

Decisions of Interest

MARCH 18, 2024

CRIMINAL

FIRST DEPARTMENT

People v Vasquez | March 12, 2024

SHOWUP IDENTIFICATION | SUPPRESSED | HARMLESS ERROR

The appellant appealed from a New York County Supreme Court judgment convicting him of 4th degree grand larceny after a jury trial. The First Department suppressed a showup identification as unduly suggestive and otherwise affirmed. Approximately 30 minutes after the appellant's arrest, police brought the identifying witness to the site where the appellant was handcuffed and surrounded by several officers. Bottles of stolen cosmetics were scattered on the ground around him, and two of the officers allegedly made comments to the witness before and during the identification. However, this error was harmless in light of the overwhelming circumstantial evidence of guilt.

[People v Vasquez \(2024 NY Slip Op 01276\)](#)

People v Johnson | March 12, 2024

BRUEN CHALLENGE FORECLOSED | VALID WOA | AFFIRMED

The appellant appealed from a Bronx County Supreme Court judgment convicting him of attempted 2nd degree CPW based on his guilty plea. The First Department affirmed. The appellant's valid appeal waiver foreclosed any *Bruen* challenge to the constitutionality of his weapon possession conviction. Alternatively, the appellant lacked standing to challenge New York's gun licensing scheme because he did not apply for a license and failed to establish that his conviction was unconstitutional under *Bruen*. [NOTE: This holding creates a split with the Fourth Department's decision in *People v Benjamin*, 216 AD3d 1457 (4th Dept 2023) regarding the effect of a valid waiver of appeal].

[People v Johnson \(2024 NY Slip Op 01275\)](#)

SECOND DEPARTMENT

People v Lucky | March 13, 2024

ILLEGAL SENTENCE | PRS REDUCED | NOT EXCESSIVE

The appellant appealed from a Kings County Supreme Court judgment convicting him of attempted 2nd degree CPW and sentencing him to 2 ½ years with 5 years of PRS based on his guilty plea. The Second Department reduced the illegal 5-year term of PRS to 2 years and otherwise affirmed. The appellant did not allege that Supreme Court failed to properly consider or apply the DVSJA factors in sentencing, and his valid waiver of appeal

precluded review of his claim that the sentence imposed under the DVSJA was harsh and excessive. The Legal Aid Society of NYC (Paris C. DeYoung, of counsel) represented the appellant.

[People v Lucky \(2024 NY Slip Op 01319\)](#)

FOURTH DEPARTMENT

People v Abraham | March 15, 2024

INVOLUNTARY PLEA | DIRECT CONSEQUENCE OMITTED | REVERSED

The appellant appealed from a Monroe County Court judgment convicting him of felony driving while ability impaired by drugs based on his guilty plea. The Fourth Department reversed, vacated the plea, and remitted. County Court's failure to advise the appellant that a fine could be imposed in addition to a term of imprisonment if he violated the conditions of his interim probation rendered his plea involuntary. The Monroe County Public Defender (Clea Weiss, of counsel) represented the appellant.

[People v Abraham \(2024 NY Slip Op 01419\)](#)

People v Mack | March 15, 2024

COURT'S STATEMENTS | COERCED PLEA | REVERSED

The appellant appealed from a Monroe County Supreme Court judgment convicting him of attempted 2nd degree burglary. The Fourth Department reversed, vacated the plea, and remitted. The court's coercive statements rendered the appellant's guilty plea involuntary. The court told the appellant: "there's no way in God's earth that if you're convicted of this crime [after trial] you're going to get towards the minimum with me." This signaled the court's intent to penalize the appellant if he exercised his right to a trial. Further, the court twice misinformed the appellant that he faced up to 30 years in prison when his maximum exposure was capped 20 years. The Monroe County Public Defender (David R. Juergens, of counsel) represented the appellant.

