

Decisions of Interest

JUNE 13, 2022

CRIMINAL

FOURTH DEPARTMENT

McNair v McNamara | June 10, 2022

DOUBLE JEOPARDY | PROHIBITION

Seeking to prohibit his criminal prosecution on double jeopardy grounds, the petitioner initiated a CPLR Article 78 in the Fourth Department. The appellate court prohibited the Oneida County DA from retrying him on weapons charges. A trial had commenced, the jury was selected and sworn, and three witnesses testified. Then the trial judge felt sick and thought he might have Covid. Before being tested, he declared a mistrial. Jeopardy had attached. There was no manifest necessity. The judge should have considered alternatives, such as a continuance or substitution of another judge. Rebecca Wittman represented the petitioner.

[McNair v McNamara \(2022 NY Slip Op 03825\)](#)

People v Mountzouros | June 10, 2022

MOLINEUX | NEW TRIAL

The defendant appealed from a County Court judgment, convicting him of 1st degree sexual abuse and other crimes, arising from his alleged abuse of a son. The Fourth Department granted a new trial. The trial court erred in allowing testimony about the defendant's sexual abuse of another son, under the *Molineux* modus operandi exception. If, arguendo, the defendant's identity as the perpetrator was not conclusively established, the similarities between the uncharged acts and charged crimes were not sufficiently unique. The error was not harmless. The Livingston County Conflict Defender (Bradley Keem, of counsel) represented the appellant.

[People v Mountzouros \(2022 NY Slip Op 03840\)](#)

People v Hodge | June 10, 2022

SUPPRESSION | DISMISSAL

The defendant appealed from an Onondaga County Court judgment, convicting him of 2nd degree CPW and another crime, upon his plea of guilty. The Fourth Department reversed. The appeal brought up for review the denial of suppression. Police lawfully stopped the petitioner and did not inordinately prolong his detention. However, after ordering the defendant to exit the truck, they unlawfully tried to pat frisk him without a reasonable suspicion that he posed a threat to their safety. Further, when the defendant

threw his coat onto an officer and fled to a grassy area along the highway, police lacked probable cause to arrest him for obstructing governmental administration, because their conduct was not authorized. Two justices dissented. Hiscock Legal Aid Society (Philip Rothschild) represented the appellant.

[People v Hodge \(2022 NY Slip Op 03821\)](#)

People v Bunton | June 10, 2022

INJURY | INSUFFICIENT

The defendant appealed from a County Court judgment, convicting him of 2nd degree assault (two counts) and other crimes. The Fourth Department dismissed one assault count, finding the proof legally insufficient as to the element physical injury. There was only a vague description of the injury and no testimony about any pain medications. Further, the prosecution produced no medical records, and the officer did not miss work. The Monroe County Public Defender (Janet Somes) represented the appellant.

[People v Bunton \(2022 NY Slip Op 03856\)](#)

People v Freeman | June 10, 2022

YO | DETERMINATION

The defendant appealed from a judgment of Onondaga County Supreme Court, convicting him of attempted 1st degree robbery and 2nd degree assault, upon a jury verdict. The Fourth Department reserved decision and remitted. The trial court erred in failing to determine if the defendant should be afforded youthful offender status. Because he was convicted of an armed felony offense, the court had to first determine if he was an eligible youth and, if so, whether YO treatment was warranted. Hiscock Legal Aid Society (Philip Rothschild, of counsel) represented the appellant.

[People v Freeman \(2022 NY Slip Op 03829\)](#)

FAMILY

FOURTH DEPARTMENT

Matter of McKinley H. -W. | June 10, 2022

NEGLECT | MEDICAL CARE

The father appealed from an order of Genesee County Family Court, which adjudged that he had neglected the subject child. The Fourth Department vacated the finding of neglect based on the failure to obtain medical care and treatment. The mother testified that she and the father washed the area where the child had a cut, used ointment, and applied a bandage. Two days later, a caseworker told the mother to have the child seen by a doctor, and she did so. There was no showing that the failure to seek immediate care impaired the child's health or posed a threat. Caitlin Connelly represented the appellant.

[Matter of McKinley H.-W. \(2022 NY Slip Op 03858\)](#)

Matter of William | June 10, 2022

ADOPTION | CONSENT

The petitioners appealed from an order of Jefferson County Family, which determined that the consent of the biological father was needed for their adoption of the subject child and dismissed their petition. The Fourth Department affirmed. The father did everything possible to manifest his parental responsibility. He pursued paternity testing, sought custody of the child, and enlisted the help of military commanding officers, whereas the mother frustrated his efforts. The father's temporary inability to provide housing was not dispositive. Many active military members facing such challenges should not lose custody due to their service to our country. One justice dissented.

[Matter of William \(2022 NY Slip Op 03831\)](#)



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)