION | MODIFIED

The mother appealed from a Jefferson County Family Court order that granted the petitioner grandmother sole custody of the child and ordered that the mother participate in counseling, take her prescribed medications, and provide proof of a negative hair follicle test before having therapeutic visitation with the child. The Fourth Department modified the order by striking the preconditions of the mother's therapeutic visitation. Although the court may include these terms as a component of visitation, it does not have the authority to make them a prerequisite to visitation. Todd G. Monahan represented the mother.
Matter of Sharlow v Hughes (2023 NY Slip Op 00518)

Matter of Smith v Baldwin | Feb. 3, 2023

CONSENT ORDER | APPEAL DISMISSED

The mother appealed from an Oswego County Family Court order that awarded the father sole custody of the children with therapeutic visitation to the mother. The Fourth Department dismissed the appeal. After the entry of the order on appeal, Family Court entered a consent order directing that sole custody remain with the father and relinquishing jurisdiction to Fulton County in the State of Georgia. Because the court divested itself of jurisdiction in a nonappealable consent order, the appeal was dismissed as moot.
Matter of Smith v Baldwin (2023 NY Slip Op 00597)

Statewide Appellate Support Center
New York State Office of Indigent Legal Services
80 S Swan St, Ste 1147, Albany, NY 12210 | www.ils.ny.gov
(518) 486-6602 | SASC@ils.ny.gov