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CRIMINAL

Second Department

People v Worrell, 2/28/18 – **Invalid Waiver of Appeal / Relevant Factors**
The defendant appealed from a Kings County judgment of conviction on the ground that the sentence imposed upon his plea of guilty was excessive. The Second Department held that the purported waiver of the right to appeal was invalid and thus did not preclude review of the excessive sentence claim. The court cited the defendant's age, experience, and background as relevant factors in determining whether the appeal waiver was enforceable. *See People v Bradshaw*, 18 NY3d 257 (setting forth relevant factors regarding appeal waivers; trial court's perfunctory discussion of waiver was inadequate, given that defendant had no felony history, long mental illness history). In the instant case, the excessive sentence argument was academic as to the term of imprisonment, which had been completed, and the period of post-release supervision imposed was found appropriate. Appellate Defenders (Erica Horwitz, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_01344.htm

Third Department

People v Stahli, 3/1/18 – **Criminal Negligence / No Lesser Included Offense Charge**
The defendant was found guilty in Ulster County Court of second-degree murder in the death of his companion's two-year-old son (depraved indifference murder of a child). An appellate challenge to the legal sufficiency of a salient element was unpreserved by the motion for a trial order of dismissal. But the Appellate Division weight-of-evidence review encompassed consideration of whether the elements of the challenged crime were proven beyond a reasonable doubt. The reviewing court held that the verdict was not against the weight of evidence. The defendant also argued that the trial court had erred in denying his request to charge criminally negligent homicide as a lesser included offense of depraved indifference murder of a child. Citing prior precedent, the Third Department rejected the argument. A person does not commit criminally negligent homicide unless he or she fails to perceive a substantial and unjustifiable risk of death. The relevant murder charge required that an adult person, under circumstances evincing a depraved indifference to human life, recklessly engaged in conduct creating a grave risk of serious

physical injury or death to a child less than age 11. "Serious physical injury" encompasses injuries that do not create a substantial risk of death. Thus, it was possible to commit the murder charged without committing criminally negligent homicide. Arguments regarding prosecutor misconduct were rejected. In summation, the prosecutor had purportedly expressed his personal upset over the proof and had vouched for the credibility of certain witnesses. After the summation, defense counsel made objections, apparently identifying some particular errant prosecution comments. *See* CPL 470.05 (2); *People v Balls*, 69 NY2d 641. In response, the prosecutor acknowledged and apologized for his excesses. The defendant crafted a curative instruction, and the trial court delivered it, albeit in modified form. The reviewing court observed that the subject comments "would have been better left unsaid," but were not so flagrant as to deprive the defendant of a fair trial. The judgment of conviction was affirmed. Paul Connolly represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_01359.htm

People v Poulin, 3/1/18 – **Second-Degree Manslaughter / Gunshot Wound to Head**
The defendant's girlfriend died from a gunshot wound to the head. He was charged with second-degree murder, first- and second-degree manslaughter, criminally negligent homicide, and third-degree criminal possession of a weapon. The incident took place in a home the defendant and victim shared in Rensselaer County. Two friends were also present. Defendant, the victim, and one of the friends had been drinking all day. The defendant appeared to be in shock after the shooting. He told police that he and the victim had been arguing, and he had pointed the gun at her head and pulled the trigger to scare her. The defendant purportedly did not know that the weapon was loaded; but he also said that he knew that there was a real risk that the gun would fire. Experts for both sides disagreed about whether the gun, when fired, was pushed against the victim's skull or was several inches away. Upon the defendant's motion for a trial order of dismissal, County Court dismissed the charge of first-degree manslaughter. The jury found the defendant not guilty of the murder and weapon possession charges, but guilty of second-degree manslaughter. The Third Department was unpersuaded by an argument that the proof was legally insufficient to support such conviction. The defendant's mistaken belief that the gun was not loaded did not preclude a finding of recklessness. Admission of purportedly graphic photographs depicting the victim's body was found proper, since they were relevant to the conflicting expert proof and were not used solely to arouse jurors' emotions and prejudice the defendant. The issue was resolved in the absence of the photographs, which the People said they could not locate. The judgment of conviction was affirmed. James Caruso represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_01357.htm

