

Decisions of Interest

APRIL 22, 2022

CRIMINAL

FIRST DEPARTMENT

People v Patterson | April 21, 2022

FST | *FRYE*

The defendant appealed from a judgment of New York County Supreme Court, convicting him of 2nd degree CPW. The First Department held the appeal in abeyance and remitted. The motion court should have granted the defense request for a *Frye* hearing on the Forensic Statistical Tool (FST) for DNA evidence. The factors cited by the People—including the removal of barriers to access the FST and its use by defense attorneys—were insufficient to show consensus in the scientific community as to the methodology’s reliability. The error was not harmless, given the significance of the DNA evidence derived from use of the FST. The Legal Aid Society of NYC (Tomoeh Murakami Tse, of counsel) represented the appellant.

[People v Patterson \(2022 NY Slip Op 02637\) \(nycourts.gov\)](#)

SECOND DEPARTMENT

People v Cortes | April 20, 2022

FOR CAUSE | IMPLIED BIAS

The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 1st degree criminal contempt and another crime. The Second Department reversed. Supreme Court erred in denying the defense for-cause challenge to a prospective juror who had a relationship that was likely to preclude her from rendering an impartial verdict. See CPL 270.20 (1) (c). During jury selection, the panelist informed the trial court that she was presently working as an ADA at the Queens County DA’s Office—the very agency prosecuting the defendant. This “implied bias” mandated exclusion. See *People v Furey*, 18 NY3d 284. Given the defendant’s challenge for cause and ensuing exhaustion of all peremptory challenges, the error required reversal and a new trial. Appellate Advocates (Alice Cullina, of counsel) represented the appellant.

[People v Cortes \(2022 NY Slip Op 02561\) \(nycourts.gov\)](#)

People v Thompson | April 20, 2022

JURY CHARGE | LESSER INCLUDED | COUNSEL'S DECISION

The defendant appealed from a judgment of Westchester County Court, convicting him of 2nd degree murder and another crime. The Second Department affirmed, rejecting the argument that the defendant received ineffective assistance when counsel deferred to his wishes in declining to seek a jury charge on the lesser included offense of 1st degree manslaughter. The decision regarding whether to request such an instruction was indeed a matter of strategy that ultimately rested with defense counsel. *See People v Colville*, 20 NY3d 20. However, counsel's exchange with the trial court was ambiguous as to her reasoning for declining to request the charge. Thus, the defendant's contention was based in part on matters outside the record, and a CPL 440.10 motion was the proper vehicle for reviewing the claim in its entirety.

[People v Thompson \(2022 NY Slip Op 02565\) \(nycourts.gov\)](#)

THIRD DEPARTMENT

People v Heiserman | April 21, 2022

JURY CHARGE | JUSTIFICATION | REVERSAL

The defendant appealed from a Franklin County Court judgment, convicting him of 2nd degree assault, upon a jury verdict. The Third Department reversed and ordered a new trial. County Court erred in denying the defendant's request for a jury charge on the defense of justification. While being processed at jail for harassment, the defendant was ordered to take off his shoes and wear footwear provided by the jail. He refused, was pepper sprayed in the face, and struck a police sergeant. There was a reasonable view of the evidence that police used excessive force and that the defendant's acts were justified. Two justices dissented. G. Scott Walling represented the appellant.

[People v Heiserman \(2022 NY Slip Op 02588\) \(nycourts.gov\)](#)

People v Sykes | April 21, 2022

PLEA | VOLUNTARY

The defendant appealed from a Clinton County Court judgment, convicting him of multiple crimes, upon his plea of guilty. The Third Department modified. The crimes of conviction were committed through a single act. Thus, once a fine was imposed upon the 1st degree burglary conviction, County Court erred in also ordering separate fines for each of the remaining crimes. The defendant challenged the voluntariness of his plea based on counsel's alleged failure to turn over supporting depositions by two police detectives, which indicated that the victims identified someone else as the likely perpetrator. However, such claim was unpreserved for review, given the absence of an appropriate post-allocation motion. The defendant's generalized statements at the time of sentencing were insufficient to trigger the exception to the preservation requirement. The reviewing court also rejected the defendant's argument regarding the denial of his request for new counsel at sentencing. Counsel may be said to take a position adverse to his client by stating that a motion lacks merit. At County Court's behest, this defense counsel outlined the course of his representation. But counsel did not create an actual conflict in that he

did not affirmatively state that the request for new counsel lacked a factual or legal basis. Edward Graves represented the appellant.

[People v Sykes \(2022 NY Slip Op 02586\) \(nycourts.gov\)](#)

People v Lende | April 21, 2022

SUPPRESSION | FORFEITED

The defendant appealed from a Schoharie County Court judgment, convicting him of 1st degree criminal possession of marihuana, upon his plea of guilty. The Third Department affirmed. As to the defendant's suppression arguments, an order finally denying a motion to suppress evidence may be reviewed upon an appeal from an ensuing judgment of conviction, even where the judgment was entered upon a plea of guilty. See CPL 710.70 (2). However, such review was precluded here because of the defendant's guilty plea before a suppression decision was rendered and because of the unchallenged waiver of the right to appeal.

