

Decisions of Interest

MARCH 27, 2023

CRIMINAL

COURT OF APPEALS

People v Ba | March 21, 2023

HARSH AND EXCESSIVE SENTENCE | STANDARD OF REVIEW | REMANDED

The defendant appealed from a First Department Appellate Term order affirming his sentence. The Court of Appeals reversed and remanded for a determination of whether the sentence was unduly harsh and excessive. Judges Garcia, Cannataro, and Singas concurred in an opinion written by Judge Garcia, explaining that the Appellate Term’s language that it “perceive[d] no basis for reducing the fine” and that the defendant received a bargained-for, legal sentence meant that the court did not find the sentence unduly harsh—but agreed to remit for clarification. Judges Troutman, Rivera, and Wilson separately concurred in an opinion written by Judge Troutman, finding that the Appellate Term’s language showed that the court incorrectly believed that it was bound to uphold the sentence because it was bargained for and within the legal parameters. Lauren E. Jones represented the appellant.

[People v Ba \(2023 NY Slip Op 01468\)](#)

People v Baldwin | March 21, 2023

HARSH AND EXCESSIVE SENTENCE | WRONG STANDARD OF REVIEW | APPEAL MOOT

The defendant appealed from a Third Department order that affirmed his sentence. The Court of Appeals dismissed the appeal as moot. Judge Wilson agreed that the appeal was moot but wrote a concurrence explaining why the mootness exception did not apply. The defendant contended that the standard of review applied by the Third Department to determine whether to reduce a sentence in the interest of justice—requiring extraordinary circumstances or an abuse of discretion—was incorrect. While the appeal was pending in the Court of Appeals, the Third Department corrected its longstanding use of the wrong standard, making it unlikely that the error would be repeated.

[People v Baldwin \(2023 NY Slip Op 01467\)](#)

FIRST DEPARTMENT

People v Guzman-Caba | March 23, 2023

PADILLA | CPL 440 | IAOC | REVERSED

The defendant appealed from a New York County Supreme Court judgment convicting him of 3rd degree CSCS based on his guilty plea. The First Department reversed. The trial court abused its discretion in summarily denying the defendant's CPL 440 motion based on *Padilla*; the motion contained adequately supported allegations of fact for his IAOC claim. The defendant's plea counsel did not recall discussing immigration consequences with the defendant and admitted that he was not well versed in immigration law. Labe M. Richman represented the appellant.

[People v Guzman-Caba \(2023 NY Slip Op 01593\)](#)

SECOND DEPARTMENT

People v Robinson | March 22, 2023

CPL 440 | DNA EVIDENCE | REVERSED

The defendant appealed from a Queens County Supreme Court order that denied his CPL 440.10 (1) (g-1) motion seeking to vacate his 2nd degree murder conviction. The Second Department reversed. New DNA evidence showed that the defendant was not the source of male DNA recovered from the victim's fingernail scrapings. The defense theory at trial was mistaken identity, and the only identity evidence presented was the testimony of an 88-year-old man with impaired vision, who was unable to conclusively identify the defendant at trial. While not a "virtual certainty," there was a reasonable probability that the verdict would have been different had the DNA evidence been admitted. The Legal Aid Society of NYC (Harold V. Ferguson, of counsel) represented the appellant.

[People v Robinson \(2023 Slip Op 01533\)](#)

People v Nyack | March 22, 2023

ILLEGAL SENTENCE | VIOLENT FELONY OFFENDER | REVERSED

The defendant appealed from a resentence of Kings County Supreme Court upon his conviction of attempted 3rd degree CPW. The Second Department reversed and remitted for resentencing. The defendant was illegally sentenced as a violent felony offender. The defendant pleaded guilty to attempted 3rd degree CPW as a count added to the indictment upon consent—he was never charged with 3rd degree CPW. Because he did not plead guilty to the attempted crime as a lesser included offense of a count charged in the indictment, the conviction did not constitute a violent felony (see Penal Law § 70.02 [1] [d]; CPL 220.20 [1]). Appellate Advocates (Lynn W.L. Fahey, of counsel) represented the appellant.

