

Decisions of Interest

APRIL 1, 2022

CRIMINAL

FIRST DEPARTMENT

People v McDonald | March 29, 2022

CONSTITUTIONAL SPEEDY TRIAL | DISMISSAL

The defendant appealed from a 2017 judgment of Bronx County Supreme Court, convicting him after a jury trial of 2nd degree murder and other crimes, and sentencing him to an aggregate term of 23 years to life. The First Department reversed and dismissed the indictment. The trial court should have granted the defense motion to dismiss based on a violation of the defendant's constitutional right to a speedy trial. The nearly six-year pretrial delay was unreasonably long, and the defendant was incarcerated throughout that time. Given those factors, he was presumptively prejudiced. The charges were serious—that the defendant shot two people, killing one and wounding the other—but the case was relatively simple. The People did not show good cause for letting the prosecution languish. After the defendant's 2011 arraignment, the case was reassigned to successive ADAs. The third ADA waited a year before seeking a DNA sample, and the meritless motion was denied. The People also pointed to a retired detective's reluctance to testify, but he did not take the stand at the suppression hearing or trial and was not needed to introduce the defendant's statements. The Center for Appellate Litigation (Abigail Everett, of counsel) represented the appellant.

[People v McDonald \(2022 NY Slip Op 02099\) \(nycourts.gov\)](https://nycourts.gov/record/2022/NYSlipOp02099)

People v Bowman | March 31, 2022

CHALLENGE FOR CAUSE | NEW TRIAL

The defendant appealed from a judgment of New York County Supreme Court, convicting him of 2nd and 3rd degree robbery after a jury trial. The First Department reversed and ordered a new trial. During jury selection, the court advised the panel that the trial could last until April 17, 2018. The panelist at issue stated that she “absolutely” could not serve on April 18, because she had irrevocable travel plans for that day. When defense counsel said, “We are starting to get closer to the 16th, 17th,” and asked whether she “may not be able to give [her] best attention if we started moving in that direction,” the panelist said, “Yes.” Defense counsel challenged the juror for cause or, in the alternative, sought further inquiry. The trial court denied the challenge, and counsel used his final peremptory challenge against the panelist. Given the impression conveyed—that the prospective juror would have difficulty focusing on the trial and might have leaned toward reaching a verdict

quickly—the court should have probed to determine her ability to serve. The Center for Appellate Litigation (Allison Kahl, of counsel) represented the appellant.

[People v Bowman \(2022 NY Slip Op 02208\) \(nycourts.gov\)](#)

People v Brown | March 31, 2022

MEDICAL CENTER | NOT DWELLING

The defendant appealed from a judgment of NY County Supreme Court, convicting him of four counts each of 2nd and 3rd degree burglary. The First Department vacated the 2nd degree burglary convictions under counts three and four of the indictment, regarding the theft of laptops from a medical center building, and dismissed those counts. There was legally insufficient evidence of the “dwelling” element. Patients did not stay overnight in this building, and no “unit” within the building was a dwelling. The building, although part of a large campus, did not provide the defendant with ready access to other buildings where hospital patients stayed overnight. The Office of the Appellate Defender (Joseph Nursey, of counsel) represented the appellant.

[People v Brown \(2022 NY Slip Op 02205\) \(nycourts.gov\)](#)

SECOND DEPARTMENT

People v Coleman | March 30, 2022

DEHORS RECORD | STRUCK

The defendant appealed from a resentence of Queens County Supreme Court, upon his conviction of attempted 2nd degree burglary. The Second Department affirmed. In conjunction with such appeal, the defendant moved to strike portions of the respondent’s brief referring to matters dehors the record. The motion was granted, and references in the DA’s brief to a 2015 felony complaint were stricken and were not considered in deciding the appeal.

