

Decisions of Interest

MARCH 21, 2022

CRIMINAL

COURT OF APPEALS

People v Burgos | March 17, 2022

CONSTRUCTIVE SUSPENSION | REJECTED

The defendant appealed from a First Department order affirming the denial of his CPL 440.10 motion to set aside a judgment convicting him of 1st degree assault. In an opinion by Judge Troutman, a unanimous Court of Appeals held that the defendant was not deprived of effective assistance when his attorney failed to disclose that he was suspended in the Second Circuit for neglecting criminal cases. Defense counsel had no such duty of disclosure. Moreover, counsel was not constructively suspended from the practice of law in New York at the time of trial, where the First Department later imposed reciprocal discipline. Defenses and mitigation evidence in opposition to reciprocal discipline could be presented, so discipline in New York was not a foregone conclusion.

[People v Burgos \(2022 NY Slip Op 01868\) \(nycourts.gov\)](#)

FIRST DEPARTMENT

People v Ash | March 17, 2022

DEFECTIVE COUNT | DISMISSED

The defendant appealed from a judgment of New York County Supreme Court, convicting him of multiple crimes. The First Department modified. Without objection, the trial court submitted to the jury a count charging 1st degree coercion, although a motion court had reduced that charge to an attempt, after which the People failed to take steps required by CPL 210.20 (6) . The defendant was entitled only to dismissal of the defective count. He did not show that prejudice from the omission spilled over to other counts. The Office of the Appellate Defender (Margaret Knight, of counsel) represented the appellant.

[People v Ash \(2022 NY Slip Op 01883\) \(nycourts.gov\)](#)

People v Harvey | March 17, 2022

VICTIM AND PROOF | ERRORS HARMLESS

The defendant appealed from a judgment of NY County Supreme Court, convicting him of 1st degree aggravated sexual abuse and other offenses. The First Department affirmed. The trial court should have permitted the defendant to introduce evidence relating to text

messages to counter the theory that the complainant was a powerless victim of domestic abuse. Further, the lower court should have excluded proof that the victim's teenage sister had a tattoo of the defendant's name. Family dynamics were established through other proof, and the tattoo suggested an inappropriate relationship. Finally, Supreme Court should have precluded cross-examination of the defendant about a trespass conviction, where the underlying facts raised an inflammatory inference. However, the errors were harmless, given that the victim's testimony was extensively corroborated; the defense theory was completely implausible; and the defendant's trial testimony was incredible.

[People v Harvey \(2022 NY Slip Op 01885\) \(nycourts.gov\)](#)

***People v Gideon* | March 15, 2022**

VICTIM AND PROOF | ERROR NOT HARMLESS

The defendant appealed from a judgment of NY County Supreme Court, convicting him of 2nd degree burglary as a sexually motivated felony and another crime, after a nonjury trial. The First Department reversed and granted a new trial. Supreme Court admitted, as excited utterances and prompt outcries, four hearsay statements made by the alleged victim after the incident. That was error. None of the statements was an excited utterance. Two were prompt outcries, so only the fact of a complaint, not its accompanying details, was admissible. Yet the trial court considered all four utterances for their substance. The error was not harmless for several reasons. There could be no presumption that the court as the trier of fact considered only competent evidence. Further, the People strongly relied on the hearsay statements to prove their case. Finally, the trial court indicated that it intended to review the written statement that was in evidence during deliberation. The Center for Appellate Litigation (Hunter Haney, of counsel) represented the appellant.

[People v Gideon \(2022 NY Slip Op 01746\) \(nycourts.gov\)](#)

SECOND DEPARTMENT

***People v Moore* | March 16, 2022**

PEQUE VIOLATION | REMITTAL

The defendant appealed from a judgment of Nassau County Supreme Court, convicting him of attempted 2nd degree criminal possession of a forged instrument. The Second Department held the appeal in abeyance. Supreme Court failed to warn the defendant of possible deportation consequences of his guilty plea, in violation of *People v Peque*, 22 NY3d 168. The matter was remitted to give the defendant an opportunity to move to vacate his plea and seek to establish that there was a reasonable probability that he would not have pleaded guilty had the lower court properly advised him. Stacy Albin-Leone represented the appellant.

