Indigent Legal Services

Decisions of Interest

JULY 8, 2022

CRIMINAL

FIRST DEPARTMENT

People v Martin | July 5, 2022

440.10 | IAC | DENIED

The defendant appealed from an order of New York County Supreme Court denying his CPL 440.10 motion after a hearing; and from a judgment convicting him of 2nd degree murder, aggravated vehicular homicide (two counts), and other crimes after a nonjury trial. The First Department affirmed both the order and the judgment. As to the 440 motion, the defendant did not establish that counsel was ineffective in: (1) making a strategic decision to refrain from calling an expert regarding whether drugs prevented the defendant from forming the mental state of depraved indifference; or (2) the general handling of the intoxication aspect of the defense. As to the direct appeal, to the extent that depraved indifference could be negated by intoxication, the proof showed that the defendant was not rendered incapable of forming the requisite mental state and that his conduct was a sufficiently direct cause of death.

People v Martin (2022 NY Slip Op 04284)

People v Hatchett | July 5, 2022

CPW 3 | VACATED

The defendant appealed from a judgment of New York County Supreme Court, convicting him of 2nd and 3rd degree CPW. In the interest of justice, the First Department dismissed the 3rd degree count, where both convictions were based on the defendant's possession of the same weapon. The trial court properly denied suppression of a cartridge recovered from the defendant's pants pocket. Police acted in their public service function when searching for identification in the clothing of the defendant—who was treated as an injured victim, not a suspect, at that point. Based on the lack of CPL 710.30 notice, the trial court should have precluded proof of the defendant's false statement that someone had shot him. However, any error was harmless, given overwhelming evidence of his knowing and unlawful possession of the pistol with which he accidentally shot himself. The Center for Appellate Litigation (Barbara Zolot, of counsel) represented the appellant.

People v Hatchett (2022 NY Slip Op 04282)

SECOND DEPARTMENT

People v Franklin | July 6, 2022

CONFRONTATION | TESTIMONIAL PROOF

The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 2nd degree CPW, based on allegations that police recovered a silver gun following a search of the basement of the home where he allegedly lived. The Second Department reversed and ordered a new trial. The trial court erroneously admitted a Criminal Justice Agency form through a CJA employee who did not create the form where it was not shown that the creator of the form was unavailable. In the document, the defendant's address was listed as the basement of the home where police searched and recovered the silver gun. The admission of the testimony and document to establish an essential element of the charges of 2nd and 3rd degree CPW violated the defendant's constitutional right of confrontation. The error was not harmless beyond a reasonable doubt. Appellate Advocates (Hannah Kon, of counsel) represented the appellant.
People v Franklin (2022 NY Slip Op 04308)

People v Echols | July 6, 2022

SORA | LEVEL THREE | IAC

The defendant appealed from an order of Queens County Supreme Court, designating him a level-three sex offender. The Second Department reversed and remitted. The defendant had pleaded guilty to attempted 1st degree criminal sexual act. At the SORA hearing, counsel rendered ineffective assistance by: (1) waiving a viable argument regarding risk factor 4; (2) not knowing applicable law; and (3) failing to articulate any argument supporting the downward departure sought. Appellate Advocates (Ava Page, of counsel) represented the appellant.
People v Echols (2022 NY Slip Op 04310)

People v Wolbert | July 6, 2022

SORA | LEVEL THREE | NO IAC

The defendant appealed from a Suffolk County Court order, designating him a level-three sex offender. The Second Department affirmed. The defendant had been convicted of 1st degree sexual abuse. At the SORA hearing, defense counsel was not ineffective in declining to argue that the defendant's response to the sex-offender treatment program he completed while incarcerated was exceptional and constituted a mitigating factor warranting a downward departure. The argument had little chance of success.
People v Wolbert (2022 NY Slip Op 04313)

APPELLATE TERM

People v Ortega | 2022 NY Slip Op 50587 (U)

DWAI | FACIALLY INSUFFICIENT

The defendant appealed from a judgment of Richmond County Criminal Court, convicting him of DWAI. The Appellate Term, Second Department reversed. The facial insufficiency of the

accusatory instrument constituted a jurisdictional defect—an issue that was not forfeited by the guilty plea. The instrument alleged that the arresting officer observed the defendant "seated behind the driver's seat with the engine running." Without additional factual allegations—pertaining, for example, to the position, condition, and location of the vehicle—the element of operation was not sufficiently alleged. Since operation was a necessary element of the two other counts, the accusatory instrument was dismissed in its entirety. Appellate Advocates (Anna Kou) represented the appellant.
People v Ortega (2022 NY Slip Op 50587 U

