From: ILSAPP <ilsapp-bounces+cynthia.feathers=ils.ny.gov@listserve.com> on behalf of Feathers, Cynthia (ILS) via ILSAPP <ilsapp@listserve.com>

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CRIMINAL

Court of Appeals

DECISION OF THE WEEK

People v O'Kane, 2/8/18 – **People's Appeal / Defense Counsel Not Ineffective**

Multiple protective orders were entered against the defendant for purportedly tormenting his landlord. The defendant was charged with aggravated harassment, stalking, and criminal contempt (a total of 14 misdemeanors). To distinguish between similar allegations covering many acts and time periods, Albany City Criminal Court annotated each count on the verdict sheet with dates and a short description of the alleged conduct. The parties agreed to such annotations. The jury found the defendant guilty of 12 counts. On appeal, the defendant argued that his trial attorney was ineffective, but he did not complain about the annotations. Sua sponte, County Court held that the annotations were "extraneous and highly inflammatory" and that defense counsel's consent constituted ineffective assistance. A unanimous Court of Appeals reversed. CPL 310.20 permits the annotation of verdict sheets containing two or more counts charging offenses set forth in the same article of law, by adding dates, names of complainants, or specific statutory language. If other annotations are deemed instructive, consent is required. Counsel had a sound strategic reason for consenting: the annotations encouraged the jury to think about each count and relevant evidence independently. The Court of Appeals did not address whether the sua sponte action by the intermediate appellate court was proper. The matter was remitted to consider issues raised, but not previously determined.

http://www.nycourts.gov/reporter/3dseries/2018/2018_00859.htm

Second Department

People v Giuca, 2/7/18 – **440 Motion Granted / *Brady* Violation**

After the defendant's murder conviction was affirmed, he made a CPL 440.10 motion charging that the People had committed *Brady* violations and knowingly used false, misleading testimony. The motion was denied following a hearing. The reviewing court reversed, based on proof regarding prosecution witness John Avitto. Before trial, the witness had pleaded guilty to a felony burglary charge. Pursuant to the plea deal, Avitto was required to complete a drug treatment program or face a stiffer sentence. At trial, he testified about inculpatory statements the defendant had made to him in jail; and the witness claimed that

he was not promised anything in exchange for his testimony against the defendant. In their summation, the People highlighted Avitto's testimony about not receiving favorable treatment in return for his testimony. The reviewing court detailed that the 440 hearing revealed that, upon leaving the drug program, Avitto immediately contacted police and was thereafter treated leniently—despite poor treatment progress and numerous violations. The prosecution had a duty to disclose such information. The jury could have found that there was a tacit quid pro quo. Such evidence tended to show Avitto's motivation to lie. The prosecution was also required to correct his misleading testimony, which was exacerbated by the summation. Since a reasonable possibility existed that the errors affected the verdict, a new trial was ordered. Andrew Stengel represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_00846.htm

Matter of Putland v New York State Dept. of Corr. & Community Supervision, 2/7/18 – **PAROLE BOARD APPEAL / PAROLE GRANT UPHELD**
The defendant was convicted for a murder committed in 1979 when he was age 15 and was sentenced to nine years to life imprisonment. In 2014, at age 50, he was denied parole for the 14th time. The defendant commenced an Article 78 proceeding, and his petition was granted. The challenged determination was annulled, and the matter remitted for a de novo interview before a different panel. The Parole Board appealed, and the Second Department affirmed. During the pendency of the appeal, a Third Department decision had held that the Board must consider a defendant's youth, and the "attendant characteristics" of his youth, when the crime was committed by a juvenile, and, but for a favorable parole determination, he would be punished by life in prison. In its reply brief, the Parole Board stated that it was complying with the Third Department decision on a statewide basis. *[In another parole matter decided 2/7/18,* Matter of Banks v Stanford, *the Second Department explained that a parole "interview" must encompass the full evaluative process described by Executive Law § 259-i(2)(c), but was to be distinguished from an evidentiary "hearing."]*
http://nycourts.gov/reporter/3dseries/2018/2018_00837.htm

Fourth Department

People v Chase, 2/9/18 – **ENDANGERING WELFARE OF A CHILD / REVERSAL**
The defendant was convicted of second-degree murder and endangering the welfare of a child. The appellate court found legally insufficient the proof of the latter charge, which arose from the defendant allegedly having her four-year-old son accompany her when she transported the victim's body to her mother's house. The People presented no evidence that the child was aware that the body was in the car or was upset by smells or sights in the vehicle or later at her grandmother's house. Further, the People did not establish that harm was likely to occur to the boy. Two justices dissented, opining that the transporting of a severely decomposed, dismembered corpse of the man the child knew to be his father was likely to cause him harm. The Ontario County Public Defender (Gary Muldoon, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_00935.htm

People v Hobbs, 2/9/18 – **YOUTHFUL OFFENDER TREATMENT / NO DA CONSENT NEEDED**
The defendant was eligible for a youthful offender adjudication; but it appeared that the sentencing court believed it was constrained to deny the defense request simply because such relief was not contemplated by the People's plea offer. CPL 720.20 (1) mandates that, where the defendant is eligible, there must be

a YO determination in every case—even where the defendant agrees to forgo such an adjudication as part of a sentencing proceeding. The sentences imposed in the two subject appeals were vacated, and the matter remitted to County Court for an independent determination regarding YO status before imposition of sentence. The Ontario County Public Defender (Mary Davison, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_00995.htm