[People v Mack \(2024 NY Slip Op 01409\)](#)

People v Khadka | March 15, 2024

NONEXISTENT OFFENSE | COUNT DISMISSED

The appellant appealed from a Monroe County Court judgment convicting him of felony DWI and refusal to submit to a breath test after a jury trial. The Fourth Department reversed and dismissed the conviction for refusal to submit to a breath test, which "is not a cognizable offense for which a person may be charged or convicted in a criminal court." The Monroe County Public Defender (Tonya Plank, of counsel) represented the appellant.

[People v Khadka \(2024 NY Slip Op 01402\)](#)

People v Taylor | March 15, 2024

DEBOUR | PARKED CAR | HELD AND REMITTED

The appellant appealed from an Erie County Court judgment convicting him of 2nd degree CPW. The Fourth Department held the appeal and remitted. Police approached a car in which the appellant was a passenger while it was parked at a gas station and directed the occupants out of the vehicle, revealing a firearm in the back seat. The trial court erroneously concluded that this was a *DeBour* level one intrusion; but requesting that an

occupant exit a parked car is a level three encounter. Remittal was required to determine whether there was reasonable suspicion justifying the order to exit the car. The Legal Aid Bureau of Buffalo (Allison V. McMahon, of counsel) represented the appellant.

[People v Taylor \(2024 NY Slip Op 01449\)](#)

TRIAL COURTS

People v Rivas | 2024 WL 1040612

STAY AWAY ORDER | *CRAWFORD* HEARING | MODIFIED

Rivas challenged the appropriateness and scope of a stay away temporary order of protection (TOP) issued in favor of her mother. Bronx County Criminal Court modified the order to a limited TOP after a *Crawford* hearing. The stay away provisions deprived Rivas of a significant property interest. For over a year, Rivas and her mother had lived together in an apartment where she paid rent and her child attended a school that was within walking distance. The stay away provisions forced Rivas to move, resulting in Rivas and her child commuting over an hour by bus to the child's school. Rivas had no known drug or alcohol abuse, no access to weapons, and no prior convictions or arrests; nine years had passed since her prior contacts with the criminal justice system, during which time she had a child and obtained steady employment; and the People failed to prove that she posed a risk to her mother that could not be addressed by a limited TOP. The Bronx Defenders (Matthew S. Bruno, of counsel) represented Rivas.

[People v Rivas \(2024 NY Slip Op 24073\)](#)

People v J.B. | 2024 WL 1040649

WARRANTLESS SEARCH | NO EXIGENT CIRCUMSTANCES | GUN SUPPRESSED

J.B. sought suppression of statements and evidence related to her arrest for animal cruelty and weapon possession. Bronx County Supreme Court suppressed a firearm recovered from J.B.'s purse but not her statements. No exigent circumstances supported a warrantless search of her purse—J.B.'s arrest was for a non-violent offense relating to the care of her dogs, she was calm and cooperative throughout the encounter, and a large number of officers present militated against any risk to officer safety. Inevitable discovery did not apply to the gun because it was primary evidence recovered as a direct result of an illegal search. The Bronx Defenders (Elizabeth Bright and Aurora Maoz, of counsel) represented J.B.

[People v. J.B. \(2024 NY Slip Op 24074\)](#)

FAMILY

SECOND DEPARTMENT

Matter of Claudio D.A.I. (Segundo A.) | March 13, 2024

GUARDIANSHIP | REUNIFICATION NOT VIABLE | MODIFIED

The petitioner appealed from a Queens County Family Court order that denied a motion for a specific finding that reunification of the child with the mother was not viable due to abuse, neglect, and/or abandonment, which would allow the child to petition for special immigrant juvenile status (SIJS). The Second Department modified certain language in the order to indicate that the mother abandoned the child. The record showed that reunification was not viable due to parental abandonment. Further, Family Court does not render an immigration determination by making specific factual findings—the federal government makes the final decision about SIJS. Montenza Law Firm, P.C. (Athena Matos, of counsel) represented the petitioner.