[People v Lende \(2022 NY Slip Op 02581\) \(nycourts.gov\)](#)

People v Slivienski | April 21, 2022

RIGHT TO SILENCE | HARMLESS ERROR

The defendant appealed from a judgment of Albany County Supreme Court, convicting him of 2nd degree murder and another crime, upon a jury verdict. The Third Department affirmed. Supreme Court erred in denying the defendant's motion to suppress his statements to police. Upon arrest, the defendant was advised of his *Miranda* rights and waived them. Upon arriving at the police station, however, he twice stated, "I do not want to talk anymore." Thus, he invoked his right to remain silent. Police violated that right when, mere minutes later and without further *Miranda* warnings, they continued to interrogate him. However, given the overwhelming proof of guilt, as well as the fact that most of the defendant's statements were exculpatory, there was no reasonable possibility that the error might have contributed to the conviction. The appellate court also rejected the defendant's argument that the search warrant served on TextNow seeking his cell phone records was unlawful. He argued that he sought to preserve his identity as private by choosing TextNow, rather than an ordinary texting service. Any subjective expectation of privacy was not objectively reasonable.

[People v Slivienski \(2022 NY Slip Op 02584\) \(nycourts.gov\)](#)

FAMILY

SECOND DEPARTMENT

Pescales v OCFS | April 20, 2022

MALTREATMENT | CONFIRMED

In an Article 78 proceeding, the petitioner appealed from an OCFS determination denying his application to amend and seal an indicated report maintained by State Central Register of Child Abuse and Maltreatment. The Second Department confirmed the determination. The instant report was based on an incident in which the petitioner allegedly hit his wife in the presence of their children. ACS investigated and found the report indicated. The determination was supported by substantial evidence presented at the fair hearing, including the petitioner's hearing testimony and progress notes from the OCFS investigation. Moreover, the dismissal of criminal charges against the petitioner did not have res judicata effect with respect to the administrative proceeding.

[Matter of Pescales v New York State Off. of Children & Family Servs. \(2022 NY Slip Op 02546\) \(nycourts.gov\)](#)

Corcoran v Liebowitz | April 20, 2022

CUSTODY | MODIFIED

The father appealed from a custody order issued by Westchester County Family Court. The Second Department modified. A stipulation of settlement incorporated in the divorce judgment provided for joint custody. An ensuing order gave the mother sole physical custody. In the instant order, without holding a hearing, the lower court granted her application for sole legal custody and awarded the father unsupervised parental access with the youngest child, once a month for five hours. The record suggested that the award to the mother served to punish the father, not benefit the children. Initially, Family Court had granted the mother only decision-making authority as to the youngest child's education. But after the father called that decision "ridiculous," the court made the legal custody award. The father's disrespect for the court was not a proper basis to modify custody. Helen Greenberg represented the appellant.

[Matter of Corcoran v Liebowitz \(2022 NY Slip Op 02542\) \(nycourts.gov\)](#)



Cynthia Feathers

Director, Appellate & Post-Conviction Representation

New York State Office of Indigent Legal Services

80 S Swan St, Ste 1147, Albany, NY 12210 | www.ils.ny.gov

(518) 949-6131 | cynthia.feathers@ils.ny.gov | (she/her/hers)

Decisions of Interest

APRIL 25, 2022

CRIMINAL

FOURTH DEPARTMENT

People v Burney | April 22, 2022

BURGLARY 2nd | DISMISSED

The defendant appealed from three Genesee County Court judgments, convicting him of various crimes after a single jury trial. The appellate court reversed and dismissed the indictment as to appeal #3, concerning a 2nd degree burglary conviction. That charge arose from the defendant violating a stay-away order when his sometimes girlfriend allowed him to enter her place to take a shower and nap. His intent to commit a separate crime in the apartment was not proven beyond a reasonable doubt. In each appeal, the defendant contended that he was deprived of effective assistance because, in response to requests for new counsel, his assigned attorney took an adverse position. The Fourth Department rejected that argument. Counsel did deny that he told the defendant that the decision as to whether to call witnesses was his. However, counsel did not oppose the request for substitute counsel. The Legal Aid Bureau of Buffalo (Adam Amirault, of counsel) represented the appellant.