[People v Moore \(2022 NY Slip Op 01809\) \(nycourts.gov\)](#)

***People v Umar* | March 16, 2022**

SENTENCING | PRESENCE

The defendant appealed from a judgment of Queens County Supreme Court, convicting him of several crimes, upon his plea of guilty. The Second Department modified. A defendant had a fundamental right to be personally present when sentence was

pronounced. CPL 380.40 (1). This defendant was not produced at sentencing on two convictions, and the record did not reveal that he expressly waived his right to be present. The matter was remitted for resentencing on the subject convictions. Appellate Advocates (Emile Lurie and De Nice Powell, of counsel) represented the appellant.

[People v Umar \(2022 NY Slip Op 01818\) \(nycourts.gov\)](#)

***People v Thompson* | March 16, 2022**

YO FINDING | REMITTAL

The defendant appealed from two judgments of Kings County Supreme Court, convicting him of attempted 2nd degree murder and 1st degree manslaughter, upon his pleas of guilty. The Second Department modified and remitted. CPL 720.20 (1) required a youthful offender determination in every case where the defendant was eligible, even where he/she failed to request such determination or agreed to forgo it as part of a plea bargain. The record did not show that Supreme Court made a YO determination, despite the defendant's eligibility. Richard Levitt and Zachary Segal represented the appellant.

[People v Thompson \(2022 NY Slip Op 01816\) \(nycourts.gov\)](#)

***People v Tumolo* | March 16, 2022**

ORDERS OF PROTECTION | DURATION

The defendant appealed from a Suffolk County Court judgment, convicting him of EWC, upon his plea of guilty. The Second Department remitted. The appeal brought up for review two orders of protection issued at sentencing. The challenge to such orders survived the valid waiver of appeal. In the interest of justice, the appellate court held that the duration of the orders exceeded the maximum set forth in CPL 530.13 (4), since time served was not credited. Thus, the durational provisions were vacated. Mark Diamond represented the appellant.

[People v Tumolo \(2022 NY Slip Op 01817\) \(nycourts.gov\)](#)

***People v Arevalo* | March 16, 2022**

SUPPRESSION | ERROR HARMLESS

The defendant appealed from a judgment of Nassau County Supreme Court, convicting him of criminally negligent homicide. The Second Department affirmed. Supreme Court erred in concluding that the defendant was not under arrest when he was removed from his vehicle at gunpoint by officers, handcuffed, and placed in a police vehicle. Since the People failed to establish that the arrest was lawful, the court should have suppressed the blood sample evidence and the defendant's statements to police. However, the error was harmless. The People did not present the blood evidence at trial, and proof of guilt was overwhelming, without regard to his inculpatory statements.

[People v Arevalo \(2022 NY Slip Op 01801\) \(nycourts.gov\)](#)

***People v Forbes* | March 16, 2022**

30.30 CLAIM | FORFEITED

The defendant appealed from a 2016 judgment of Queens County Supreme Court, convicting him of 3rd degree CPW. The Second Department affirmed. The defendant forfeited his right to claim that he was deprived of his statutory speedy trial rights. CPL 30.30 (6) (such claim reviewable on appeal from ensuing judgment of conviction,

notwithstanding that judgment was entered upon plea of guilty), did not go into effect until 2019 and did not apply retroactively.

[People v Forbes \(2022 NY Slip Op 01805\) \(nycourts.gov\)](#)

People v Motta | March 16, 2022

ANDERS | NEW COUNSEL

The defendant appealed from an order of Nassau County Supreme Court, which designated him a level-three sex offender. Appellate counsel submitted an *Anders* brief. The Second Department assigned new counsel. Nonfrivolous issues existed, including whether the defendant was deprived of effective assistance at the SORA hearing to determine his risk level.