[Matter of Claudio D.A.I. \(Segundo A.\) \(2024 NY Slip Op 01301\)](#)

Matter of Elisa F. v Daniel D. | March 13, 2024

BEST INTEREST HEARING REQUIRED | REMITTED

The maternal grandfather and the child appealed from an Orange County Family Court order that granted the mother sole legal and physical custody of the child. The Second Department reversed and remitted. Family Court erred by finding that the grandfather did not show extraordinary circumstances. The mother voluntarily relinquished care and control of the child to the grandfather during a period when the child was separated from the mother for over 24 months. Finding no extraordinary circumstances, the court did not conduct a best interest hearing—which is now required. Samuel S. Coe represented the grandfather and Kelly M. Enderley represented the child.

[Matter of Elisa F. v Daniel D. \(2024 NY Slip Op 01306\)](#)

Matter of Wright v Metz | March 13, 2024

PARENTAL ACCESS | MODIFIED | DECREASED IN-PERSON TRANSFERS

The mother appealed from a Nassau County Family Court order that granted the father a set parental access schedule. The Second Department modified the parenting schedule to reduce the number of in-person transfers and opportunities for conflict between the parents in the child's presence and increase the mother's after-school time with the child, which previously was limited to Mondays and alternate Fridays. Gassman Baimonte Gruner, P.C. (Stephen Gassman and Karen Bodner of counsel) represented the mother.

[Matter of Wright v Metz \(2024 NY Slip Op 01316\)](#)

Matter of Timothy K. Jr. (Timothy K.) | March 13, 2024

NEGLECT FINDING | PERMANENT STIGMA | NOT MOOT

The father appealed from a Suffolk County Family Court order that found he had neglected the subject children, placed him under the petitioner's supervision for one year, and released the children to the mother for a one-year period. The Second Department affirmed but explained that the father's appeal from the neglect finding was not moot even though the challenged provisions of the order had expired. The neglect adjudication constitutes a permanent and significant stigma that could affect the father's status in future proceedings.

[Matter of Timothy K. Jr. \(Timothy K.\) \(2024 NY Slip Op 01308\)](#)

FOURTH DEPARTMENT

Matter of Noah C. | March 15, 2024

TPR | NEW FACTS | NEW HEARING REQUIRED

The parents appealed from an Ontario County Family Court order that terminated their parental rights to their four children. The Fourth Department vacated the disposition as to three of the children and remitted. New facts alleged by the children and the father—including that the oldest child’s kinship guardianship had been terminated and the paternal grandmother had been awarded custody of the second oldest child and was seeking custody of the third oldest child (who opposed being adopted)—required a new hearing to determine the best interest of the three oldest children. Cara A. Waldman represented the father and Michael J. Pulver represented the mother.

[Matter of Noah C. \(Greg C.\) \(2024 NY Slip Op 01430\)](#)

CIVIL

Matter of Shipmon v Moran | March 15, 2024

ARTICLE 78 | WRIT OF PROHIBITION | GRANTED

The petitioner sought a writ of prohibition barring his retrial based on double jeopardy. The Fourth Department granted the petition. The petitioner and his codefendant were charged with CPW and 2nd degree murder. During jury deliberations at their joint trial, it was reported that one of the jurors had looked up the definition of 2nd degree murder and discussed the case outside the presence of the full jury. Also, there were racial tensions in the jury room. The trial court granted the codefendant’s request for a mistrial over the petitioner’s objection. Double jeopardy barred the petitioner’s retrial because the People did not show that a mistrial was manifestly necessary. The trial court failed to consider other alternatives, like proceeding with an 11-member jury, or to inquire whether a verdict had been reached on any counts of the indictment before declaring a mistrial. Lindsey M. Pieper represented the petitioner.

[Matter of Shipmon v Moran \(2024 NY Slip Op 01424\)](#)

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