

Decisions of Interest

MAY 30, 2023

CRIMINAL

COURT OF APPEALS

People v Reid | May 23, 2023

RIGHT TO PUBLIC TRIAL | CLOSED COURTROOM | REVERSED

The defendant appealed from a First Department order affirming his conviction for 2nd degree murder and 2nd degree CPW (two counts). The Court of Appeals reversed. The defendant's Sixth Amendment right to a public trial was violated when the judge closed the courtroom for the last four days of the eight-day jury trial. The judge closed the courtroom based on a "cumulative" effect of intimidation: unidentified spectators had shared trial photos on social media; unnamed spectators were staring in an intimidating manner; and a court reporter was "very shaken" by an interaction with a group of unidentified spectators in the elevator. The *Waller* (467 US 39 [1984]) requirements were not met. The judge did not create a sufficient record to justify a complete closure and, as a result, the closure was not narrowly tailored to the interests sought to be protected. Romano & Kuan, PLLC, New York (Richard M. Greenberg, of counsel) represented the appellant.

[People v Reid \(2023 NY Slip Op 02755\)](#)

People v Muhammad | May 23, 2023

RIGHT TO PUBLIC TRIAL | EXCLUDED SPECTATORS | REVERSED

The defendant appealed from a Fourth Department order affirming his conviction for 2nd degree murder and 2nd degree CPW. The Court of Appeals reversed. The judge's policy of prohibiting the public from entering or exiting the courtroom during witness testimony resulted in a violation of the defendant's Sixth Amendment right to a public trial. Several spectators were inadvertently excluded from the courtroom because court officers did not properly implement the policy. The spectators had arrived on time, turned over their cell phones, and were waiting for permission to enter the courtroom when the first witness was called and began testifying. A few minutes into cross examination, the prosecutor learned that the spectators were waiting in the hallway and immediately notified the court. The judge failed to establish procedures to ensure that those who timely arrived would be permitted entry, resulting in the spectator's unjustified exclusion. Paul J. Connolly represented the appellant.

[People v Muhammad \(2023 NY Slip Op 02756\)](#)

FIRST DEPARTMENT

People v Baptiste | May 25, 2023

JURY NOTES | O'RAMA VIOLATION

The defendant appealed from a New York County Supreme Court judgment convicting him of 1st degree scheme to defraud (two counts), 4th degree grand larceny (three counts), and petit larceny (three counts) after a jury trial. The First Department reversed and ordered a new trial. Supreme Court did not follow the procedures described in *People v O'Rama* (78 NY2d 270 [1991]) in response to four jury notes. The court did not even show the notes to the parties and the record does not indicate that the court responded to the notes at all. While the notes all sought trial exhibits, at least two did not unambiguously describe the requested exhibits—these notes warranted input from counsel and required meaningful notice to the parties. The Office of the Appellate Defender (Samuel Steinbock-Pratt of counsel) represented the appellant.

[People v Baptiste \(2023 NY Slip Op 02835\)](#)

People v Flores | May 23, 2023

BRADY | IMPEACHMENT MATERIAL | U VISA | REVERSED

The defendants appealed from Bronx County Supreme Court judgments convicting them after a joint jury trial of 1st degree criminal sexual act, 3rd degree assault, and 4th degree CPW and the denial of their CPL 440.10 motions. The First Department reversed the 440 denials, vacated their convictions and—because the defendants had served their sentences and been deported—dismissed the indictments. The People violated *Brady* by failing to disclose impeachment evidence that its Crime Victim Assistance Unit was helping the complainant obtain a U visa. U visas are issued to crime victims and require a certification from law enforcement confirming that the applicant has been or is likely to be helpful in investigating or prosecuting criminal activity. The complainant's credibility was central to the case, and the suppressed U visa evidence could have raised enough reasonable doubt to affect the outcome of trial. The Office of the Appellate Defender (Sean Nuttall, Karena Rahall, Lev L. Dassin, Sela Brown, and Laura Dougherty, of counsel) represented appellant Flores, and the Center for Appellate Litigation (Alexandra Mitter and Brittany N. Fancis, of counsel) represented appellant Carrera.

[People v Flores \(2023 NY Slip Op 02768\)](#)

People v Scott | May 23, 2023

TRAFFIC STOP | WARRANTLESS SEARCH | REVERSED

The defendant appealed from a New York County Supreme Court judgment convicting him of 2nd degree CPW based on his guilty plea. The First Department reversed and granted the defendant's suppression motion. The officers pulled over a car in which the defendant was a front-seat passenger. The defendant and the driver were ordered out of the vehicle and stood at the rear of the car while officers searched the vehicle. They found a gun in a purse on the backseat. The traffic stop was valid, but the warrantless sweep was not justified. The officers never saw the defendant or the driver turn to the back seat. Nothing indicated that a weapon in the vehicle posed an actual and specific danger to the officers. The Office of Appellate Defender (Joseph M. Nursey, of counsel) represented the appellant.