THIRD DEPARTMENT

People v Dowling | July 7, 2022

MISSING WITNESS | NO CONTROL

The defendant appealed from a judgment of Albany County Supreme Court, convicting him of attempted 2nd degree murder and other crimes. The Third Department affirmed. The trial court did not err in refusing to give a missing witness charge concerning the victim. The defendant showed that the witness had material knowledge and was expected to give non-cumulative testimony. Further, as to availability, the People acknowledged that they knew the victim was housed in the local jail. However, he was not under prosecution control, in that he was wholly uncooperative during the investigation.
People v Dowling (2022 NY Slip Op 04324)

FAMILY

SECOND DEPARTMENT

Statini v Reed | July 6, 2022

ADOPTION | CONSENT

The mother and her husband appealed from an order of Dutchess County Family Court, which determined that the father's consent to the adoption of the subject child was required. The Second Department reversed and reinstated the adoption petition. The father provided no support for the child and presented no evidence that he lacked the means to do so. Further, during substantial periods when out of prison, the father did not petition for contact with the child. Thus, he failed to establish that his consent was required under DRL § 111 (1) (d). Ronna DeLoe represented the appellants.
Statini v Reed (2022 NY Slip Op 04304)

Chukwuemeka v Chukuemeka | July 6, 2022

TEMPORARY CUSTODY | HEARING

In an interlocutory appeal filed amidst divorce proceedings, the father challenged an order of Dutchess County Supreme Court, granting the mother's motion for temporary custody of the child. *See* CPLR 5701 (a) (appeal as of right from Supreme Court order deciding motion on notice involving some part of merits or affecting substantial right); *cf.* Family Ct

Act § 1112 (a) (no appeal as of right from Family Court's Article 6 interim custody order). The Second Department reversed. Even in a pendente lite context, where disputed factual issues existed, it was error as a matter of law to rule on custody without a full hearing. The matter was remitted for an expedited hearing and a new decision on custody. Annette Hasapidis represented the appellant.
Chukwuemeka v Chukuemeka (2022 NY Slip Op 04287)

THIRD DEPARTMENT

Katie R. v Peter Q. | July 7, 2022

NEW FACTS | NO PREJUDICE

The mother appealed from an order of Sullivan County Family Court, dismissing her custody modification petition. The Third Department affirmed. As to the mother's assertion that her petition should be conformed to the hearing proof, the appellate court noted that the challenged order revealed that Family Court had indeed considered proof regarding matters that occurred after the petition was filed—despite the lack of an appropriate motion by the mother. *See* CPLR 3025 (c) (court may permit party to amend pleadings to conform to proof, before or after judgment, upon such terms as are just); Family Ct Act § 165 (a) (CPLR applies in Family Court where appropriate). Addressing the new developments was proper where the father had the opportunity to respond and thus was not prejudiced. However, the mother did not establish a change in circumstances.
Katie R. v Peter Q. (2022 NY Slip Op 04339)

Amber B. v Scott C. | July 7, 2022

AFC | AUTHORITY | TAKING APPEAL

The AFC appealed from an order of Sullivan County Family Court, which dismissed the custody petition of the paternal grandmother. In affirming, the Third Department explained that the AFC was authorized to take the appeal. While the grandmother did not appeal, she submitted a letter supporting the AFC's position. *See Matter of Newton v McFarlane*, 174 AD3d 67 (2nd Dept) (AFC had right equal to that of litigants to take appeal on behalf of child in custody dispute, at least where child did not seek to compel custody award in favor of unwilling parent); *cf. Matter of Lawrence v Lawrence*, 151 AD3d 1879 (4th Dept) (child in custody matter lacked full-party status and could not force mother to litigate claim she had abandoned). However, the grandmother did not demonstrate that extraordinary circumstances existed.
Amber B. v Scott C. (2022 NY Slip Op 04340)

Matter of Olivia RR. | July 7, 2022

AFC | AUTHORITY | SUBSTITUTING JUDGMENT

The respondent appealed from an order of Warren County Family Court, which granted the petitioner agency's abuse petition. The Third Department affirmed. While the respondent argued that the AFC improperly substituted her judgment for that of the child, he failed to preserve his challenge by moving in Family Court for removal of the AFC. In any event, his contention lacked merit.
Olivia RR. (Paul RR.) (2022 NY Slip Op 04332)

Webster v Larbour | July 7, 2022

TRANSCRIPT GAPS | APPELLATE REVIEW

The husband appealed from an order of Saratoga County Family Court, granting the wife's Article 8 family offense petition and issuing an order of protection. The Third Department affirmed. A portion of the cross-examination, and all the redirect, of the husband were not recorded. However, he had not described the substance of the missing testimony or how it was important or relevant to issues raised on appeal. Thus, the incomplete hearing transcript did not preclude meaningful appellate review.

Webster v Larbour (2022 NY Slip Op 04333)

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