FAMILY

Second Department

DECISION OF THE WEEK

Matter of Aleman v Lansch, 2/28/18 – **Custody Proceeding / Right to Represent Self**
The mother had primary physical custody of the parties' children, and the father had liberal parenting time, pursuant to an agreement incorporated in a divorce judgment. Following the filing of a family offense petition, the father received supervised visitation, sought custody, and charged that the mother

had falsely accused him of sexual abuse of the children. The father, a tax attorney, appeared pro se. In several court appearances, Westchester County Family Court conducted an inquiry into his request to represent himself, rather than retain counsel. Ultimately, the trial court denied the request, continued supervised visitation, and dismissed his petitions. The Second Department reversed. In Family Court proceedings in which a party has a constitutional and/or statutory right to counsel, the court must honor the principles set forth in *Faretta v California*, 422 US 806 (under U.S. Constitution, defendant in state criminal trial has right to proceed WITHOUT counsel when he voluntarily and intelligently elects to do so), and *People v McIntyre*, 36 NY2d 10 (under New York Constitution, defendant in criminal case may invoke right to defend himself pro se, provided that request is unequivocal and timely; there has been knowing, intelligent waiver of right to counsel; and defendant has not engaged in conduct that would prevent fair, orderly exposition of issues). The same rule has been applied where the party has sufficient means to employ counsel. *See e.g. People v Tennant*, 96 AD2d 671. In the case at bar, denial of the right to self-representation was not justified by the father's lack of familiarity with family law or the trial court's belief that counsel would be helpful to him. Moreover, Family Court had erred in entering a permanent order of supervised visitation without conducting a hearing to determine the best interests of the children, the Second Department held. In light of Family Court's "unreasonable refusal" to honor the father's right to self-representation, which was "accompanied by increasing intolerance towards the father," the matter was remitted to a different judge, to be held "with all convenient speed." Upon remittal, the father would be permitted to proceed pro se. In the appeal, the father represented himself.
http://nycourts.gov/reporter/3dseries/2018/2018_01303.htm

Matter of Isabella (Charles O.), 2/28/18 – **ADOPTION / NOT PRECLUDED BY CRIMINAL RECORD**
The petitioner became the legal guardian of the subject child in 2011. Four years later, he filed a petition to adopt her. The child's biological father consented. The mother's consent was not required due to abandonment. However, Orange County Family Court dismissed the adoption petition on the ground that the petitioner had a lengthy criminal record. The reviewing court found such order erroneous. Perfection is not demanded of adoptive parents, and a record of crime or other misconduct may be mitigated by proof that the proposed adoptive child is healthy and happy and considers the petitioner to be her parent. Thus, the trial court had erred in focusing only on the petitioner's criminal history and not receiving evidence on other relevant factors. This was particularly true where the petitioner had been the child's permanent guardian for five years—most of her life—and where his convictions had occurred more than two decades before adoption proceedings were commenced. The matter was remitted for further proceedings on the petition, to be held before a different judge. Kevin Gomez represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_01309.htm

Matter of Istat B. v Admin. for Children's Services, 2/28/18 – **ADOPTION / GRANDPARENT VISITS**
After the mother was convicted of murdering the subject child's father, her parental rights were terminated. Queens County Family Court properly granted the petition for visitation filed by the paternal uncle and aunt. But the court's rationale for dismissing the visitation petition of the maternal grandmother was erroneous. The trial court held that, due to the child's adoption, the grandmother lacked standing to seek visitation. However, even after a child is adopted, a grandparent has standing to petition for visitation when either parent is deceased. Family Court did properly determine, in the alternative, that the petition should be dismissed, on the merits, without a hearing. The best interests hearing conducted in the adoption proceeding had yielded sufficient information as to the grandmother's petition.

http://nycourts.gov/reporter/3dseries/2018/2018_01305.htm

Matter of Esscence R. (Ebony B. R.), 2/28/18 – **AGENCY APPEAL / CHILD'S RETURN WAS RIGHT**
In an Article 10 proceeding, there was a sound and substantial basis in the record for the determination of Kings County Family Court granting the mother's § 1028 application, since the risks to the child were mitigated by conditions imposed, including that the mother participate in therapy, bring the child to sibling visitations at the foster mother's home, and take the child to medical appointments. The reviewing court did not address the status of the underlying child protective proceedings or any mootness issues. Brooklyn Defender Services (Lauren Shapiro, of counsel) represented the mother.
http://nycourts.gov/reporter/3dseries/2018/2018_01314.htm

