Indigent Legal Services

Decisions of Interest

MAY 22, 2023

CRIMINAL

COURT OF APPEALS

People v Johnson | May 18, 2023

DE BOUR LEVEL 3 | NO REASONABLE SUSPICION | REVERSED

The defendant appealed from a Fourth Department order affirming his conviction for 3rd degree CPCS (two counts). The Court of Appeals reversed, holding that the *De Bour* level three stop and frisk was not warranted. The defendant was stopped and frisked after he exited a parked car and walked down the street. The officer had observed the defendant: (1) move from the driver's seat to the passenger seat; (2) move his upper torso back toward the driver's seat; (3) pull up his pants and attempt to buckle his belt; and (4) appear nervous while being questioned. Because the police lacked reasonable suspicion to believe he had committed a crime or was in possession of a weapon, the evidence should have been suppressed. Paul B. Watkins represented the appellant.

People v Johnson (2023 NY Slip Op 02734)

People v Saenger | May 18, 2023

JURISDICTIONAL DEFECT | NOT IAOC

The defendant appealed from a Second Department order affirming his convictions for 1st degree criminal contempt and aggravated family offense. The Court of Appeals dismissed the aggravated family offense charge and affirmed the criminal contempt conviction. The count of the indictment charging aggravated family offense was jurisdictionally defective. It alleged that the defendant had "committed an offense specified in [Penal Law § 240.75 (2)]." It did not specify the offense, and that subdivision contains 54 specified offenses. The defendant was not given sufficient notice of the charges against him. Regarding the criminal contempt conviction, the defendant failed to demonstrate that defense counsel was ineffective for failing to challenge the legal sufficiency of the evidence. At the time of trial, there was no clear appellate authority resolving the statutory interpretation issue raised by appellate counsel (*see People v Barrett*, 188 AD3d 1736, 1738 [4th Dept 2020]). Appellate Advocates (Sam Feldman, of counsel) represented the appellant.

People v Saenger (2023 NY Slip Op 02735)

People v Wheeler | May 18, 2023

PEOPLE'S APPEAL | ASSAULT 2ND | LEGALLY SUFFICIENT

The People appealed from a Second Department order that reversed the defendant's 2nd degree assault conviction. The Court of Appeals reversed. The evidence was legally

sufficient to establish physical injury under Penal Law § 120.05 (3). The complainant, a police detective, testified that the defendant punched him in the mouth, causing him pain, bleeding and swelling. He described the pain as "aching" and was directed to take over-the-counter painkillers.
People v Wheeler (2023 NY Slip Op 02736)

FIRST DEPARTMENT

People v Barksdale | May 18, 2023
VIRTUAL SENTENCING | RIGHT TO BE PRESENT | REMITTED
The defendant appealed from a New York County Supreme Court judgment convicting him of attempted 1st degree assault, 2nd degree assault, and 3rd degree CPW after a jury trial and sentencing him to an aggregate 14-year term. The First Department affirmed the conviction, vacated the sentence, and remitted for resentencing. The defendant had a right to be personally present at sentencing, and he did not expressly waive that right during the virtual proceeding. The Center for Appellate Litigation (Bryan S. Furst, of counsel) represented the appellant.
People v Barksdale (2023 NY Slip Op 02744)

SECOND DEPARTMENT

People v Sams | May 17, 2023
CPL 60.35 | IMPEACHED PARTY WITNESS | REVERSED
The defendant appealed from a Kings County Supreme Court judgment convicting him of 2nd degree murder and 2nd degree CPW after a jury trial. The Second Department reversed. Supreme Court erred in permitting the prosecutor to impeach her own witness in violation of CPL 60.35. The witness's testimony that he did not see the perpetrator's face and did not see the defendant fire a gun did not contradict or disprove any of the People's evidence. The error was not harmless, as the evidence was not overwhelming. Appellate Advocates (Michael Arthus and Brian Perbix, of counsel) represented the appellant.
People v Sams (2023 NY Slip Op 02684)

