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CRIMINAL

DECISION OF THE WEEK

People v Spratley, 3/7/18 – **NOT RESPONSIBLE / MENTAL DISEASE PROVEN / DISSENT**

The defendant shot and killed the victim in a grocery store. At trial, the defendant asserted the defense of lack of criminal responsibility by reason of mental disease or defect. Such affirmative defense was implicitly rejected by the jury, which convicted the defendant of second-degree murder. The Second Department found that the verdict was against the weight of evidence, reversed the conviction, and remitted the matter to Dutchess County Court for proceedings pursuant to CPL 330.20. Surveillance video showed that the defendant had entered the store shortly after the victim, shot her, went outside, lingered until police arrested him, and said, "That bitch stole my clothes." In a videotaped interview, he told detectives that he was hearing voices that told him "negative stuff." A defense expert reported that the defendant had long suffered from significant mental health issues and had been hearing voices since he was a teenager. The day before the shooting, a mental health clinic found the defendant to be at "the highest lethality risk of hurting someone else," yet he could not fill his prescription for antipsychotic medication. Hours before the incident, the defendant believed that he was the target of a secret society of assassins. The defense expert opined that, at the time of the crime, due to a schizoaffective disorder, the defendant lacked substantial capacity to know or appreciate that what he did was wrong. The opinion of the People's expert was conclusory, speculative, and without evidentiary support, the majority stated. Such testimony was found well-reasoned by a dissenter. Del Atwell represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_01488.htm

FIRST DEPARTMENT

Matter of Kellogg v New York State Bd. of Parole, 3/6/18 – **PAROLE / NEW HEARING**

In 1991, the petitioner learned that her husband had been molesting a teenager who lived with the couple and babysat for their sons. The petitioner joined a group, including the babysitter and her boyfriend, who decided to confront the husband at the family's lake cottage. They drove there through the night and brought with them the husband's loaded handgun. Upon arrival, the boyfriend leapt from the truck and

shot the sleeping husband to death, while the petitioner remained in the vehicle. The shooter pleaded guilty to intentional murder and conspiracy charges. After a trial, the petitioner was found guilty of felony murder and other charges and was acquitted of intentional murder and conspiracy. While in prison, she achieved an extraordinary disciplinary record and participated in numerous programs. A 2015 assessment placed her in the lowest category of risk of re-offense. At her most recent parole hearing, the petitioner stated that she had not conspired to kill her husband and had not intended to kill him. She felt a sense of responsibility, however, for making bad choices when she was young and naïve, thereby contributing to the fatal chain of events. Parole was denied, based primarily on the petitioner's purported failure to take responsibility for her crimes. Supreme Court granted an Article 78 petition and ordered the petitioner's release. The Parole Board appealed, and the First Department modified. The Board had failed to appreciate that the petitioner's conviction was not for intentional murder, and her statements at the hearing were consistent with the jury's verdict. Thus, the denial of parole manifested "irrationality bordering on impropriety," warranting Supreme Court's vacatur of the order. However, instead of the petitioner's release, the proper relief was a new hearing, to be held within 60 days before commissioners who had not sat at the petitioner's prior hearings. Vladimir Tsirkin represented the petitioner.
http://nycourts.gov/reporter/3dseries/2018/2018_01425.htm

SECOND DEPARTMENT

People v Fonerin, 3/7/18 – **Assault / Against Weight of Evidence / Divided Court**
One evening outside a deli, the co-defendant set fire to a sleeping homeless man, while the defendant recorded the incident on his cell phone and said, "Do that shit, man." Eventually, the defendant extinguished the fire. The co-defendant was the manager of the deli, where the defendant had briefly worked and outside of which the victim often slept. A Kings County jury found the defendant guilty of first-degree assault on a theory of accessorial liability. The Second Department reversed, observing that the defendant did not assist the co-defendant in dousing the victim with lighter fluid or setting him on fire. While the defendant's actions were deplorable, they did not prove that he solicited, requested, commanded, importuned, or intentionally aided the co-defendant. The indictment was dismissed. Two justices dissented, emphasizing the statement—"Do that shit, man"—uttered while the co-defendant squeezed the bottle of lighter fluid. The dissenters opined that the defendant had thereby importuned his cohort to commit the crime and that he fully shared the co-defendant's intent. Randall Unger represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_01480.htm