[People v Motta \(2022 NY Slip Op 01822\) \(nycourts.gov\)](#)

People v Stevens | March 16, 2022

APPEAL WAIVER | MODEL COLLOQUY

The defendant appealed from a Dutchess County Court judgment, convicting him of 2nd degree CPCS. The Second Department affirmed. The waiver of appeal was valid. The Model Colloquy regarding an appeal waiver was only a guide. In some cases, the plea court might find it appropriate to advise the defendant of a particular issue that survived an appeal waiver. But here County Court could reasonably have decided not to discuss certain issues. Further, a written waiver was not required. The enforceable waiver precluded review of the claim of an unduly severe sentence.

[People v Stevens \(2022 NY Slip Op 01815\) \(nycourts.gov\)](#)

[Waiver of Right to Appeal.docx \(live.com\)](#)

THIRD DEPARTMENT

People v Williams | March 17, 2022

APPEAL WAIVER | MODEL COLLOQUY

The defendant appealed from a Schenectady County Court judgment, convicting him of attempted 2nd degree robbery. The Third Department affirmed. The appeal waiver was invalid, since the written waiver was overbroad and inaccurate, and County Court did not overcome the overbroad language by ensuring that the defendant understood that some appellate and collateral review survived. The Third Department encouraged County Court to review the Model Colloquy for appeal waivers.

[People v Williams \(2022 NY Slip Op 01845\) \(nycourts.gov\)](#)

People v Crispell | March 17, 2022

DVSJA | RESENTENCING

The defendant appealed from a Chenango County judgment, convicting her of 1st degree robbery upon her plea of guilty. The Third Department affirmed. The defendant's challenge to her sentence was not precluded, given the invalid appeal waiver. Although at sentencing the defendant alluded to her domestic violence history, she failed to indicate how such history impacted her participation in the instant offense. To the extent that she

sought a reduced sentence as a victim of domestic violence, she needed to make a CPL 440.47 application for resentencing.

[People v Crispell \(2022 NY Slip Op 01843\) \(nycourts.gov\)](#)

[Domestic Violence Survivors Justice Act - ILS \(ny.gov\)](#)

[DVSJA - New York State Defenders Association \(nysda.org\)](#)

People v Moore | March 17, 2022

PROSECUTOR | INNUENDO

The defendant appealed from a judgment of Sullivan County Court, convicting him of 2nd degree CPW, upon his plea of guilty. The Third Department affirmed. The defendant contended that his right to due process was violated by prosecution remarks during sentencing. The prosecutor described law enforcement's knowledge of the defendant's purportedly sketchy past and alluded to an investigation of his possible role in a recent shooting. Defense counsel objected. The court disregarded the prosecutor's inflammatory and unsubstantiated remarks as "innuendo." The record did not establish that the sentence was based on materially untrue facts or misinformation. The appellate court rejected the contention that County Court erred in refusing to strike the offending remarks based on potential future prejudice. *[NOTE: Not addressed was any potential for the subject statements to adversely impact corrections or parole determinations.]*

[People v Moore \(2022 NY Slip Op 01847\) \(nycourts.gov\)](#)

People v Johnson | March 17, 2022

CPL ART. 450 | NO APPEAL

The defendant was convicted of 2nd degree murder, and the judgment was affirmed in a prior appeal. In the instant case, the defendant appealed from a Madison County Court order that dismissed his motion to resettle a sentencing transcript and uniform sentence and commitment form, and an order amending the USCF to add the mandatory surcharge. The Third Department dismissed the appeal. A defendant's right to appeal to the Appellate Division was strictly limited by statute. See CPL Article 450. The challenged orders did not fit within the statute.

