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Subject: Decisions of Interest

CRIMINAL

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Court of Appeals

DECISION OF THE WEEK

People v Wiggins, 2/15/18 – **Constitutional Speedy Trial Violation / Extraordinary Pretrial Delay**

In a 4-3 decision authored by Judge Fahey, the Court of Appeals held that the constitutional speedy trial rights of the defendant—a teenager incarcerated since age 16 at Rikers Island—had been violated by a six-year pretrial delay. The conviction for murder and other charges was reversed, and the indictment was dismissed. Following a shooting at a party, the defendant was arrested in 2008 and remanded without bail. The People unsuccessfully pursued a cooperation agreement with his co-defendant for two-and-a-half years and then spent three years trying to convict the co-defendant. After three mistrials, the People were no closer to securing the co-defendant's testimony against the defendant. In 2014, the defendant pled guilty to first-degree manslaughter and withdrew his pending speedy trial motion. The time from arrest to plea spanned six years, four months; and the defendant was incarcerated for the entire time. In finding that the defendant's speedy trial rights had been violated, the Court considered the five factors set forth in *People v Taranovich*, 37 NY2d 442: the extent of delay; reason for delay; nature of charge; period of pretrial incarceration; and prejudice due to delay. The length of delay was extraordinary. As to the co-defendant's consent to adjournments, each criminal defendant has a constitutional right to a speedy trial that cannot be negated by a co-defendant's dilatory tactics. Rather than pursuing the co-defendant's testimony against the defendant for years, the People could have instead moved the defendant's case to trial. They had not established good cause for the delay; and they had not shown that the defendant would have been held on an unrelated pending charge alone. The defendant suffered presumptive prejudice due to the period of delay and incarceration. Judges Rivera, Stein, and Wilson concurred. Chief Judge DiFiore dissented in an opinion in which Judges Garcia and Feinman concurred. The dissent observed that the relevant period was the five years from arrest to the first motion to dismiss, and such period was not, in itself, a tipping point. The facts were in dispute as to the reason for the delay; and no apparent prejudice flowed from the pretrial incarceration, the dissent opined. The Center for Appellate Litigation (Ben Schatz, of counsel) represented the appellant.
http://www.nycourts.gov/reporter/3dseries/2018/2018_01111.htm

People v Reyes, 2/15/18 – **People's Appeal / Conspiracy Proof Legally Insufficient**

The Second Department correctly held that, at a Kings County Supreme Court trial, the evidence was legally insufficient to sustain the defendant's second-degree conspiracy conviction. There was no valid line of reasoning or inferences from which a rational jury could have found that the element of an illicit agreement was proven beyond a reasonable doubt. The defendant's passive act of being present at gang

meetings, at which details of the intended arson were discussed, could not be equated with the affirmative act of agreeing to engage in a criminal conspiracy, nor did knowledge of the existence of a conspiracy make one a co-conspirator. Judge Garcia (who had granted leave to appeal) dissented. He observed that the defendant's presence at gang meetings and knowledge of the conspiracy goals should not be examined in isolation, but instead in the context of his membership in the gang and participation in a prior violent attack on a rogue gang member. The Legal Aid Society of New York City (Allen Fallek, of counsel) represented the defendant.
http://www.nycourts.gov/reporter/3dseries/2018/2018_01113.htm

People v Francis, 2/13/18 – **SORA Order / YO History Properly Used**
The defendant was adjudicated a youthful offender after committing the crime of third-degree criminal possession of stolen property when he was 17 years old. At age 19, upon his conviction of first-degree rape, he was designated a level-three sex offender. That status was based in part on 25 points for his criminal history, consisting of his YO adjudication. The defendant argued that, when assessing the risk to reoffend, the State Board of Examiners of Sex Offenders (Board) may not consider YO adjudications. In an opinion authored by Judge Rivera, a unanimous Court disagreed. Using YO history for the limited public safety purpose of assessing risk level was not prohibited by statute and did not undermine the legislative policy of not stigmatizing young persons with a criminal record. Thus, Board Guidelines properly treated a YO adjudication as part of criminal history. As the Guidelines stated, although a YO adjudication is not a conviction, it is a reliable indicator of wrongdoing and should be considered in assessing a likelihood of re-offense. The defendant's arguments to the contrary were for the Legislature and the Board to consider. Appellate Advocates (Jenin Younes, of counsel) represented the appellant.
http://www.nycourts.gov/reporter/3dseries/2018/2018_01017.htm