[People v Scott \(2023 NY Slip Op 02769\)](#)

SECOND DEPARTMENT

People v Green | May 24, 2023

SORA | INSUFFICIENT NOTICE | PEOPLE'S RECOMMENDATION

The defendant appealed from a Queens County Supreme Court order adjudicating him a level three sex offender. The Second Department reversed and remitted. The Board recommended assessing 30 points on factor 1 for being armed with a dangerous instrument. The People recommended assessing 15 points on this factor for the infliction of physical injury. Supreme Court assessed 15 points based on the People's recommendation. However, the People failed to give the defendant at least 10 days' notice that they were seeking a different determination than the Board recommended, which deprived him of a meaningful opportunity to respond. A new hearing was required, but it would be limited to the challenged 15 points on factor 1 and the defendant's request for a downward departure. Appellate Advocates (Ava Page and Jenna Hymowitz of counsel) represented the appellant.

[People v Green \(2023 NY Slip Op 02799\)](#)

FAMILY

SECOND DEPARTMENT

Matter of Liang v O'Brien | May 24, 2023

MODIFICATION PETITION | HEARING REQUIRED

The mother appealed from a Kings County Family Court order that summarily dismissed her petition to modify a prior consent order awarding the parents joint legal and physical custody. The Second Department reversed and remitted. The allegations in the mother's petition—demonstrating that the parents' ability to cooperate with each other had deteriorated such that they could no longer communicate civilly about the children—were sufficient to show a change in circumstances warranting a hearing. The Law Office of Towers & Associates, P.C. (Geanine Towers of counsel) represented the mother.

[Matter of Liang v O'Brien \(2023 NY Slip Op 02789\)](#)

Matter of Waters v Yacopino | May 24, 2023

INCONVENIENT FORUM | PREMATURE DISMISSAL

The father appealed from a Suffolk County Family Court order that dismissed his petition based on forum non conveniens. The Second Department reversed and remitted. The father commenced this proceeding in 2021 to enforce a 2013 custody order, alleging that the mother violated the order by moving with the child to Texas in 2020. The mother moved to dismiss based on, among other things, forum non conveniens. Family Court correctly found that Texas was the more convenient forum. But DRL § 76-f (3) requires the court to stay the pending proceedings until a custody proceeding is commenced in the other state before declining to exercise jurisdiction. Heather A. Fig represented the father.

[Matter of Waters v Yacopino \(2023 NY Slip Op 02792\)](#)

Primero v Lee | May 24, 2023

FORENSIC EVALUATION | NO RIGHT TO COUNSEL

In a divorce action, the defendant wife appealed from an order of Kings County Supreme Court denying her motion to enjoin a court-appointed forensic evaluator from requiring her to submit written answers to a parenting survey or to allow her to consult with counsel regarding responses, and to preclude the parties from seeking production of written responses to the survey via a CPLR article 31 request. The Second Department affirmed. Neither the wife's statutory right to counsel nor her due process rights were violated. Even where counsel is permitted to be present at a client's forensic examination in a TPR proceeding, there is no right to the participation or assistance of counsel (see *Matter of Alexander L.*, 60 NY2d 329 [1983]).

[Primero v Lee \(2023 NY Slip Op 02801\)](#)

THIRD DEPARTMENT

Matter of Elijah AA. (Alexander AA.) | May 25, 2023

LEGALLY RESPONSIBLE PERSON | NEGLECT | REVERSED

The father appealed from an Otsego County Family Court order finding that he neglected his newborn child. The Third Department reversed. DSS filed a neglect petition against the parents after the baby tested positive for drugs at birth. Although a "close call," the father was a person legally responsible for the child's care. The parents split after a short relationship, but the father continued to help the mother during her pregnancy until he was incarcerated two months before the child was born. Although unsure if he was the father, he planned to care for the child and later seek paternity testing. But DSS did not establish neglect. Paternity was not established until the child was one year old. Before his incarceration, the father offered his mother as a possible custodial resource. DSS did not tell the father that his mother later said she could not care for the baby, and they failed to investigate other familial resources. Its proof of neglect was impermissibly predicated solely on the father's incarceration. The Rural Law Center (Kristin A. Bluvus, of counsel) represented the appellant.

[Matter of Elijah AA. \(Alexander AA.\) \(2023 NY Slip Op 02812\)](#)

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