

Decisions of Interest

JULY 25, 2022

CRIMINAL

COURT OF APPEALS

People v Hemphill | July 21, 2022

CONFRONTATION CLAUSE | HARMLESS ERROR

Upon reargument following remand from the U.S. Supreme Court, the New York Court of Appeals affirmed the challenged First Department order. The question presented was whether the admission of the plea allocution of third-party Morris, in violation of the defendant's Confrontation Clause rights, was harmless. The COA found that it was. The defendant was convicted of 2nd degree murder for the shooting death of a two-year-old bystander. The primary disputed issue was the shooter's identity. At trial, the defendant maintained that the shooter was Morris, relying primarily on his initial prosecution for the crime. But there was overwhelming evidence that the defendant was the shooter, and there was no reasonable possibility that the erroneously admitted colloquy might have contributed to the conviction. The plea allocution neither exculpated Morris nor inculpated defendant as the shooter, and the prosecutor's reliance on the allocution was minimal.

[People v Hemphill \(2022 NY Slip Op 04663\)](#)

SECOND DEPARTMENT

People v Noel | July 20, 2022

ACCOMPLICE | CORROBORATION | JURY CHARGE

The defendant appealed from a judgment of Kings County Supreme Court, convicting her of 1st degree murder and other crimes. The Second Department reversed and ordered a new trial. The People's evidence consisted primarily of testimony of the defendant's paramour, codefendant Lovell. As part of a cooperation agreement, Lovell testified that the defendant solicited his help to kill her husband and that they hired codefendant Portious to do the deed. Supreme Court failed to instruct the jury that Lovell was an accomplice as a matter of law and thus subject to the statutory corroboration requirement. The unpreserved error was addressed in the interest of justice. Although the People presented some corroborative evidence, if the jury had discounted Lovell's testimony, the remaining evidence would have been insufficient to find the defendant guilty. The trial court also erred in admitting, as an adoptive admission by silence, testimony about a phone call in which the defendant allegedly remained silent when accused by her mother-in-law of having killed the husband. The People failed to establish that the defendant heard the allegation or had an opportunity to respond before the call was disconnected. Legal Aid Society of NYC (David Crow, Michelle Fox, and Paul Weiss Rifkind, of counsel) represented the appellant.

[People v Noel \(2022 NY Slip Op 04647\)](#)

***People v Bilfulco* | July 20, 2022**

FOREIGN PREDICATE | NOT EQUIVALENT

The defendant appealed from judgments of Kings County Supreme Court, convicting him of 3rd degree robbery (three counts), upon his pleas of guilty. The Second Department modified. The defendant should not have been adjudicated a second felony offender based on a prior federal conviction for possession of a firearm by a felon. The federal crime did not require that the firearm be operable and thus did not constitute a New York felony for the purpose of enhanced sentencing. Appellate Advocates (Lynn W.L. Fahey, of counsel) represented the appellant.

[People v Bilfulco \(2022 NY Slip Op 04637\)](#)

***People v Gonzalez* | July 20, 2022**

ORDERS OF PROTECTION | DURATION

The defendant appealed from judgments of Kings County Supreme Court, convicting him of 2nd and 3rd degree burglary. The appeals brought up for review orders of protection. The Second Department vacated the durational provisions. Since Supreme Court did not announce the length of the orders at the plea or sentencing proceedings, the defendant could not register a timely objection, so the preservation rule did not apply. The orders' span exceeded the statutory maximum. Therefore, the matter was remitted for a new determination. Appellate Advocates (Emily Lurie, of counsel) represented the appellant.

[People v Gonzalez \(2022 NY Slip Op 04644\)](#)

***People v Burns* | July 20, 2022**

DVSJA | RESENTENCING

The defendant appealed from a Supreme Court order, insofar as it denied his CPL 440.47 motion to resentence him pursuant to Penal Law § 60.12 on a murder conviction. The Second Department reversed. In 1996, at age 19, the defendant killed his father and his father's girlfriend during an altercation in the home they all shared. The defendant pleaded guilty to 1st degree manslaughter as to the father and 2nd degree murder as to the girlfriend and was sentenced to an aggregate term of 28 years to life. Supreme Court resentenced the defendant for the manslaughter but denied relief as to the murder sentence. Yet the record showed that the father's substantial abuse of the defendant was a significant contributing factor to the murder of the girlfriend. Further, the sentence of 25 years to life was unduly harsh, given the nature of the crime, the defendant's age at the time, his accomplishments in prison, and his family support. The matter was remitted for resentencing. Legal Aid Society of Suffolk County (Kate Mogulescu, Felice Milani, and Cravath, Swaine & Moore LLP, of counsel) represented the appellant.