[People v Nyack \(2023 Slip Op 01532\)](#)

People v Rodriguez | March 22, 2023

FORGERY | FACTUALLY INSUFFICIENT | REVERSED

The defendant appealed from a Queens County Supreme Court judgment convicting him of 3rd degree criminal possession of a forged instrument based on his guilty plea. The Second Department reversed and dismissed the misdemeanor information. The information was factually insufficient. It alleged that an NYPD officer observed a “forged Texas buy tag” on the defendant’s vehicle. The officer concluded it was forged based on “his training in the detection and identification of forged instruments” and his examination of “a copy of the records of Z-finest.” The officer’s reference to his training was insufficient; he did not explain what “Z-finest” was or how it helped him to determine that the tag was forged; and he did not describe the allegedly forged “buy tag.” Overall, the forgery allegation was too conclusory. Appellate Advocates (Caitlyn Carpenter and Martin Sawyer, of counsel) represented the appellant.

[People v Rodriguez \(2023 Slip Op 01535\)](#)

People v Hernandez | March 22, 2023

PEQUE | TPS | DEPORTATION | REMITTED

The defendant appealed from a Suffolk County Court judgment convicting him of 2nd degree assault (two counts) and endangering the welfare of a child (two counts) based on his guilty plea. The Second Department held the appeal in abeyance and remitted to allow the defendant to move to vacate his plea. Although the defendant acknowledged that he might lose his Temporary Protected Status (TPS) because of his plea, the record did not demonstrate that the court mentioned, or that the defendant was aware of, the possibility of deportation. The Legal Aid Society of Suffolk County (Amanda E. Schaefer, of counsel) represented the appellant.

[People v Hernandez \(2023 Slip Op 01530\)](#)

FOURTH DEPARTMENT

People v Congdon | March 24, 2023

OMITTED GJ INSTRUCTION | INDICTMENT DISMISSED

The defendant appealed from an Onondaga County Court judgment convicting him of promoting a sexual performance by a child (8 counts) after a nonjury trial. The Fourth Department reversed and dismissed the indictment. The integrity of the grand jury proceeding was impaired by the prosecutor’s failure to instruct the grand jury that an affirmative act, beyond viewing images of a sexual performance by a child on a computer, is required to establish promotion of the images. J. Scott Porter represented the appellant.

[People v Congdon \(2023 NY Slip Op 01622\)](#)

People v Giles | March 24, 2023

INSUFFICIENT EVIDENCE | CONVICTION REDUCED

The defendant appealed from an Onondaga County Court judgment convicting him of 3rd degree criminal possession of stolen property after a jury trial. The Fourth Department reduced the conviction from 3rd degree CPSP to 4th degree CPSP, vacated the sentence, and remanded. The evidence established that the defendant possessed stolen property

but the proof that the property was worth more than \$3,000 was legally insufficient. The Hiscock Legal Aid Society (Philip Rothschild, of counsel) represented the appellant.

[People v Giles \(2023 NY Slip Op 01628\)](#)

People v Newman | March 24, 2023

BURGLARY | CRIMINAL TRESPASS | NOT LESSER INCLUDED

The defendant appealed from a judgment of the Monroe County Court convicting him of menacing a police officer (two counts) and 3rd degree criminal trespass. The Fourth Department modified by reversing his conviction for 3rd degree criminal trespass. The trial court erred in granting the People's request to charge 3rd degree criminal trespass as a lesser included offense of 3rd degree burglary. The criminal trespass charge required proof that the building or real property was fenced or otherwise enclosed in a manner to exclude intruders, which is not an element of 3rd degree burglary. Thus, it is theoretically possible to commit 3rd degree burglary without committing 3rd degree criminal trespass. The Monroe County Public Defender (Drew R. Dubrin, of counsel) represented the appellant.

