

# Decisions of Interest

JULY 15, 2022

## CRIMINAL

### SECOND DEPARTMENT

#### ***People v Drago*** | July 13, 2020

SUMMATION | PREJUDICIAL

The defendant appealed from a Suffolk County Court judgment, convicting her of multiple crimes. The Second Department reversed. The prosecutor's improper comments during summation deprived the defendant of a fair trial—an issue that was partially unpreserved. The prosecutor mischaracterized the evidence relating to the charge of criminally negligent homicide and suggested that the defendant's conduct was intentional or reckless. In addition, closing remarks denigrated defense theories as “excuses” and “garbage” and evoked sympathy for the defendant in strong emotional terms. The People argued that such improper comments did not deprive the defendant of a fair trial because a video depicted her striking the victim with her vehicle. However, the jury was called upon to determine whether such conduct was sufficiently “blameworthy” to rise to the level of criminally negligent homicide. Legal Aid Society of Suffolk County (Felice Milani) represented the appellant.

[People v Drago \(2022 NY Slip Op 04561\)](#)

#### ***People v Medina*** | July 13, 2022

NO PHYSICAL INJURY | SUMMATION | HARMLESS

The defendant appealed from a judgment of Queens County Supreme Court, convicting him of multiple crimes. The Second Department vacated the conviction of 3<sup>rd</sup> degree assault and dismissed that count. The evidence did not establish that the victim sustained a physical injury where he did not testify that he was in pain after the attack or that he took any medication or sought medical attention. In addition, the defendant asserted that certain comments made by the prosecutor during summation were improper. Although references to race generally should be avoided, here the prosecutor's comment—that the defendant did not like the fact that one of the complainants, a white man, was dating a Black woman—was not improper. The statement was relevant to show the basis for the altercation at issue. Remarks about the work one complainant did to serve disabled children—elicited without objection—were improper and designed to appeal to the jury's sympathy. But any error was harmless. Appellate Advocates (Anna Jouravleva, of counsel) represented the appellant.

[People v Medina \(2022 NY Slip Op 04566\)](#)

#### ***People v Tiger*** | July 13, 2022

CPL 440.10 | IAC | REVERSAL

The defendant appealed from an Orange County Court order, which denied her CPL 440.10 motion to vacate a judgment, convicting her of 1<sup>st</sup> degree endangering the welfare of a vulnerable

elderly person or an incompetent or physically disabled person, based on ineffective assistance of counsel. The Second Department reversed, vacated the judgment and the plea of guilty, and remitted. A licensed practical nurse, the defendant was hired to provide home care for a physically disabled child. After the defendant bathed her, the child's skin was red and peeling, and the defendant was accused of having caused thermal burns. She pleaded guilty, even though she had initially stated in the allocution that the water was not hot. Defense counsel failed utterly in his duty to do an investigation. He did not consult a medical expert and did not obtain a skin biopsy report indicating that the condition was caused by an allergic reaction to the child's medication. There was a reasonable probability that, but for her attorney's defective performance, the defendant would have insisted on going to trial. Larkin Ingrassia LLP represented the appellant. [People v Tiger \(2022 NY Slip Op 04568\)](#)

### ***People v Alleyne*** | July 13, 2022

PROTECTION | DURATION

The defendant appealed from a judgment of Kings County Supreme Court, convicting him of attempted 3<sup>rd</sup> degree robbery, upon his plea of guilty. The appeal brought up for review two orders of protection. The defendant failed to preserve his contention that the duration of the orders exceeded the statutorily permissible period, since he did not raise the matter at sentencing or move to amend the orders. In the interest of justice, the Second Department vacated the durational directives and remitted. Legal Aid Society of New York City (Simon Greenberg, of counsel) represented the appellant.

[People v Alleyne \(2022 NY Slip Op 04556\)](#)

### ***People v Songster*** | July 13, 2022

SORA | PROCEDURE

The defendant appealed from an order of Kings County Supreme Court, designating him a level-three sex offender. The Second Department affirmed, while finding fault with the procedures followed. Upon the defendant's impending release from prison, the Board of Examiners prepared a single case summary but three separate risk assessment instruments for convictions under three different indictments. Supreme Court held one hearing, but issued three separate orders, rendering different SORA adjudications as to each indictment. Where convictions under multiple indictments came up for disposition at the same SORA hearing, the Board should instead prepare a single RAI based on all the crimes that were the subject of the disposition, considering them all together as the "Current Offense(s)." The SORA court should then render a single risk determination.

[People v Songster \(2022 NY Slip Op 04570\)](#)

## THIRD DEPARTMENT

### ***People v Agan*** | July 14, 2022

MURDER ONE | REDUCED

The defendant appealed from a judgment of Columbia County Court, convicting him of multiple crimes. The Third Department modified, reducing the conviction of 1<sup>st</sup> degree (witness elimination) murder to 2<sup>nd</sup> degree murder. The evidence did not establish that the deceased victim (the defendant's wife) witnessed the defendant's sex offenses with the minor victim. At most, she may have been a coincidental witness. Further, there was no evidence that the defendant feared that his prosecution was imminent or that his wife might be called to testify against him. Two separate concurring opinions were filed. Matthew Hug represented the appellant.

