

Decisions of Interest

MAY 27, 2022

CRIMINAL

COURT OF APPEALS

People v Deverow | May 24, 2022

DEFENSE THWARTED | NEW TRIAL

The defendant appealed from a Second Department order upholding his conviction of 2nd degree murder and another crime. The Court of Appeals reversed in a unanimous opinion by Judge Singas. At trial, the court precluded evidence offered to support a justification defense, thereby depriving the defendant of his constitutional right to present a defense. The proffered testimony was not collateral; it was probative of the ability of the sole prosecution witness to observe and recall details of the shooting. The trial court also erred in excluding 911 calls made from the scene at the time of the crime. They qualified as present sense impressions and were corroborated by independent evidence. The errors were not harmless where proof against the justification defense was far from overwhelming. Appellate Advocates (Alice Cullina, of counsel) represented the appellant. [People v Deverow \(2022 NY Slip Op 03362\)](#)

People v Garcia | May 24, 2022

DISSENT | *SUAZO* | STARE DECISIS

The defendant appealed from an Appellate Term, First Department order upholding a judgment convicting him of public lewdness. The Court of Appeals affirmed, finding that conclusory allegations by the defendant were insufficient to establish his right to a jury trial based on possible deportation. Judge Wilson dissented, joined by Judge Rivera. When the defendant demanded a jury trial, he asserted that any of the charged B misdemeanors would result in deportability and cited a relevant federal statute and two immigration decisions. The burden on noncitizen defendants to invoke the right to a jury trial should be realistic and feasible. There was no basis to deviate from *People v Suazo*, 32 NY3d 491. The dissent also discussed the fundamental importance of the doctrine of stare decisis.

[People v Garcia \(2022 NY Slip Op 03359\)](#)

People v Mitchell | May 24, 2022

DISSENT | "ACCAST"

The defendant appealed from an Appellate Term, First Department order, affirming a judgment convicting him of fraudulent accosting. The Court of Appeals affirmed in an

opinion by Chief Judge DiFiore. The conviction was based on the defendant's attempts to obtain money from pedestrians, supposedly for charitable organizations supporting the homeless. The majority found the complaint facially sufficient, rejecting the argument that "accost" should be narrowly construed to require "a physical approach and an element of aggressiveness or persistence...directed toward a specific individual." Judge Rivera dissented, and Judge Wilson concurred in the dissent. The majority's construction of "accost" was contrary to its common meaning. The statute required conduct focused on a victim, and the accusatory instrument lacked the requisite factual assertion.

[People v Mitchell \(2022 NY Slip Op 03360\)](#)

FIRST DEPARTMENT

People v Cisneros | May 26, 2022

SORA | REVERSED

The defendant appealed from an order of Bronx County Supreme Court, which adjudicated him a level-two sexually violent offender. The First Department reversed. The Bronx County proceeding should have been dismissed on the defendant's motion. New York County Supreme Court had entered a SORA adjudication based on the defendant's criminal conduct in both counties, which constituted the "current offenses" under the risk assessment instrument. Legal Aid Society, NYC (Arthur Hopkirk, of counsel) represented the appellant.

[People v Cisneros \(2022 NY Slip Op 03454\)](#)

People v Rosario | May 24, 2022

10 SKIN CELLS | CONVICTION

The defendant appealed from a judgment of New York County Supreme Court, convicting him of 2nd degree assault and other crimes. The First Department affirmed. Unless the only innocent explanation for a person's DNA at a crime scene was implausible, the People had to present something more to secure a conviction, the defendant urged. In this case, only 10 skin cells were found on an airbag, and two other people contributed to some of those cells. The appellate court reasoned that, if the defendant occupied the vehicle at some time before it collided with a police car, injuring three officers, the airbag would not have been accessible to him then. Further, if he was operating the car at the time of the incident, the force of the airbag would have caused the transfer of skin cells to the bag.