[People v Newman \(2023 NY Slip Op 01621\)](#)

People v McDowell | March 24, 2023

GUILTY PLEA | ILLEGALLY LOW SENTENCE | REMITTED

The defendant appealed from an Onondaga County Court judgment convicting him of 2nd degree CPW based on his guilty plea and sentencing him to 8 years to life. The Fourth Department modified by vacating the sentence. The bargained-for sentence was illegally low. The remedy was to remit the matter for County Court to either resentence the defendant in a manner that ensures he will receive the benefit of his bargain or to permit both parties an opportunity to withdraw from the agreement. The Hiscock Legal Aid Society (Robert W. Ward, of counsel) represented the appellant.

[People v McDowell \(2023 NY Slip Op 01606\)](#)

People v Alcaarez-Ubiles | March 24, 2023

PRETRIAL PHOTO ID | *RODRIGUEZ* HEARING REQUIRED | REMANDED

The defendant appealed from a Monroe County Supreme Court judgment convicting him of 1st degree assault after a jury trial. The Fourth Department reserved decision and remanded. Supreme Court erred by relying on a witness' trial testimony to establish that a pretrial photographic identification procedure was confirmatory and did not require CPL 710.30 notice. Prior familiarity should be resolved before trial, and the witness' testimony was insufficient to establish as a matter of law that the identification was confirmatory. The Abbatoy Law Firm, PLLC (David M. Abbatoy, Jr., of counsel) represented the appellant.

[People v Alcaarez-Ubiles \(2023 NY Slip Op 01637\)](#)

People v Sharp | March 24, 2023

RIGHT TO BE PRESENT | OFF-THE-RECORD SANDOVAL HEARING | DISSENT

The defendant appealed from a Monroe County Supreme Court judgment convicting him of 2nd and 3rd degree CPW. The Fourth Department affirmed, with one justice dissenting. Before trial, the court conducted an off-the-record conference in chambers—without the

defendant present—where counsel presented their respective positions on the *Sandoval* issues. In court, with the defendant present, the court stated its intent to rule on the motion and “cursorily asked” defense counsel if he wanted to be heard. Defense counsel declined and stated that he “would stand by [their] discussion in chambers.” In the dissent’s view, the trial court’s mere offer to defense counsel to be heard on the *Sandoval* application did not constitute a *de novo* hearing, and the defendant was therefore denied the right to be present.

[People v Sharp \(2023 NY Slip Op 01602\)](#)

TRIAL COURTS

***People v Chen* | 2023 WL 2579082**

COC/SOR | ERRONEOUS SERVICE | CHARGES DISMISSED

The defendant moved to dismiss on speedy trial grounds. New York County Criminal Court dismissed the charges. The People timely filed their COC/SOR with the court, but they sent the documents and discovery to an invalid email address for defense counsel. Defense counsel had provided his correct email address on his notice of appearance, and the People had previously successfully emailed him at that address. But when the email was “bounce[d] back,” the People responded to the wrong address to inquire whether there was a problem. They made no further inquiries before the 30.30 clock expired. There is no good faith exception to the service requirements for the COC/SOR and the automatic discovery materials and, even if there were, it would not apply here. Addabo & Greenberg (Todd Greenberg, of counsel) represented the defendant.

[People v Chen \(2023 NY Slip Op 50212\[U\]\)](#)

***People v Cummins* | 2023 WL 2588332**

COC/SOR | INVALID | NOT GOOD FAITH

The defendant moved to strike the People’s COC and SOR as invalid and illusory. Albany City Court granted the motion. The People filed a COC and SOR. Two weeks later, just before the scheduled suppression hearings, the People filed a supplemental COC disclosing two police officers as additional witnesses. These officers had signed the Bill of Particulars, arrest reports, and accusatory instruments; their identities and involvement were known to the People. The People did not explain their belated disclosure or describe any efforts to ascertain the existence of these witnesses. Their efforts were not made in good faith and were unreasonable under the circumstances. The Albany County Public Defender (Richard A. Burger, of counsel) represented the defendant.