[People v Agan \(2022 NY Slip Op 04581\)](#)

***People v Alexander* | July 14, 2022**

WARRANT | OVERBROAD

The defendant appealed from a Schenectady County Court judgment, convicting him of 1<sup>st</sup> degree rape and 1<sup>st</sup> degree sexual abuse. The Third Department affirmed. The appeal waiver was invalid, so the appellate court addressed the contention that the warrant authorizing the police search of his cell phone was unconstitutional. The affidavit was insufficient to establish probable cause to search the phone and seize evidence related to all Penal Law Article 130 crimes. However, probable cause existed to search and seize photographic and video evidence relating to the alleged June 2018 commission of sexual abuse. The overbroad portion of the warrant was severed. Such severance did not require exclusion of May 2018 videos allegedly depicting the defendant committing rape, because they were properly seized under the plain view doctrine. Police could search the phone pursuant to the valid part of the warrant, and thumbnail images in an extraction report would have made the character of the May 2018 videos apparent.

[People v Alexander \(2022 NY Slip Op 04585\)](#)

***People v Corrodore* | July 14, 2022**

PERSISTENT FELON | SIX DWIs

The defendant appealed from a judgment of Albany County Supreme Court, convicting him of DWI (two counts) and other crimes. The Third Department affirmed. The defendant urged that the determination to sentence him as a persistent felony offender was unduly severe, in that he had remained crime-free for 10 years, was gainfully employed, and had not caused injury in the subject crime. The sentencing options were stark—a maximum of 1½ to 4 years as a first felony offender or a minimum of 15 years to life as a persistent felon. (Second felony offender sentencing was not permitted based on the distant prior convictions.) At the sentencing hearing, the defendant conceded that he qualified as a persistent felon. Supreme Court considered that he had committed five prior felony convictions (four for DWI) over a 25-year period; concluded that a non-recidivist sentence was inappropriate; and imposed a term of 15 years to life.

[People v Corrodore \(2022 NY Slip Op 04590\)](#)

## FAMILY

## SECOND DEPARTMENT

***Matter of Serena G.* | July 13, 2022**

DERIVATIVE NEGLECT | HEARING

The mother appealed from an order of Suffolk County Family Court, which found that she neglected Serena G. and derivatively neglected Vincent G. The Second Department affirmed as to the daughter but reversed as to the son. In March 2020, Family Court began a fact-finding hearing on the neglect petition as to Serena. The following month, the mother gave birth to Vincent, and a second petition was filed. Family Court made no mention of the latter petition during the fact-finding hearing for Serena and did not hold a hearing about the infant. The right to due process encompassed a meaningful opportunity to be heard at a fact-finding hearing and to present relevant evidence. Upon remittal, among other things, evidence should be considered as to whether, at the time of filing of the derivative neglect petition, the mother had resolved the

issues that resulted in the neglect finding as to Serena. Steven M. Burton represented the appellant.

[Matter of Serena G. \(2022 NY Slip Op 04547\)](#)

***VanDunk v Bonilla*** | July 13, 2022

FAMILY OFFENSE | VENUE

The mother appealed from an order of Rockland County Court dismissing her family offense petition. The Second Department reversed and remitted. Family Court erred in finding that the mother commenced the proceeding in an improper venue. A family offense petition could be originated in the county in which the acts occurred or any party resided. The mother lived in Rockland County. In any event, if she had initiated the proceeding in the wrong county, the proper action would have been a transfer pursuant to Family Ct Act § 174. Salvatore Adamo represented the appellant.

[VanDunk v Bonilla \(2022 NY Slip Op 04554\)](#)

## THIRD DEPARTMENT

***Jeffrey O. v NYS OCFS*** | July 14, 2022

MALTREATMENT | UNSEALING

In an Article 78 proceeding, the petitioner appealed from an OCFS order denying his application to have a report maintained by the Statewide Central Register amended to be unfounded and expunged. The Third Department confirmed. The petitioner's due process rights were not violated by the ALJ's consideration of sealed charges. A party who affirmatively placed in issue the underlying criminal conduct by bringing a civil suit thereby waived the protection afforded by CPL 160.50. Further, the defendant's due process rights were not violated by the six-month delay in issuance of the indicated report. The failure of the agency to comply with the 60-day statutory deadline did not warrant vacatur where there was no showing of substantial prejudice.

[M/O Jeffrey O. v OCFS \(2022 NY Slip Op 04593\)](#)

***Kutzin v Katz*** | July 14, 2022

MARITAL AGREEMENT | MALPRACTICE

The plaintiff appealed from an order of Ulster County Supreme Court, granting summary judgment dismissing his complaint, which legal malpractice based on the purportedly defective drafting of a marital settlement agreement. The Third Department affirmed. To succeed on his claim, the plaintiff was required to demonstrate that the defendant failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession; that the failure was the proximate cause of actual damages to the plaintiff; and that the plaintiff would have succeeded on the merits of the underlying action but for such negligence. The defendant made a prima facie showing that his actions were not the proximate cause of the plaintiff's alleged damages, and the plaintiff did not raise any questions of fact.

[Kutzin v Katz \(2022 NY Slip Op 04595\)](#)