[People v Coleman \(2022 NY Slip Op 02132\) \(nycourts.gov\)](#)

People v Passantino | March 30, 2022

ANDERS | NEW COUNSEL

The defendant appealed from a Westchester County Court judgment, convicting him of DWI in violation of VTL § 1192 (2), upon his plea of guilty. Assigned counsel submitted an *Anders* brief. The Second Department assigned new appellate counsel. Nonfrivolous issues included whether the appeal waiver was valid and whether the sentence was excessive in requiring the defendant, for three years, to install an ignition interlock device on any vehicle he owned or operated.

[People v Passantino \(2022 NY Slip Op 02136\) \(nycourts.gov\)](#)

THIRD DEPARTMENT

People v Roberts | March 31, 2022

PREJUDICIAL JAIL CALL | NEW TRIAL

The defendant appealed from a Schenectady County judgment, convicting him of 2nd degree CPW. The Third Department reversed and ordered a new trial in the interest of

justice. The defendant was deprived of a fair trial based on the admission of a jail phone call wherein he stated that he might as well “cop out to...the five years or whatever.” Such statement would have made it difficult for the jury to accept the presumption of innocence and to evaluate the evidence fairly. The defendant was further prejudiced by the prosecutor’s comment on summation that, in the phone conversation, the defendant said that he needed to get a paid lawyer to see if he could get less time—thus improperly using against him his constitutional right to counsel. The errors were not harmless. Matthew Hug represented the appellant.

[People v Roberts \(2022 NY Slip Op 02157\) \(nycourts.gov\)](#)

***People v Solomon* | March 31, 2022**

SCI | JURISDICTIONAL DEFECT

The defendant appealed from a Sullivan County Court judgment, convicting him of EWC upon his plea of guilty. The Third Department reversed. The Superior Court Information was jurisdictionally defective, and the issue survived the unchallenged appeal waiver and was not subject to preservation rules. The SCI indicated that the victim was age 17 at the time of the offense, but the offense charged required that the victim be *less than* 17 at that time. Leopold Gross represented the appellant.

[People v Solomon \(2022 NY Slip Op 02158\) \(nycourts.gov\)](#)

***People v Irizarry* | March 31, 2022**

YO | OFF-THE-RECORD REMARKS

The defendant appealed from a County Court judgment, convicting him of 2nd degree robbery, upon his plea of guilty. The Third Department reversed. At sentencing, defense counsel asked that the defendant, who was age 17 at the time of the crime, be adjudicated a youthful offender. County Court found that the defendant was an eligible youth but stated that YO treatment was “not an option” because the People had said during plea negotiations that, if such relief was granted, they would withdraw consent to the plea deal. Off-the-record promises made in plea bargaining will not be recognized where, as here, they are contradicted by the record. The sentence was vacated. The Albany County Alternate Public Defender (Steven Sharp, of counsel) represented the appellant.

[People v Irizarry \(2022 NY Slip Op 02159\) \(nycourts.gov\)](#)

***Streety v DOCCS* | March 31, 2022**

CERTIFICATE | GOOD CONDUCT | REVERSAL

The petitioner appealed from a judgment of Albany County Supreme Court, which dismissed his CPLR Article 78 petition to review a DOCCS determination denying his request for a certificate of good conduct. The Third Department reversed and remitted. In finding that it would be inconsistent with the public interest to grant a CGC permitting the petitioner to seek to work as a school bus driver, DOCCS failed in its duty to articulate a factual basis beyond the conviction itself for such conclusion. Legal Aid Society, NYC (Robert Newman, of counsel) represented the appellant.

[Matter of Streety v Annucci \(2022 NY Slip Op 02170\) \(nycourts.gov\)](#)

FAMILY

FIRST DEPARTMENT

Richard v Buck | March 29, 2022

DIVORCE | MENTAL ILLNESS

The husband appealed from an order of New York County Supreme Court, which denied his motion to vacate a judgment of divorce. The First Department reversed. The judgment was entered after the husband pro se failed to appear for an inquest. There should have been an inquiry into whether he needed a guardian ad litem, given his significant mental health condition. The judgment was vacated and the matter remanded. The husband had shown a reasonable excuse and a potentially meritorious defense as to equitable distribution. Thus, reversal would also have been warranted under CPLR 5015, had a motion to vacate the default been made. Polly Passonneau represented the father.