First Department

People v Garay, 2/15/18 – **Serious Physical Injury / Legally Insufficient Evidence**
The defendant was convicted of gang assault in the first degree and assault in the second degree. The reviewing court held that the evidence was legally insufficient to establish that the victim sustained a serious physical injury—an element of the gang assault charge. The evidence regarding enduring physical effects was limited and did not show that the injury was such that a reasonable observer would find the victim's appearance distressing or objectionable. Further, it was undisputed that the victim's injury did not impair his general health. The appellate court reduced the conviction to the lesser included offense of attempted gang assault in the first degree and remanded for a plenary resentencing proceeding on both convictions. The Office of the Appellate Defender (Rosemary Herbert, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_01117.htm

People v Weber, 2/13/18 – **SORA Order / Reduction to Level One**
Supreme Court found the defendant to be a level-two offender. The First Department held that the People failed to establish by clear and convincing evidence that points should be assessed for drug abuse. The defendant had twice possessed marijuana, but there was no proof that he had smoked marijuana or had ever been screened or treated for substance abuse. The subtraction of the drug abuse points resulted in level-one status. The Legal Aid Society of New York (Kristina Schwarz, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_01034.htm

Second Department

People v Lijo, 2/14/18 – **Assault Conviction Reversed / Error in Justification Charge**
In a trial on a second-degree assault charge, the defendant's case rested on a finding that he was justified in responding to the actions of the complainant's husband. The trial court erred in refusing to instruct the jury that it could consider those actions in resolving the justification defense. The error was not harmless. Evidence that the defendant's actions were not justified was not overwhelming. Had a proper instruction been given, the jury might have reached a different conclusion. A new trial was ordered. Heriberto Cabrera represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_01081.htm

Matter of State of New York v Hilton C., 2/14/18 – **Civil Management / Unreliable Diagnosis**
The Second Department reversed an order of Nassau County Supreme Court which held that the appellant suffered from a mental abnormality and ordered a regimen of strict and intensive supervision and treatment. At a *Frye* hearing, all experts had agreed that the forensic use of the diagnosis of unspecified paraphilic disorder was controversial and unreliable. Apparently, no published research, clinical trial or field studies addressed the disorder. Thus, the State had failed to establish that the diagnosis had the requisite general acceptance needed for admissibility. The matter was remitted for a new trial. Mental Hygiene Legal Service represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_01071.htm

Matter of State of New York v Richard S., 2/14/18 – **Civil Management / Another Sketchy Diagnosis**
The Second Department reversed another Mental Hygiene Law Article 10 order, this one out of Queens County. The appellant was found to suffer from a mental abnormality requiring civil confinement. At trial, evidence of the diagnosis of paraphilia NOS (non-consent) was received. At a *Frye* hearing, it was determined that such diagnosis was not generally accepted in the psychiatric and psychological communities. Therefore, proof about the diagnosis was improperly received at trial. Since the error was not harmless, the matter was remitted for a new trial. MHLS represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_01072.htm

Third Department

People v Suits, 2/15/18 – **Restitution Award / Modification**
In a Saratoga County SCI, the defendant was charged with two counts of third-degree burglary for misdeeds at a Malta restaurant. He pleaded guilty to the SCI in satisfaction of all pending and potential charges arising from those burglaries, as well as others at a restaurant in Halfmoon. In addition, he agreed to pay restitution to the owners of both restaurants, including about $31,000 as to the Halfmoon restaurant. However, the defendant reserved the right to request a restitution hearing if the actual amounts exceeded the approximations provided. On appeal, the People conceded that, under Penal Law § 60.27, County Court had erroneously included the compensation to the Halfmoon eatery, where no accusatory instrument charged the defendant with any crimes related thereto. Thus, the restitution award was modified. Linda Berkowitz represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_01098.htm

FAMILY COURT

Second Department

Matter of Bella S. (Sarah S.), 2/14/18 – **NEGLECT FINDING REVERSED / ADEQUATE MENTAL HEALTH TREATMENT**

Kings County Family Court found that the bipolar mother had neglected the child by failing to obtain adequate treatment. The reviewing court reversed. The petitioner agency had failed to establish that treatment was inadequate or that the child was placed at imminent risk of harm. The mother—who was homeless when she became pregnant and relapsed into heroin use—had obtained housing and prenatal care; complied with methadone treatment and counseling; and taken prescribed medications. Catherine Bridge represented the appellant.

http://nycourts.gov/reporter/3dseries/2018/2018_01069.htm

Matter of Justine R. (Cara T.), 2/14/18 – **ANOTHER NEGLECT CASE / DISMISSAL REVERSED**

The respondent father and his three children lived with his respondent girlfriend and her teenage son. When the teenager exhibited escalating violent, erratic behavior in their home, the respondents failed to take any action to protect the father's children. At the close of the agency's case, Family Court granted the respondents' motions to dismiss. That was error, since the petitioner had presented a prima facie case. The matter was remitted for a new hearing.

http://nycourts.gov/reporter/3dseries/2018/2018_01068.htm

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