People v Gurley | May 17, 2023
SORA | TIME WITHOUT REOFFENSE | REVERSED
The defendant appealed from a Kings County Supreme Court order designating him a level two sex offender. The Second Department reversed. The risk assessment instrument did not account for the 17-year period that the defendant was at liberty after his release without reoffending. Given the lengthy time without re-offense, the Second Department granted the downward departure and designated the defendant a level one sex offender. Appellate Advocates (Martin B. Sawyer, of counsel) represented the appellant.
People v Gurley (2023 NY Slip Op 02686)

People v Parsley | May 17, 2023

CPL 440 | ILLEGALLY ALTERED SENTENCE | REVERSED

The defendant appealed from a Westchester County Court order denying his CPL 440.20 motion. The Second Department reversed. The defendant was convicted in 2012 of 2nd degree murder (two counts), attempted 2nd degree murder, 1st degree assault, and 1st degree burglary after a jury trial. At sentencing, the court stated that the attempted murder and the assault sentences were to run consecutively to the intentional murder sentence. In 2013, the court issued an amended sentence and commitment form indicating the sentences for intentional murder, attempted murder, and assault were all to run consecutively to each other. This was error—County Court illegally altered the sentence in violation of CPL 430.10. The initial sentence and commitment form reflected the sentence unambiguously imposed by the sentencing court. Warren S. Landau represented the appellant.

People v Parsley (2023 NY Slip Op 02683)

THIRD DEPARTMENT

People v McCall | May 18, 2023

PREDICATE FELONY | 10-YEAR LOOK-BACK | MODIFIED

The defendant appealed from an Albany County Supreme Court judgment convicting him of attempted 3rd degree CPW based on his guilty plea. The Third Department affirmed the conviction but vacated the sentence. The defendant was not properly sentenced as a second felony offender. Although not preserved, the illegality of the sentence was clear from the face of the appellate record. The defendant's predicate felony conviction occurred more than 10 years before the instant offense, and the People did not demonstrate that the 10-year look-back period was tolled by incarceration. The matter was remitted for a hearing on this issue and resentencing. Martin J. McGuinness represented the appellant.

People v McCall (2023 NY Slip Op 02719)

TRIAL COURTS

People ex rel. Bradley v Baxter | 2023 WL 3402252

DECLARATORY JUDGMENT | DOUBLE PREDICATE | BAIL REFORM

The petitioner was arraigned in Rochester City Court on several non-qualifying criminal offenses (*see* CPL 510.10). City Court remanded him under the double predicate rule based on his four prior felonies (*see* CPL 530.20 [2] [a]). The petitioner commenced this matter in the Fourth Department as a habeas corpus proceeding, contending that his pretrial detention was illegal under the reformed bail law. The petitioner was thereafter released, rendering the proceeding moot. The Fourth Department held that the exception to the mootness doctrine applied, converted the matter to a declaratory judgment action, and transferred it to Monroe County Supreme Court for further proceedings (203 AD3d 1576 [4th Dept 2023]). Supreme Court granted the petition and declared that the double predicate rule (*see* CPL 530.20 [2] [a]) shall apply only to qualifying offenses under the

reformed bail law (*see* CPL 530.20 [1] [b] and 510.10 [4]). The Monroe County Public Defender (John Bradley, of counsel) represented the petitioner.
People ex rel. Bradley v Baxter (2023 NY Slip Op 23145)