[People v Johnson \(2022 NY Slip Op 01844\) \(nycourts.gov\)](#)

[Article 450 - \(450.10 - 450.90\) APPEALS--IN WHAT CASES AUTHORIZED AND TO WHAT COURTS TAKEN :: 2015 New York Laws :: US Codes and Statutes :: US Law :: Justia](#)

NEW JERSEY

Rivera v Union County | 2022 WL 760664

POLICE | TRANSPARENCY

The Supreme Court of New Jersey held that the state's Open Public Records Act did not permit public access to internal affairs reports, but that such reports could be disclosed under the common law. In general, the public had an interest in disclosure of these reports to achieve transparency and accountability, deter misconduct, and foster trust in law enforcement. The instant investigation involved misconduct by a former police chief who engaged in racist and sexist behavior while in office. Under the common law, the right of

access prevailed when interests favoring disclosure outweighed confidentiality concerns. As to the public's right to know, relevant factors included the seriousness of the misconduct, whether it was substantiated, the discipline imposed, the nature of the official's position, and the person's record of misconduct. The public interest here was great. The instant report was ordered to be disclosed after the trial court redacted parts that raised legitimate confidentiality concerns.

[A-58-20 - Richard Rivera v. Union County Prosecutor's Office \(084867\) \(Union County & Statewide\) \(njcourts.gov\)](#)

FAMILY

COURT OF APPEALS

Matter of Irelynn S. | March 17, 2022

TPR | DEFAULT | DISSENT

Family Court terminated the father's parental rights on the ground that he failed to appear at the dispositional hearing and that his attorney, although present, elected not to participate in his absence. The Fourth Department dismissed the ensuing appeal based on the father's default. The Court of Appeals affirmed. Judge Rivera dissented. There was no default so the Appellate Division should have reached the merits. Under CPLR 5511, an aggrieved part may appeal from any appealable judgment or order except one entered on default. CPLR 321 (a) allowed a party to prosecute or defend a civil action in person or by attorney. Unless the party was ordered by the court to appear, a failure to appear in person could not be deemed a default. The fact that counsel stayed silent in this case—a tactical choice—did not support finding a default. The petitioner agency had the burden to establish, by clear and convincing evidence, its case for the termination of parental rights. The father had no obligation to present proof.

[Onondaga County Dept. of Children & Family Servs. v Maurice S. \(2022 NY Slip Op 01869\) \(nycourts.gov\)](#)

FIRST DEPARTMENT

Fern G. v Kim J. | March 15, 2022

NON-BIO PARENT | PARENTAGE

The respondent appealed from an order of New York County Family Court, which granted the petitioner's motion, finding that she had standing to seek custody/visitation of the subject child. The First Department affirmed. A nonbiological, nonadoptive parent had the legal status of a parent where clear and convincing evidence showed that he/she agreed with the biological parent to conceive and raise the child as co-parents. The hearing proof showed that the parties regarded the subject child as the newest member of their established family, which included the parties' son.

[Matter of Fern G. v Kim J. \(2022 NY Slip Op 01736\) \(nycourts.gov\)](#)

SECOND DEPARTMENT

Marin v Banasco | March 16, 2022

FAMILY OFFENSE | MENACING

The father appealed from an order of Queens County Family Court, which found that he committed family offenses, including 3rd degree menacing, and issued an order of protection. The Second Department modified. The mother's petition alleged, among other things, that in the presence of the child, the father knocked her cell phone out of her hand and threatened to hurt her. The evidence did not demonstrate that the father committed 3rd degree menacing. There was insufficient evidence that the father's conduct was intended to place the petitioner in fear of death or physical injury by physical menace. Robert Hausner represented the appellant.

[Matter of Marin v Banasco \(2022 NY Slip Op 01790\) \(nycourts.gov\)](#)

Yinuo Yin v Xiao Feng Qiao | March 16, 2022

DIVORCE | SANCTIONS

In a divorce action, the plaintiff appealed from an order of Nassau County Supreme Court, which, among other things, granted the defendant's motion to impose sanctions against the plaintiff's attorney and directed the client to pay \$2,000. The Second Department modified. The motion should have been denied. Counsel's actions were not completely without merit in law nor undertaken primarily to harass or maliciously injure. Further, the motion sought sanctions against plaintiff's counsel, not the plaintiff. Jean Wang represented the appellant.

[Yinuo Yin v Xiao Feng Qiao \(2022 NY Slip Op 01839\) \(nycourts.gov\)](#)



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