[People v Burns \(2022 NY Slip Op 04638\)](#)

***People v Holiday* | July 20, 2022**

READING TESTIMONY | PROSECUTORS

The defendant appealed from a judgment of Kings County Supreme Court, convicting him 2nd degree murder and 2nd degree CPW. The Second Department affirmed. Upon reversal of a previous judgment of conviction, the defendant had been retried. At the instant trial, the People introduced the testimony of two witnesses from the first trial (one had died, the other could not be found). One prosecutor read the questions, another the answers. Defense counsel objected, arguing that the jury would "hear that another assistant DA is testifying here," which might have "a psychological effect" on them. However, counsel did not contend that either prosecutor acted as an unsworn witness and injected his/her own credibility into the trial. *Cf. People v Paperno*, 90 AD2d 168. CPL 670.10 did not describe a method for reading testimony. The better practice would

have been for nonjudicial court personnel unaffiliated with the prosecutor's office to recite the answers.

[People v Holiday \(2022 NY Slip Op 04645\)](#)

THIRD DEPARTMENT

People v Franklin | July 21, 2022

TERMS | CONCURRENT

The defendant appealed from a Chenango County Court judgment, convicting her of 1st degree manslaughter, 3rd degree arson, and tampering with evidence, upon her plea of guilty. The Third Department modified. County Court should not have imposed consecutive terms for arson and tampering. Given that the fire was set to conceal evidence, those convictions arose from a single act, and the sentences had to run concurrently with one another. Pamela Bleiwas represented the appellant.

[People v Franklin \(2022 NY Slip Op 04677\)](#)

People v Streater | July 21, 2022

WAIVER OF APPEAL | INVALID

The defendant appealed from an Ulster County Court judgment, convicting him of aggravated family offense and 1st degree criminal contempt. The Third Department affirmed. The waiver of the right to appeal was invalid. Neither the oral discussion nor the written waiver explained that some appellate issues would survive. Instead, the waiver suggested that an absolute bar to a direct appeal covered even nonwaivable issues. However, the sentence was not harsh and excessive.

[People v Streater \(2022 NY Slip Op 04668\)](#)

People v Mcmillian | July 21, 2022

WAIVER OF APPEAL | *ANDERS*

The defendant appealed from an Ulster County Court judgment, convicting him of 1st degree criminal contempt. Appellate counsel filed an *Anders* brief. The Third Department assigned new counsel. There were issues of arguable merit pertaining to the validity of the waiver of appeal, which might impact other possible issues, such as whether County Court conducted an adequate inquiry before denying a request for new counsel.

[People v Mcmillian \(2022 NY Slip Op 04664\)](#)

People v LeBlanc | July 21, 2022

SORA | TAKING RESPONSIBILITY

The defendant appealed from a Delaware County Court order, which classified him as a level-three sex offender. The Third Department affirmed. The defendant challenged the assessment of 10 points under risk factor 12 (acceptance of responsibility). During the pre-plea investigation, the defendant adamantly denied having had intercourse with the victim and claimed that they were just holding hands and that she told him she was 17. Although the defendant did plead guilty and had successfully completed sex-offender treatment, he never directly contradicted his original statements, and he continued to equivocate as to the circumstances leading up to his offense.

[People v LeBlanc \(2022 NY Slip Op 04681\)](#)

FAMILY

SECOND DEPARTMENT

Touchet v Horstman | July 20, 2022

UCCJEA | VIOLATED

The mother appealed from an order of Suffolk County Family Court. Based on a lack of subject matter jurisdiction, the court dismissed her petitions to enforce and modify a prior custody order issued in California. The Second Department reversed. The trial court failed to adhere to the UCCJEA when it announced its ruling on jurisdiction without having given the parties an opportunity to present facts and legal arguments. Darla Filiberto represented the appellant.

[Touchet v Horstman \(2022 NY Slip Op 04633\)](#)



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