Matter of Lopez | 2023 WL 3474580

"LESS IS MORE" | PAROLE REVOCATION | APPEAL

Rochester City Court rendered a decision providing guidance regarding new procedures for parole revocation appeals under the "Less is More" statute. Executive Law § 259-i (4-a) (L. 2021, c. 427, § 7, eff. March 1, 2022) provides that administrative appeals of decisions revoking parole based on technical violations are still heard by the Board of Parole; but revocations based on non-technical violations (for conduct constituting a crime) may be appealed either to the Board or to a specified criminal court. The latter appeals are commenced by filing a notice of appeal (NOA) "in the same manner as an appeal to the appellate division," as set forth in CPL 460.10 (NOA filed in "criminal court" in which sentence was imposed). In this case, a contested hearing was held, an ALJ revoked appellant's parole, and his parole counsel filed—with the Board of Parole—a NOA which did not identify Rochester City Court as the appeal forum. Appellate counsel then filed a motion seeking to transfer that pending administrative appeal to City Court or for certain alternative relief. City Court held that: (1) the appellant was a nontechnical violator since the substance of a sustained charge constituted a misdemeanor or felony, so he could indeed appeal to criminal court; (2) the NOA was properly filed with the Board; (3) and no law permitted transferring the appeal or amending the NOA. But, based on initial counsel's improper conduct in failing to fully advise the appellant of his appeal options, the court granted his CPL 460.30 motion to file a late notice of appeal designating City Court as the appellate court. The Monroe County Public Defender (Jane Yoon, of counsel) represented the appellant.
Matter of Lopez (2023 NY Slip Op 23149)

Matter of McDevitt v Suffolk County | 2023 NY Slip Op 50486(U)

FOIL | POLICE RECORDS | GRANTED

In an article 78 proceeding, the petitioner challenged the partial denial of his FOIL request seeking disclosure of certain police personnel records. Suffolk County Supreme Court partially granted the petition and directed the respondents to provide the requested records of unsubstantiated claims of police misconduct, subject to redaction of any personal, private information. In denying the petitioner's FOIL request, the respondents relied on two advisory opinions from the Committee on Open Government, which directed that records of unsubstantiated complaints of officer misconduct could be withheld under the personal privacy exemption of Public Officers Law § 87 (2) (b). But the First and Fourth Departments had since held that Public Officers Law § 87 (2) (b) does not categorically exempt documents related to unsubstantiated claims of misconduct from disclosure (*see Matter of New York Civ. Liberties Union v New York City Dept. of Corr.*, 213 AD3d 530 [1st Dept 2023]; *Matter of New York Civ. Liberties Union v City of Syracuse*, 210 AD3d 1401 [4th Dept 2022]). Cory H. Morris represented the petitioner.
Matter of McDevitt v Suffolk County (2023 NY Slip Op 50486[U])

FAMILY

SECOND DEPARTMENT

Matter of Dawson v Iskhakov | May 17, 2023

CHILD SUPPORT | NO SUBJECT MATTER JURISDICTION

The mother appealed from a Kings County Family Court order dismissing her petition for child support. The Second Department affirmed. In a 2017 divorce judgment, the parents agreed to each pay child support to the maternal grandmother. In 2021, the mother petitioned for child support. The Support Magistrate correctly dismissed the petition for lack of subject matter jurisdiction since the petition sought to establish a child support order, not modify the existing order (*see* Family Court Act § 461 [a], [b]). The Support Magistrate could not have converted the proceeding under CPLR 103 or 2001.
Matter of Dawson v Iskhakov (2023 NY Slip Op 02660)

Matter of Erica H.-J. (Tarel H.) | May 17, 2023

ABUSE/NEGLECT | LEGALLY RESPONSIBLE PERSON | DISSENT

The father of the subject child and his girlfriend appealed from Queens County Family Court fact-finding orders finding that they had abused the subject child and derivatively neglected their two children. The 24-month-old subject child was admitted to the hospital with a lacerated liver and other injuries. ACS commenced child protective proceedings against the mother, the father, and his girlfriend, as legally responsible persons, based on the theory of res ipsa loquitur because the child had been in their care when the injuries occurred. Notwithstanding the fact that the girlfriend had only met the subject child two or three times, the Second Department held that she was legally responsible for the child's care during the relevant time period based on her relationship with the father and her control over the child's environment. The dissent disagreed; the evidence did not establish that the girlfriend exercised the degree of control and involvement in the child's life to warrant such a determination.
Matter of Erica H.-J. (Tarel H.) (2023 NY Slip Op 02662)

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