Indigent Legal Services

Decisions of Interest

MARCH 6, 2023

CRIMINAL

SECOND DEPARTMENT

People v Gittens | March 1, 2023

911 CALL | HEARSAY | HARMLESS ERROR

The defendant appealed from a Kings County Supreme Court judgment convicting her of attempted 1st degree assault, 2nd degree assault, and 3rd degree assault following a jury trial. The Second Department affirmed. Supreme Court erred by admitting an anonymous 911 call into evidence as an excited utterance or a present sense impression. There were insufficient facts to infer that the caller had personally observed the incident or that the incident was unfolding during the call. However, the admission did not violate the defendant's right to confrontation because the statements were not testimonial and the error was harmless.

People v Gittens (2023 NY Slip Op 01098)

People v Patterson | March 1, 2023

FORCIBLE COMPULSION | COMPLAINANT'S AGE | INSUFFICIENT PROOF

The defendant appealed from an Orange County Court judgment convicting her of 1st degree rape, 1st degree criminal sexual act, and use of a child in a sexual performance after a jury trial. The Second Department reversed and dismissed the indictment. There was no evidence that the defendant used actual force or expressly threatened the complainant. The complainant's testimony was insufficient to establish that the defendant implicitly threatened her; there was no proof that the defendant did anything threatening or abusive before the incident. Further, there was no evidence that the defendant knew or suspected that the complainant was less than 17 years old. Gary E. Eisenberg represented the appellant.

People v Patterson (2023 NY Slip Op 01103)

People v Perez | March 1, 2023

SORA | DEFENDANT RELATED TO VICTIM | REVERSED

The defendant appealed from a Kings County Supreme Court order that designated him a level three sexually violent sex offender. The Second Department reversed and remanded. Supreme Court improperly assessed 20 points on factor 7 because the People failed to establish that the defendant and victim were strangers. The People conceded that the defendant was related to the victim—which is "specifically excluded by the Commentary and by the plain language of the Guidelines" from factor 7. While the

deduction of these 20 points would result in a presumptive level two designation, the People indicated that they would have sought an upward departure if the defendant was not otherwise designated a risk level three. Appellate Advocates (Michael Arthus, of counsel) represented the appellant.
People v Perez (2023 NY Slip Op 01108)

People v Smith | March 1, 2023
MOLINEUX ERROR | IMPROPER REDIRECT | REVERSED
The defendant appealed from a Queens County Supreme Court judgment convicting him of 2nd degree murder following a jury trial. The Second Department reversed and remanded. Testimony that the defendant committed an armed bank robbery one month after the murder was improperly admitted as *Molineux* evidence. Defense counsel did not open the door for the People to elicit testimony that the defendant previously threatened to kill another witness. Defense counsel's cross about previous lies a witness told did not create a misleading impression requiring corrective testimony. Appellate Advocates (Kathleen Whooley, of counsel) represented the appellant.
People v Smith (2023 NY Slip Op 01106)

People v Wilkerson | March 1, 2023
SORA | DOWNWARD DEPARTURE REQUEST | IMPLICIT DENIAL
The defendant appealed from a Queens County Supreme Court order that designated him a level three sex offender. The Second Department affirmed. The violent nature of the offense was not fully accounted for by the guidelines and supported an upward departure. Remittal to determine the defendant's request for a downward departure was not necessary because Supreme Court implicitly denied the request. [NOTE: *cf.* Correction Law § 168-n (3); *People v Conrad*, 193 AD3d 1187 (3d Dept 2021) (holding that court must set forth findings and reasons for denial of request for downward departure)]
People v Wilkerson (2023 NY Slip Op 01109)

TRIAL COURTS

People v Figueroa | 2023 WL 2320232
DISCOVERY | POLICE MISCONDUCT RECORDS | 30.30 DISMISSAL
The defendant sought dismissal of charges pursuant to CPL 30.30, arguing that the People's SOR was illusory because they never disclosed police witnesses' misconduct records held by the NYPD. Queens County Criminal Court dismissed the charges. Summaries of police misconduct records did not fulfill the People's discovery obligations. Contrary to the People's argument that they did not constructively possess the misconduct records held by the NYPD, their statutory duty extended to information which was known to the police. Queens Defenders (Jordan Nicole Coyne, of counsel) represented the defendant.
People v Figueroa (2023 NY Slip Op 50149[U])

