

Decisions of Interest

APRIL 24, 2023

CRIMINAL

COURT OF APPEALS

People v Hartle | April 20, 2023

CPL 440.10 | RECOVERED TEXTS | DISSENT

The defendant appealed from a Third Department order affirming the summary denial of his CPL 440.10 motion. The defendant was convicted of rape and other sex crimes involving a 15-year-old girl. The defendant moved to vacate his conviction based on newly discovered evidence consisting of recovered pictures and text messages that he had exchanged with the complainant. This was not newly discovered evidence—the defendant knew about the messages, deleted them to conceal his criminal activity, and chose to pursue a theory of actual innocence at trial. Furthermore, the defendant did not demonstrate that the evidence could not have been produced with due diligence. Judge Rivera dissented. The defendant’s submissions, including a digital forensic expert’s report explaining that he only succeeded in recovering the messages by using recently updated software, warranted a hearing.

[People v Hartles \(2023 NY Slip Op 02029\)](#)

People v Solomon | April 20, 2023

PEOPLE’S APPEAL | SCI | AFFIRMED

The People appealed from a Third Department order reversing the defendant’s conviction and dismissing the SCI. The Court of Appeals affirmed. After the defendant was indicted on several felony sex offenses, he agreed to be prosecuted by SCI and pleaded guilty to endangering the welfare of a child. The plea was in full satisfaction of the amended indictment, which was consolidated with the SCI for purposes of the plea. The SCI did not comply with the strict technical requirements of CPL 195.10 (2) because it was filed after the grand jury’s indictment. Thus, the SCI was a nullity, and it was properly dismissed. Nathaniel Z. Marmur represented the respondent.

[People v Solomon \(2023 NY Slip Op 02030\)](#)

FIRST DEPARTMENT

People v Straker | April 18, 2023

SORA | NO FINDINGS OR CONCLUSIONS | REMANDED

The defendant appealed from a Bronx County Supreme Court order that adjudicated him a risk level two sex offender. The First Department held the appeal in abeyance and

remanded. Supreme Court assessed twenty points on risk factor 7, relationship between offender and victim, but made no findings of fact or conclusions of law relevant to this factor. The case was remitted for Supreme Court to specify the requisite findings and conclusions based on the evidence already introduced.

[People v Straker \(2023 NY Slip Op 01971\)](#)

People v Raul A. | April 18, 2023

CPW | SCHOOL GROUNDS NOT ALLEGED | DISMISSED

The defendant appealed from a New York County Supreme Court judgment convicting him of 2nd degree attempted murder and 2nd degree CPW based on his guilty plea. The First Department dismissed the CPW conviction and remanded for resentencing and a YO determination. The CPW count charged the defendant with possessing a firearm in his home. But the 15-year-old defendant could not be held criminally liable unless he possessed the gun on school grounds (see Penal Law § 30.00 [2]). CPL 310.85, which permits replacing a guilty verdict with a JD determination when the defendant is not criminally responsible by reason of infancy, does not apply to a guilty plea. Because the defendant pleaded guilty to a charge for which he could not be held criminally responsible, the conviction must be vacated and the charge dismissed. The defendant was entitled to a YO determination on the attempted murder conviction. The Office of the Appellate Defender (Samuel Steinbock-Pratt, of counsel) represented the appellant.

[People v Raul A. \(2023 NY Slip Op 01970\)](#)

People v Wald | April 18, 2023

21-YEAR PREINDICTMENT DELAY | AFFIRMED

The defendant appealed from a New York County Supreme Court judgment convicting him of 2nd degree murder. The First Department affirmed. The 21-year preindictment delay here was distinguishable from the four-year preindictment delay in *People v Regan* (2023 NY Slip Op 01353 [2023]), which the Court of Appeals recently held warranted dismissal of the indictment. In *Regan*, all of the People’s trial evidence, except for the defendant’s DNA, was obtained almost immediately following the offense, and the People conceded that their failure to take steps to obtain the DNA for 38 months was partly due to incompetence. Whereas here, during the delay “reasonable investigative steps were taken to gather evidence for an indictment,” which was based almost entirely in circumstantial evidence. While the delay was significant, “it was not due to bad faith or to gain a tactical advantage.”