People v Hamn, 2/9/18 – **440 Motion Granted / Federal Crime not Felony Equivalent**
Monroe County Supreme Court erred in denying the defendant's pro se CPL 440.20 motion, which contended that he was improperly sentenced as a second felony offender. The prior federal felony conviction, for conspiracy to commit a drug crime, did not meet the strict equivalency standard for a predicate felony. The sentence was vacated and the matter remitted to resentence the defendant as a non-predicate felon.
http://nycourts.gov/reporter/3dseries/2018/2018_00961.htm

People v Barnett, 2/9/18 – **People's Appeal / No Speedy Trial Violation**
The People appealed from an Erie County Court order granting the defendant's motion to dismiss a superseding indictment based on statutory speedy trial grounds. A witness's one-day unavailability, while her father was undergoing heart surgery, was an excludable delay occasioned by exceptional circumstances. Further, a 21-day adjournment was mostly attributable to the court, not chargeable to the People, where they sought only a one-day continuance. Thus, the challenged order was reversed, and the superseding indictment reinstated.
http://nycourts.gov/reporter/3dseries/2018/2018_00968.htm

Matter of State of New York v George N., 2/9/18 – **Civil Management / Failure of Proof by State**
Erie County Supreme Court revoked the respondent's release to strict and intensive supervision and treatment (SIST) and committed him to a secure treatment facility. The Fourth Department reversed, since the State did not establish by clear and convincing evidence that the respondent had an inability to control his sexual misconduct. The 61-year-old's most recent conviction had occurred in 1995, and he had made excellent progress in sex-offender treatment. He had violated SIST conditions by consuming alcohol. However, to support commitment to a secure facility, a finding of the requisite "inability," based on non-sexual SIST violations, must bear a close causative relationship to sexual misconduct. No expert had testified that the respondent's substance abuse was inextricably intertwined with his sex offending. The reviewing court was unimpressed by the State's discussion of "vaguely-defined and broadly-applicable psychiatric diagnoses;" its expert's "conclusory and often counterfactual prognostications;" and the State's emphasis on a "single de-contextualized line" from an expert report that was disavowed at the hearing. Mental Hygiene Legal Services of Buffalo (Vicky Valvo, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_00942.htm

FAMILY COURT

Second Department

Matter of Latham v Salvage, 2/7/18 – *MICHAEL B.* **DECISION INVOKED / MATTER REMITTED**
A 2007 order awarded custody to the father and supervised visitation to the mother. She sought custody in a 2014 petition. After a hearing, Kings County Family Court denied her application. The reviewing court noted that the AFC had revealed disturbing developments that had arisen since the date of the order appealed from. *Matter of Michael B.*, 80 NY2d 299, was cited for the proposition that changed circumstances in custody cases may render the record on appeal insufficient to determine what is in the child's best interests. The matter was remitted for an expedited hearing. The court took judicial notice of the fact that the mother was granted temporary custody of the child by a recent order, which would remain in force until resolution of the remittal proceedings. Larry Bachner represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_00834.htm

Matter of Karmer A. E. (Carlos A. E.), 2/7/18 – **ARTICLE 10 / SUMMARY JUDGMENT**
After the father was convicted of manslaughter in the death of his son's mother, based on the same conduct, he was accused of having severely abused the child, in an Article 10 petition filed in Queens County Family Court. The agency's motion for summary judgment was granted, and a termination of parental rights proceeding was commenced. Following a dispositional hearing, that petition was granted. The orders granting summary judgment and terminating parental rights were upheld.
http://nycourts.gov/reporter/3dseries/2018/2018_00831.htm

Fourth Department

Matter of Ellie Jo L.H., 2/9/18 – **NEGLECT PETITION BY AFC / NO PROOF OF HARM**
The Fourth Department stated that the Attorney for the Child had statutory authority to file a neglect petition on behalf of her client at the direction of Jefferson County Family Court. *See* Family Ct Act § 1032 (b). As to the AFC's substitution of judgment, the record supported her position that the child lacked the capacity for knowing, voluntary, and considered judgment," as required by 22 NYCRR 7.2 (d) (3) (Rules of Chief Judge for Law Guardians). However, Family Court erred in finding neglect, since proof of harm to the child was lacking. The mother might have merely sought to protect her child or she might have been determined to inflict harm on the father. In either case, while her conduct was troubling at times, there was no indication that, as a result, the child was impaired or in imminent danger of harm. The petition was therefore dismissed. Kathy Quencer and Elizabeth Moeller represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_00934.htm

Matter of Soldata v Feketa, 2/9/18 – **SUPPORT ORDER VIOLATION/ SETTLEMENT AGREEMENT ALLOWED**
The father appealed from an order confirming a Support Magistrate's determination that he willfully violated a child support order. The reviewing court agreed with the father that Oneida County Family Court had erred in refusing to allow the parties to enter into a settlement agreement. Stipulations of settlement are generally favored by the courts, since they promote efficient dispute resolution. The challenged order was reversed and the matter remitted. If the parties no longer wished to settle, a new confirmation would be held. Peter DiGiorgio, Jr. represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_00989.htm

CYNTHIA FEATHERS, Esq.
Director of Quality Enhancement
For Appellate and Post-Conviction Representation
NY State Office of Indigent Legal Services
80 S. Swan St., Suite 1147
Albany, NY 12210
Office: (518) 473-2383
Cell: (518) 949-6131