People v Gilliland | 2023 WL 2232032

BLOODSHOT EYES | ALCOHOL ODOR | INSUFFICIENT PROBABLE CAUSE

Following a combined *Ingle* / *Dunaway* / Refusal hearing, Queens County Criminal Court suppressed all evidence flowing from the defendant's arrest for DWI. The initial stop of the defendant's car for using a cell phone was legal. However, the officer's observation that the defendant's eyes were bloodshot and that he smelled of alcohol, without other evidence of impairment, did not provide probable cause to arrest him for DWI. Digiansante & Piergiovanni (Lawrence Digiansante, of counsel) represented the defendant.

People v Gilliland (2023 NY Slip Op 50129[U])

People v Ishakov | 2023 WL 2341253

SOR ILLUSORY | FACIALLY INSUFFICIENT INFORMATION

The defendant challenged the People's SOR as illusory because they never filed a facially sufficient information charging him with NYC Administrative Code § 19-190, Right of Way. Queens County Criminal Court dismissed the charges. The information failed to allege non-hearsay facts establishing that the defendant failed to exercise due care, an element of the offense. Queens Defenders (Nicandro Iannacci, of counsel) represented the defendant.

People v Ishakov (2023 NY Slip Op 50154[U])

FAMILY

SECOND DEPARTMENT

Matter of Cywiak v Packman | March 1, 2023

VISITATION | MODIFIED AND REMITTED

The father appealed from a Westchester County Supreme Court order that modified a so-ordered stipulation by awarding the mother sole legal custody and reducing the father's visitation time. The Second Department modified and remitted. The record did not support reduction of the father's visitation time, and Supreme Court should have modified the visitation schedule for holidays and vacations. The stipulation—entered when the children were 3 years old—did not account for school breaks. The father's attendance of the children's soccer practices did not violate a temporary order of protection that allowed him to be near the children and mother only during court-ordered parental access. The stipulation permitted both parents to attend the children's organized events, and the mother failed to prove that soccer practice was not contemplated by the stipulation. Karen M. Jansen represented the father.

Matter of Cywiak v Packman (2022 NY Slip Op 01089)

THIRD DEPARTMENT

Matter of Michael H. (Catherine I.) | March 2, 2023

TPR | ADOPTION DISCUSSIONS | AGENCY'S OBLIGATION | REVERSED

DSS appealed from a Delaware County Family Court order denying its motion to modify the court's order prohibiting anyone other than the AFC from discussing matters of adoption or surrender with the child. The Third Department reversed. Although the appeal was rendered moot by DSS's withdrawal of the underlying permanent neglect petition, the exception to the mootness doctrine applied. Situations may arise where it is appropriate to allow an AFC reasonable time to broach sensitive, important issues with their child clients. But AFCs cannot prevent child protective agencies—entirely and indefinitely—from fulfilling their obligation to communicate with the child about permanency planning (*see* 18 NYCRR 441.21 [c]).

Matter of Michael H. (Catherine I.) (2023 NY Slip Op 01119)

Matter of Brandon HH. v Megan GG. | March 2, 2023

CUSTODY | ADVERSE INFERENCE | HARMLESS ERROR

The mother appealed from an Otsego County Family Court order granting the father's custody modification petition. The Third Department affirmed. An FCA 1034 report stated that the mother allowed her boyfriend to have continued contact with the parties' children after an alleged act of sexual misconduct between the boyfriend and daughter. Family Court erred by drawing an adverse inference against the mother for not calling her boyfriend as a witness. Neither of the AFCs nor the father requested the inference, and the court did not give the mother a chance to oppose the ruling or try to obtain the boyfriend's testimony. However, the error was harmless given the evidence adduced at the hearing.

Matter of Brandon HH. v Megan GG. (2023 NY Slip Op 01115)

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