[People v Cummins \(2023 NY Slip Op 30780\[U\]\)](#)

***People v Howard* | 2023 WL 2544818**

DISCOVERY | PEACE OFFICER MISCONDUCT RECORDS

The defendant sought dismissal of charges pursuant to CPL 30.30, arguing that the People’s COC and SOR were illusory because the People had not provided *Giglio* material for Co-op City police officers. Bronx County Criminal Court denied the motion. The People must provide any *Giglio* material related to the officers that was actually in their possession, custody, or control. However, Co-op City police records are not deemed to be within the prosecution’s possession and control. Those officers are designated as

peace officers by CPL 2.10 (27) and are not members of a “police or law enforcement agency” for the purposes of CPL 245.20.

[People v Howard \(2023 NY Slip Op 23069\)](#)

NEW JERSEY

Matter of M.U. | March 21, 2023

SECOND AMENDMENT | BRUEN | HANDGUN PURCHASE PERMIT

The appellant appealed from a New Jersey Law Division order denying his application for a handgun purchase permit (HPP) and revoking his firearms purchaser identification card (FPIC). The issue presented was whether NJ’s recently amended statute—which restricts the issuance of HPP and FPIC when not in the interest of public health, safety or welfare—was unconstitutional in light of *Bruen*. The NJ Appellate Division held that it was not. Historical analysis showed that since the founding legislatures have had broad discretion to limit firearm possession for both felons and those with questionable “civic virtue” i.e., those who have engaged in repeated misconduct, even if not convicted. The amended statute was found constitutional, both facially and as applied to this case.

[Matter of M.U. \(2023 WL 2577324\)](#)

FAMILY

FIRST DEPARTMENT

Matter of Isaiah H. | March 23, 2023

JD | AGENCY APPEAL | REVERSED

The presentment agency appealed from a New York County Family Court order granting the respondent’s motion to dismiss the JD petitions as untimely filed. The First Department reversed. The statutory deadline for filing the petitions was tolled by the COVID-19-related executive orders. When the executive orders were rescinded, the statute of limitations began running again, “picking up where it left off.” Because the agency filed the petitions within the statutory deadline, as extended by the tolling period, the petitions were timely.

[Matter of Isaiah H. \(2023 NY Slip Op 01587\)](#)

SECOND DEPARTMENT

Matter of Eno v Illovsky | March 22, 2023

FAMILY OFFENSE | INTIMATE RELATIONSHIP | DISMISSAL REVERSED

The petitioner appealed from a Suffolk County Family Court order that dismissed her family offense petition. The Second Department reversed and remanded. The petitioner was married to the respondent’s brother, who died in 2020. After his death, the parties no longer had “a relationship of affinity,” but they did have an “intimate relationship” (Family Ct Act § 812 [1]). They had known each other for 30 years, were close as sisters-in-law,

lived about one mile apart, and had frequently engaged in social activities together. The appellant was pro se.

[Matter of Eno v Illovsy \(2023 NY Slip Op 01506\)](#)

FOURTH DEPARTMENT

Matter of McCaslin v Beck | March 24, 2023

FAMILY OFFENSE | HARASSMENT | REVERSED

The respondent appealed from a Steuben County Family Court order of protection. The Fourth Department reversed and dismissed the petition. Although Family Court failed to set forth its essential findings of fact and specify the family offense(s) upon which the order of protection was predicated, the record was sufficient for the appellate court to conduct an independent review. The petitioner testified that the respondent verbally abused her by degrading her and accusing her of not keeping a clean home, and blamed her for his poor relationship with his daughter—but this was insufficient to establish that the respondent committed 1st or 2nd degree harassment. Veronica Reed represented the appellant.

[Matter of McCaslin v Beck \(2023 NY Slip Op 01620\)](#)

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