[People v Rosario \(2022 NY Slip Op 03351\)](#)

SECOND DEPARTMENT

People v Bloome | May 25, 2022

DEFECTIVE INDICTMENT | SANDOVAL ERROR

The defendant appealed from a judgment of Richmond County Supreme Court, convicting him of various crimes. The Second Department vacated 1st degree robbery and 1st degree burglary convictions and dismissed those counts. The defendant was accused of forcibly

stealing a cell phone, but the People did not prove his larcenous intent. As to the burglary, the indictment was jurisdictionally defective in alleging that the defendant was “armed with a dangerous weapon, to wit: a knife.” Only specified knives qualified as a deadly weapon. The People’s motion to amend the count was not authorized. After a *Sandoval* hearing, the trial court improperly ruled that, if the defendant testified, the prosecutor could cross-examine him as to facts underlying a 2004 assault conviction and 2012 robbery conviction. Potential prejudice outweighed probative value. But the error was harmless. Appellate Advocates (Skip Laisure and Mark Vorkink) represented the appellant.

[People v Bloome \(2022 NY Slip Op 03398\)](#)

***People v Rodriguez* | May 25, 2022**

VERDICT | REPUGNANT

The defendant appealed from a judgment of Queens County Supreme Court, convicting him of multiple crimes. The Second Department vacated 2nd degree robbery and 4th degree grand larceny convictions and dismissed those counts, with leave to the People to submit to another grand jury. A verdict is repugnant when, evaluated in terms of the elements of the crimes as charged to the jury and without regard to the evidence as to what occurred, acquittal on one count necessarily negated an element of a crime of which the defendant was convicted. Here, given the acquittal of 3rd degree unauthorized use of a vehicle, the guilty verdict on the above convictions was repugnant. Appellate Advocates (Sam Feldman, of counsel) represented the appellant.

[People v Rodriguez \(2022 NY Slip Op 03403\)](#)

FAMILY

FIRST DEPARTMENT

***Bowden v Tingling* | May 26, 2022**

MANDAMUS | MOOT

The petitioner appealed from an order of Bronx County Supreme Court, which denied her CPLR Article 78 petition seeking mandamus relief compelling the respondent Family Court judge to timely rule on objections to a support order. The First Department affirmed. The petition was properly dismissed as moot since the court had ruled. The mootness exception did not apply, given that the statutory period was mandatory and the issue was not novel. The CPLR 8601(a) application for counsel fees was properly denied. While the court ruled hours after the petition was served, the comprehensiveness of the decision indicated that it had been in the works. The petition was not a catalyst for the ruling; the petitioner was not a “prevailing party.”

[Bowden v Tingling \(2022 NY Slip Op 03437\)](#)

***Lauren S. v Alexander S.* | May 26, 2022**

CUSTODY | CONFIDENTIAL

The father appealed from a custody order rendered by New York County Supreme Court. The First Department affirmed. The appeal from such final order brought up for review an order quashing subpoenas served by the father on the mother's therapists. See CPLR 5501 (a) (1). Disclosure or in camera review of the mother's confidential treatment records was not required to decide custody. The forensic report was properly admitted, and any inadmissible hearsay was not a ground for reversal because the conclusions were based on non-hearsay sources.

[Lauren S. v Alexander S. \(2022 NY Slip Op 03462\)](#)

SECOND DEPARTMENT

***Lavery v O'Sullivan* | May 25, 2022**

RELOCATION | IRELAND

In a divorce action, the father appealed from an interlocutory judgment of Rockland County Supreme Court, awarding the mother sole custody and permitting her to relocate with the child to Ireland. Pending appeal, the Second Department had stayed enforcement as to the relocation. See CPLR 5519 (c); *cf.* Family Ct Act § 1114 (b). In the instant decision, the appellate court affirmed the challenged judgment. The mother was the primary caregiver, and the father abused alcohol and committed domestic violence. Relocation would improve the child's life. The mother could live with the child for free in a guest house on the maternal grandparents' property and could accept a job offer at a nursing home. In addition, her extended family would be nearby to lend support. While relocation would disrupt the father's regular contact with the child, lengthy vacations could compensate for such loss. The father was a citizen of Ireland and had often visited his family there. Quatela Chimeri represented the appellant.

[Lavery v O'Sullivan \(2022 NY Slip Op 03378\)](#)



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