[Richard v Buck \(2022 NY Slip Op 02101\) \(nycourts.gov\)](#)

SECOND DEPARTMENT

M/O Khaleef M. S.-P. | March 30, 2022

NEGLECT | MENTAL ILLNESS

The petitioner appealed from an order of Kings County Family Court, which dismissed a neglect petition. The Second Department reversed, found neglect, and remitted for a dispositional hearing. ACS established that the mother neglected the child. Her untreated mental illness placed the child at imminent risk of harm, as she lashed out at shelter employees in the child's presence, resulting in involuntary hospitalization. Thereafter, the mother continued to display delusional behavior and a lack of insight into her illness.

[Matter of Khaleef M. S.-P. \(Khaleeda M. S.\) \(2022 NY Slip Op 02124\) \(nycourts.gov\)](#)

THIRD DEPARTMENT

Anne MM. v Vasiliki NN. | March 31, 2022

GRANDPARENTS | VISITATION EXCESSIVE

The mother appealed from custody orders rendered by Saratoga County Family Court. The Third Department modified. Family Court properly found that the maternal grandparents had standing to seek visitation. They had a loving relationship with the child, spent substantial time with her, and had appropriately cared for her. While there was a sound basis to grant grandparent visitation in the child's best interests, the access awarded was too extensive. The visits involved an eight-hour roundtrip, were extremely disruptive, and deprived the mother of quality weekend time with the child. The matter was remitted. Jessica Vinson represented the appellant.

[Matter of Anne MM. v Vasiliki NN. \(2022 NY Slip Op 02161\) \(nycourts.gov\)](#)

***Matter of Makayla NN.* | March 31, 2022**

ABANDONMENT | DUE PROCESS

The mother appealed from an order of Saratoga County Family Court, which found her child to be abandoned and terminated her parental rights. The Third Department reversed and remitted. In its written decision, Family Court claimed to have advised the mother's counsel that, if requested medical documentation was not timely provided, the mother would be found in default and the trial would become an inquest. However, the record showed that no such warning was given. Significantly, the mother and counsel attended the fact-finding hearing. Family Court abused its discretion in finding the mother in default and precluding her from participating in the hearing. As a matter of due process, she was entitled to be heard on abandonment. The fact that the child had turned 18 did not moot the challenge to the abandonment finding, given the stigma that might indirectly affect the mother's status in future proceedings. But any challenge to the termination of parental rights was moot, and parental consent was not required for an adoption to proceed. Alexandra Buckley represented the appellant.

[Matter of Makayla NN. \(Charles NN.\) \(2022 NY Slip Op 02165\) \(nycourts.gov\)](#)

***Louie v Louie* | March 31, 2022**

DIVORCE | EFFECTIVE ASSISTANCE

The wife appealed from a judgment of divorce rendered by Franklin County Supreme Court. The Third Department modified by awarding maintenance. Supreme Court had erred in adopting verbatim the husband's proposed findings of fact and conclusions of law, without articulating the factors considered or providing a reasoned analysis. The appellate court rejected the wife's contention that she received ineffective assistance of counsel. In the context of [most] civil litigation, counsel's errors or omissions were generally binding on the client. Absent extraordinary circumstances, a claim of ineffective assistance of counsel would not be entertained. Robert Rosborough represented the appellant. *See Bailey v Ayoug*, 2022 WL 8523059 (2nd Dept March 12, 2022) (right to counsel in Family Court under Family Court Act § 262 affords protections equivalent to constitutional standard of effective assistance applicable to defendants in criminal proceedings); *Brandel v Brandel*, 197 AD3d 1287 (divorce litigant has statutory right to counsel—and to meaningful representation—for custody portion of litigation).

[Louie v Louie \(2022 NY Slip Op 02172\) \(nycourts.gov\)](#)



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