[People v Wald \(2023 NY Slip Op 01967\)](#)

SECOND DEPARTMENT

People v Tyler | April 19, 2023

PEOPLE’S APPEAL | SUPPRESSION | AFFIRMED

The People appealed from a Suffolk County Supreme Court order granting the defendant’s suppression motion. The Second Department affirmed. An officer testified that he stopped the defendant after observing him driving at what he estimated to be a high rate of speed and cross the double yellow line. During the traffic stop, the officer

smelled marijuana and saw an empty holster, a blunt, and the corner of plastic bag with a powdery substance in the vehicle. The officer directed the defendant out of the car, searched him, and discovered a firearm in his waistband. The stop was not legal. There was no evidence that the officer was trained in visual speed estimation or that the defendant's speed was unreasonable under the conditions. Further, Supreme Court made a credibility determination regarding whether the officer actually saw the defendant cross over the double yellow line or merely heard his tire on the center rumble strip. Suffolk County Legal Aid Society (Felice B. Milani and Matthew Hereth, of counsel) represented the respondent.

[People v Tyler \(2023 NY Slip Op 02020\)](#)

People v Ghose | April 19, 2023

SORA | CORRECTION LAW § 168-O | REVERSED

The defendant appealed from a Nassau County Supreme Court order dismissing his 2021 petition for downward modification of his SORA risk level and reconsideration of the original determination that his foreign conviction qualified as a registerable sex offense. The Second Department reversed. Supreme Court erroneously described the petition as one seeking relief from registration under Correction Law § 168-o (1), which would be limited to "once every two years," and dismissed based on the defendant's July 2020 petition for reconsideration. But review of the initial determination that he was required to register was unavailable under Correction Law § 168-o (1), and petitions for downward modification are permitted annually. Because the defendant had not sought modification in the preceding year, the petition was not procedurally barred, and Supreme Court should have held a hearing. John Healey represented the appellant.

[People v Ghose \(2023 NY Slip Op 02021\)](#)

People ex rel. Neville v Toulon | April 19, 2023

HABEAS CORPUS | DECLARATORY JUDGMENT | CONVERSION

The petitioner appealed from a Suffolk County Supreme Court judgment denying his habeas corpus petition. The Second Department modified, converted to a declaratory judgment action, and declared Mental Hygiene Law § 10.11 (d) (4) not unconstitutional. The petitioner challenged as unconstitutional the provision of Mental Hygiene Law § 10.11 (d) (4) that directs a court to determine whether there is probable cause to believe that a respondent is a dangerous sex offender requiring confinement based only on the allegations in the petition. The statute is not facially unconstitutional; the risk of erroneous deprivation is limited by the applicable procedures, and the statute only applies to offenders who have already been found to be suffering from a mental abnormality. Nor was the statute unconstitutional as applied to petitioner, even though his violation was nonsexual in nature.

[People ex rel. Neville v Toulon \(2023 NY Slip Op 02015\)](#)

Williams v County of Suffolk | April 19, 2023

FALSE ARREST | 42 USC § 1983 | SUMMARY JUDGMENT

In an action seeking damages for false arrest, malicious prosecution, and civil rights violations under 42 USC § 1983, the defendants appealed from a Suffolk County Supreme Court order denying their motions for summary judgment. The Second

Department affirmed. Police arrested and charged the plaintiff with assault based on defendant Molinelli's identification of him as one of her husband's assailants. The charges were dismissed after the plaintiff provided an alibi. The defendants met their burden on summary judgment by establishing probable cause for the criminal action based on Molinelli's identification. But the plaintiff raised issues of fact by submitting the testimony of another individual involved in the altercation, who recanted his earlier statement that the plaintiff was involved and testified that police had fed him that information in the first place.

[Williams v County of Suffolk \(2023 NY Slip Op 02027\)](#)

THIRD DEPARTMENT

People v Vakhoula | April 20, 2023

2ND DEGREE BURGLARY | NOT SORA REGISTERABLE OFFENSE

The defendant appealed from a Sullivan County Court judgment convicting him of 2nd degree burglary as a sexually motivated felony based on his guilty plea. The Third Department modified by vacating the provision certifying the defendant as a sex offender required to register, and otherwise affirmed. Burglary in the second degree as a sexually motivated felony is not defined by Correction Law § 168-a (2) as a registerable sex offense. Aaron A. Louridas represented the appellant.

[People v Vakhoula \(2023 NY Slip Op 02034\)](#)

People v Lamoy | April 20, 2023

CONDITIONAL DISCHARGE | ILLEGAL TERM

The defendant appealed from a Washington County Court judgment convicting him of 2nd degree CPW and misdemeanor DWI based on his guilty plea. The Third Department modified by vacating the conditional discharge, remitted the case, and otherwise affirmed. The three-year term of conditional discharge imposed on the DWI conviction was illegal. Only a one-year term may be imposed in relation to a misdemeanor conviction. Lisa A. Burgess represented the appellant.