[People v Burney \(2022 NY Slip Op 02737\) \(nycourts.gov\)](https://nycourts.gov/2022/04/22/People-v-Burney-2022-NY-Slip-Op-02737/)

People v Mothersell | April 22, 2022

PLEA INVALID | EMPTY PROMISE

The defendant appealed from a judgment of Onondaga County Supreme Court, convicting him of 3rd and 4th degree CPCS. The Fourth Department reversed, vacated the plea, and remitted. In the interest of justice, the appellate court found that the plea was not knowing, voluntary, and intelligent. The court told the defendant pro se that he would retain the right to appeal from all its orders and failed to advise him that, by pleading guilty, he forfeited review of his argument that two counts of the indictment were duplicitous. Hiscock Legal Aid Society (Piotr Banasiak) represented the appellant.

[People v Mothersell \(2022 NY Slip Op 02661\) \(nycourts.gov\)](https://nycourts.gov/2022/04/22/People-v-Mothersell-2022-NY-Slip-Op-02661/)

People v Alim | April 22, 2022

REFUSED BREATH TEST | NOT COGNIZABLE

The defendant appealed from a County Court judgment, convicting him of DWI and several other crimes, upon a jury verdict. The Fourth Department modified. The

defendant's refusal to submit to a breath test did not establish a cognizable offense, so that count of the indictment was dismissed. The Monroe County Public Defender (William Clauss, of counsel) represented the appellant.

[People v Alim \(2022 NY Slip Op 02671\) \(nycourts.gov\)](#)

People v Lewis-Bush | April 22, 2022

HARSH SENTENCE | DISPARITY

The defendant appealed from an Onondaga County Court judgment, convicting him of attempted 2nd degree murder and other crimes, upon a jury verdict. The Fourth Department modified, finding the sentence unduly severe, given the disparity between the plea offer and the sentence imposed. All sentences would run concurrently. Bradley Keem represented the appellant.

[People v Lewis-Bush \(2022 NY Slip Op 02675\) \(nycourts.gov\)](#)

People v Brown | April 22, 2022

ILLEGAL SENTENCE | CONSECUTIVE

The defendant appealed from a judgment of Erie County Supreme Court, convicting him of various crimes, upon a jury verdict. The Fourth Department modified, finding that the terms for 1st degree assault and 1st degree robbery must run concurrently, where the robbery was the predicate felony for the assault. David Pajak represented the appellant.

[People v Brown \(2022 NY Slip Op 02655\) \(nycourts.gov\)](#)

People v Lollie | April 22, 2022

ILLEGAL SENTENCE | PREDICATE

The defendant appealed from a judgment of Onondaga County Supreme Court, convicting him of 1st degree assault, upon his plea of guilty. The Fourth Department affirmed. The defendant contended that he was improperly sentenced as a second felony offender because the federal predicate conviction was not the equivalent of a New York felony. While the challenge to the legality of the sentence was not foreclosed by the appeal waiver, the issue was not preserved and was not reached in the interest of justice. A CPL 440.20 motion was the proper vehicle to seek relief.

[People v Lollie \(2022 NY Slip Op 02679\) \(nycourts.gov\)](#)

People v Ellis | April 22, 2022

SORA | RISK FACTOR 4

The defendant appealed from a Genesee County Court order finding that he was a level-three SORA risk. The Fourth Department modified, determining that he was a level two. The SORA court erred in assessing 20 points under risk factor 4 (continuous course of sexual misconduct). The People presented proof that the defendant engaged in acts of sexual contact with the victim on more than one occasion, but they failed to demonstrate that such instances were separated in time by at least 24 hours. The Legal Aid Bureau of Buffalo (John Morrissey) represented the appellant.

[People v Ellis \(2022 NY Slip Op 02654\) \(nycourts.gov\)](#)

Freeland v Erie County | April 22, 2022

JAIL SUICIDE | ISSUES OF FACT

The defendants appealed from a Supreme Court order, denying their motion for summary judgment dismissing the wrongful death action. The action arose from the suicide of the decedent while incarcerated at the county holding center. The Fourth Department affirmed. The defendants did not make a prima facie showing that the mental health care at the jail was adequate or that the suicide was not reasonably foreseeable, nor did they submit evidence addressing charges that substandard housing at the holding center was a proximate cause of death. The calculation of pecuniary loss, which encompassed the loss of parental nurture and care, was within the province of the jury. The defendants did not demonstrate as a matter of law that the decedent's son had no reasonable expectation of future support from him.

[Freeland v Erie County \(2022 NY Slip Op 02731\) \(nycourts.gov\)](#)

FAMILY

FOURTH DEPARTMENT

Matter of Kayla K. | April 22, 2022

ORDERS OF PROTECTION | DISPOSITIONAL HEARING

In an Article 10 proceeding, the respondent stepmother appealed from orders of protection issued by Steuben County Family Court, which directed her to stay away from the children. The Fourth Department reversed and remitted. The lower court erred in issuing the dispositional orders of protection without holding a dispositional hearing. Caitlyn Connelly represented the appellant.

[Matter of Kayla K. \(Emma P.-T.\) \(2022 NY Slip Op 02668\) \(nycourts.gov\)](#)