People v White, 3/7/18 – **Suppression Error / Indictment Dismissed / Dissent**
Officer Weibert testified at a suppression hearing about a traffic stop. He said that the defendant, a passenger in the vehicle, was leaning forward and appeared nervous. His legs were shaking, his arms were tucked in by his side, and his hands were tucked tightly in his lap. Sergeant Klein told the defendant to step out. Then the sergeant asked the defendant, "What do you have?" The defendant replied, "I have a piece." Suppression was denied. At trial, Officer Weibert testified that, while in the car, the defendant had held a cell phone; and Sergeant Klein said that the defendant used it to text. On appeal, the defendant contended that counsel should have moved to reopen the suppression hearing since the texting explained his otherwise suspicious pose in the car. The Second Department did not need to address that issue; it found that the People did not establish a founded suspicion of criminal activity sufficient to justify the question posed to the defendant—"What do you have?" The police remained in full control at all

times, where all vehicle occupants complied with police commands, and there was no objective indication that the defendant tried to conceal, or reach for, a weapon. Queens County Supreme Court should have granted suppression. Without the defendant's statement and the weapon recovered, there was insufficient evidence of guilt. Thus, the reviewing court reversed and dismissed the indictment. A single justice dissented in a lengthy analysis. Appellate Advocates (Benjamin Litman, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_01492.htm

People v Bethea, 3/7/18 – **Suppression Error / Manslaughter Affirmed / Dissent**
A recording of the defendant's custodial statement showed that he twice declared, "I think I need a lawyer." Yet the police continued questioning him. The defendant's ensuing statement and buccal swab should therefore have been suppressed. However, the Second Department held that the error was harmless and upheld the manslaughter and weapons convictions. The dissenting justice contended that the suppression error was not harmless where the only witness who saw the defendant strike the victim with a baseball bat had been drinking heavily at the time of the incident. Thus, the defendant's admission that he struck the victim with a baseball bat, together with the buccal swab that connected him to a baseball bat later found at his house, were arguably the most damaging pieces of evidence before the jury.
http://nycourts.gov/reporter/3dseries/2018/2018_01474.htm

People v Troche, 3/7/18 – **Rape Conviction Affirmed / Dissent**
The Second Department affirmed a Suffolk County conviction of first-degree rape and other sexual offenses. A dissenting justice would have ordered a new trial, based on reversible evidentiary errors: the trial court had admitted extensive proof regarding the defendant's gang affiliation, but the crimes were not gang-motivated; and testimony by the complainant's companion about a statement made a week after the incident did not fit the prompt-outcry hearsay exception.
http://nycourts.gov/reporter/3dseries/2018/2018_01490.htm

THIRD DEPARTMENT

People v Matthews, 3/8/18 – **Robbery Not Proven / Error Re Counsel Withdrawal**
The defendant was convicted, upon a verdict, of robbery in the first and second degrees and other charges. The Third Department dismissed the first-degree robbery count. The element of use, or threatened immediate use, of a dangerous instrument was not supported by legally sufficient evidence. The gun at issue was plastic and did not work. One of the perpetrators held a wooden tire checker, but there was no proof that he brandished it in a threatening manner. A new trial was granted as to the remaining charges, because Washington County Court had erred in denying trial counsel's motion to withdraw from representation. A month before the trial was scheduled to begin, assigned counsel sought to be relieved because the attorney/client relationship had irretrievably broken down. Council said that the defendant had: filed pro se motions competing with counsel's applications, refused to review *Huntley/Wade* rulings, threatened to replace counsel during each of their meetings at the correctional facility, and filed a formal complaint against counsel. The People opposed the withdrawal application, and the trial court summarily denied it. The reviewing court concluded that the defendant's right to counsel had not been adequately protected where County Court had not made even a minimal inquiry to assess the gravity of counsel's concerns. One justice dissented on the legal sufficiency issue. Thomas