Matter of Alvarado v Cordova, 2/28/18 – **INITIAL CUSTODY CASE / *TROPEA* NOT CONTROLLING**
The mother's relocation precipitated custody proceedings. Since an initial custody determination was at issue, however, strict application of the relocation factors set forth in *Matter of Tropea v Tropea*, 87 NY2d 727, was not required. Instead, the mother's relocation was but one factor for the hearing court to consider in determining the children's best interests. The award of primary physical custody to the mother in Florida was sustained. Given the history of the parties' relationship, the challenged Nassau County Family Court order was unrealistic in requiring the parties to cooperate in reaching an agreement regarding a holiday and visitation schedule. Thus, the matter was remitted.
http://nycourts.gov/reporter/3dseries/2018/2018_01304.htm

Matter of Sarfati v DeJesus, 2/28/18 – **VISITATION / THREE WEEKENDS TOO MUCH**
A custody order of Kings County Family Court granted custody to the mother and visitation to the father. Cross appeals ensued. The father's contention that he should have been granted custody—despite proof of his significant history of domestic violence against the mother—was not properly before the appellate court. At the outset of the protracted hearing, he had consented to the award of sole custody to the mother, and he did not renew a request for custody during the hearing. Further, the visitation schedule, awarding him three weekends per month with the parties' two school-aged sons, was excessive. Such schedule effectively deprived the mother of any significant quality time with the children. Thus, the Second Department found it more appropriate to award the father visitation on alternate weekends. However, Family Court had properly prohibited the mother from relocating beyond a certain distance without the father's consent. Heath Goldstein represented the mother, and Linda Braunsberg represented the father.
http://nycourts.gov/reporter/3dseries/2018/2018_01315.htm

Spencer v Spencer, 2/28/18 – **AUTOMATIC ORDERS / NO CIVIL CONTEMPT AFTER DIVORCE**
By statute and court rules, all parties to a matrimonial action are precluded from transferring or otherwise disposing of marital assets, without consent or court order, during the pendency of the action. In the instant case, the defendant violated such orders by selling certain real property. For that reason, after the judgment of divorce was entered, the plaintiff sought to have him held in civil contempt. Supreme Court granted the application and ordered the defendant to pay a specified purge amount. The Second Department declared that matters of first impression were presented, and it reversed. The automatic orders prohibiting property transfers did indeed constitute unequivocal mandates of the court. However, after the judgment of divorce has been entered, the remedy of civil contempt was not available for a violation of such automatic orders. The appellate court reasoned that such orders are temporary, exist in

full force and effect only during the pendency of the action, and are meant only to preserve the status quo until judgment is entered. Thus, an aggrieved party must seek relief through other avenues, such as a proceeding to enforce the terms of the divorce judgment. Jay Baum represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_01348.htm

Third Department

Matter of Hall v Moore, 3/1/18 – **CUSTODY / PARENT'S INCARCERATION**
Pursuant to an order on consent filed in Albany County Family Court, the incarcerated father shared joint legal custody of his son with the mother and maternal grandmother. Three years later, he filed a petition for sole legal custody and physical placement with his parents. Family Court granted motions to dismiss, based on his failure to allege a change in circumstances. In a custody case involving a non-parent, the father was not required to prove such element, absent a finding of extraordinary circumstances. The record permitted the Third Department to find such circumstances, based on the extended period of physical custody in the maternal grandmother and the father's incarceration. However, even construed liberally, as a pro se application should be, the father's modification petition failed to make the requisite allegations so as to warrant a hearing. Standing alone, a parent's incarceration was not a sufficient basis to deny visitation. However, Family Court properly dismissed the petition without prejudice to the father filing a new petition as his release from prison drew nearer.
http://nycourts.gov/reporter/3dseries/2018/2018_01363.htm

Matter of Richard T. v Victoria U., 3/1/18 – **CUSTODY / EVIDENTIARY HEARING NEEDED**
The parties, parents of five children, each filed custody and family offense petitions. In orders entered in October 2016, Saratoga County Family Court dismissed the family offense petitions and the mother's custody petition. In a November 18, 2016 order, Family Court granted the father's petition, awarding him sole custody and providing for the mother to have supervised parenting time. The mother appealed. In her notice of appeal, she specified that she was appealing from the November 2016 order. The Third Department held that, in the absence of a notice of appeal referencing the October 2016 orders, the court was without jurisdiction to review them. As to the order granting custody to the father, the appellate court agreed with the mother that Family Court had erred in granting the father's petition without conducting an evidentiary hearing or otherwise possessing sufficient information to render an informed determination, consistent with the children's best interests. Thus, the matter was reversed and remitted. Brian Quinn represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_01364.htm

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