[People v Lamoy \(2023 NY Slip Op 02035\)](#)

Matter of Hussain v Lynch | April 20, 2023

ARTICLE 78 DENIED | WRIT NOT WARRANTED

The Third Department denied the petitioner's Article 78 petition seeking to compel the respondent, the trial judge assigned to his criminal case after the initial judge retired, to reinstate his guilty plea and impose the agreed-upon sentence. Mandamus to compel did not lie because sentencing is discretionary. While a writ of prohibition provided an appropriate vehicle for the petitioner's claim, it was not warranted here. The petitioner's 572 hours of community service did not constitute detrimental reliance and, regardless, the respondent had discretion to reject the agreement at sentencing. Justice Aarons dissented. The respondent improperly sought to act as an appellate court to correct what he thought was the prior judge's mistake. Because the respondent acted in excess of a trial court's jurisdiction, specific performance of the plea agreement should be directed.

[Matter of Hussain v Lynch \(2023 NY Slip Op 02049\)](#)

TRIAL COURTS

People v Amissah | 2023 WL 2962101

CPL 30.30 | DISMISSAL

The defendant challenged the validity of the People's SOR and moved for dismissal of the charges pursuant to CPL 30.30. Bronx County Criminal Court held that the COC and SOR were invalid and illusory and dismissed the charges. The People's filing of a supplemental COC 60 days after late disclosure of *Giglio* materials rendered the underlying COC and SOR illusory. The belated filing deprived the defendant of the opportunity to challenge, and the court the opportunity to assess, the reasonableness of the People's delay in providing the *Giglio* materials. Marissa Balonon-Rosen represented the defendant.

[People v Amissah \(2023 NY Slip Op 23105\)](#)

People v Harris | 2023 WL 2996935

EXTRADITION | GOVERNOR'S WARRANT REQUIRED

The People sought a ruling that the defendant's Connecticut probation agreement constituted a waiver of extradition from New York to Connecticut. New York County Criminal Court denied the application. The CT probation agreement did not advise the defendant that, if arrested in another jurisdiction, he would have a right to contest extradition. Even if the agreement could be construed as a knowing waiver of his right to a Governor's warrant, it did not contemplate NY's prohibition of return to another jurisdiction until NY criminal cases are complete. The Legal Aid Society of NYC (Eliza Orlins, of counsel) represented the defendant.

[People v Harris \(2023 NY Slip Op 23110\)](#)

People v Middleton | 2023 WL 2962111

CPL 30.30 | COC FILED AFTER BUSINESS HOURS

The defendant moved to dismiss misdemeanor charges pursuant to CPL 30.30. New York County Criminal Court denied the motion. The People filed their COC and SOR after 5 p.m. on the 90th day of attributed time. Defendant argued that, because the COC/SOR were filed after 5 p.m., they should be deemed filed on the 91st day. The court, finding that other court parts remain open after 5 p.m. and midnight filing times are widely accepted with e-filing, determined that the COC and SOR were valid. As only 90 days were attributable to the People, the motion was denied. Further, although the People inadvertently failed to disclose documents that were turned over weeks after they filed their initial COC, their prompt filing of a supplemental COC when providing the documents demonstrated diligence and did not invalidate the first COC.

[People v Middleton \(2023 NY Slip Op 23106\)](#)

FAMILY

SECOND DEPARTMENT

Matter of Baez-Delgadillo v Moya | April 19, 2023

CUSTODY | HEARING REQUIRED | REVERSED

The father appealed from a Kings County Supreme Court order that summarily granted the mother's petition for sole custody of the child and suspended the father's parental access based on his failure to comply with the court's directives to enroll in therapy, batterer's intervention, and alcohol treatment. The Second Department reversed and remitted for a hearing. Supreme Court erred in making a final custody determination and suspending the father's parental access without a best interests hearing. It was also improper for the court to condition the father's future parental access on his compliance with treatment. Paul W. Matthews represented the father.

[Matter of Baez-Delgadillo v Moya \(2023 NY Slip Op 01994\)](#)

Matter of Coley v Steiz | April 19, 2023

PRECONDITION TO PARENTAL ACCESS | MODIFIED

The incarcerated father appealed from a Dutchess County Family Court order that denied his modification petition seeking in-person parental access and conditioned his filing of future petitions on his completion of parenting classes. The Second Department modified by deleting the provision regarding parenting classes. A court may direct a party to submit to counseling or treatment as a component of parental access or custody, but it cannot require these services as a condition of future parental access or reapplication of parental access rights. Carol Kahn represented the father.

[Matter of Coley v Steiz \(2023 NY Slip Op 01995\)](#)

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