Garner represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_01499.htm

SECOND CIRCUIT

Obeya v Sessions, 3/8/18 – **PETIT LARCENY / NOT REMOVABLE OFFENSE**
A native of Nigeria, the petitioner was admitted to the United States as a lawful permanent resident in 2004 at the age of 17. Four years later, he was convicted of petit larceny upon a guilty plea in Albany County. The government sought to remove him based on such conviction, contending that the crime was one "involving moral turpitude." Under prior Board of Immigration Appeals (BIA) precedent, larceny involves moral turpitude only when a permanent taking is intended. The Second Circuit held that the BIA erred by retroactively applying a new expanded rule which also found moral turpitude where the owner's property rights were only "substantially eroded." Such rule constituted an abrupt abandonment of decades-old precedent; and it would have been reasonable for the petitioner to rely on the immigration rules in effect at the time of the guilty plea. Indeed, as a general matter, non-citizen defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions. The reviewing court further observed that sometimes deportation is the most important part of the penalty that may be imposed. The government had no compelling interest in removing individuals for crimes that were not considered removable offenses at the time they occurred. Moreover, since under NY Penal Law § 155.25, petit larceny did not require an intent to permanently deprive the owner of his property, the statute did not describe a crime that categorically involved moral turpitude, as defined under the old BIA rule. Thus, The Second Circuit reversed the challenged order and remanded for further proceedings. Richard Mark represented the petitioner. The Immigration Defense Project provided amicus curiae support.
http://www.ca2.uscourts.gov/decisions.html

FAMILY

SECOND DEPARTMENT

Matter of El v Administration for Children's Servs. – Queens*; and *Matter of Tabitha T. S. M. (Tracee L. M. – Candace E.), 3/7/18 – **FOSTER PARENT TRUMPS GRANDPARENT**
The maternal grandmother already had custody of grandson Justin when she became a kinship foster mother for infant granddaughter Tabitha. When the grandmother moved to Pennsylvania, there were delays and problems with the Interstate Compact process as to the baby girl. In May 2012, nine-month-old Tabitha was placed with her current, pre-adoptive foster mother. The grandmother began having visitation with her granddaughter in 2014, and she filed for custody. Her petition was dismissed by Queens County Family Court. However, the court then amended its order to place Tabitha in the kinship foster care of the grandmother. Two appeals ensued. In *Matter of El*, the Second Department affirmed the order dismissing the custody petition. The Social Services Law gave a preference for adoption to a foster parent who had cared for a child continuously for 12 months; biological relatives were given no special preference. Further, the child had strongly bonded with her foster family. The *Matter of Tabitha*

court acknowledged that the agency had failed to adequately support the grandmother's efforts to retain custody when she relocated. However, the appellate court found that removal of Tabitha from her foster home of four years was error. The preference for keeping siblings together can be overcome where the best interests of each child lie in residing apart.
http://nycourts.gov/reporter/3dseries/2018/2018_01466.htm
http://nycourts.gov/reporter/3dseries/2018/2018_01468.htm

Matter of Joseph I. N. (Amy S. R.), 3/7/18 – **PARENTAL RIGHTS TERMINATION / REINSTATED**
After a fact-finding hearing, Kings County Family Court dismissed permanent neglect petitions seeking to terminate the mother's and father's parental rights to their three children. That was error, the Second Department held. By offering numerous programs, the petitioner agency had shown diligent efforts to encourage and strengthen the parent-child relationships. Further, the parents had failed to plan for the future of the children. Most notably, over the course of more than two years, they had failed to complete drug treatment. One or more of the children had been in foster care at various times since 2009. The matter was remitted for a dispositional hearing, to be conducted as expeditiously as possible.
http://nycourts.gov/reporter/3dseries/2018/2018_01469.htm

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