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CRIMINAL

FIRST DEPARTMENT

DECISION OF THE WEEK

People v Knupp, 3/15/18 – **People's Appeal / Suppression Sustained**

Bronx County Supreme Court granted the motions of defendants Knupp and McCants to suppress physical evidence, as well as Knupp's motion to suppress his statement. The People appealed, and the First Department affirmed. There was no basis for disturbing the suppression court's credibility determinations. The arresting officer's conclusory and contradictory testimony failed to establish that he stopped the defendants' vehicle because he reasonably believed that McCants was guilty of reckless driving. The officer testified that the car turned left across double yellow lines. But action was lawful. Further, the officer failed to explain the danger McCants purportedly presented to other drivers. It appeared that the defendants' car was really stopped because of an encounter, on the street 20 minutes earlier, among the vehicle's occupants and the same officer. Since the People did not produce credible evidence establishing the legality of the stop, suppression was properly granted. Moreover, the arresting officer's testimony was insufficient to establish the voluntariness of Knupp's statement to a non-testifying officer. The Officer of the Appellate Defender (Kami Lizarraga, of counsel) represented Knupp. The Center for Appellate Litigation (Rachel Goldberg and Jesse Feitel, of counsel) represented McCants.
http://nycourts.gov/reporter/3dseries/2018/2018_01649.htm

SECOND DEPARTMENT

People v Cole, 3/14/18 – **No Deportation Warning / Remittal**

Upon guilty pleas, the defendant was convicted of two counts of first-degree criminal contempt. The record did not demonstrate that Kings County Supreme Court apprised the defendant of the possibility of deportation. Thus, the Second Department remitted the matter to give the defendant an opportunity to move to vacate the pleas and ordered Supreme Court to prepare a report. Upon a vacatur application, the defendant would have to establish that there was a reasonable probability that, if properly advised, he would not have pleaded guilty. Appellate Advocates (Kathleen Whooley, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2018/2018_01612.htm

People v Denny, 3/14/18 – **HUGE RESTITUTION AWARD / HEARING NEEDED**
The defendant was convicted of kidnapping in the second degree and robbery in the first degree upon his plea of guilty in Dutchess County Court. The sentence included an order that he pay $200,889 in restitution to the kidnapping victim. That was improper, the Second Department held, vacating the order and remitting the matter. The defendant had objected to the amount of restitution—which was not supported by the record—and he had requested a hearing. Under Penal Law § 60.27, he was entitled to a hearing. Bruce Petito represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_01613.htm

People v Williams, 3/14/18 **– SORA ORDER REVERSED / DEFENDANT'S CASE THWARTED**
The defendant appealed from an order of Kings County Supreme Court designating him a level-three sex offender. During the SORA hearing, sua sponte, the trial court had improperly curtailed the defendant's testimony and arguments in support of a downward departure from the presumptive risk level. The Second Department reversed the order and remitted for a new hearing before a different justice. The Legal Aid Society of New York City (Kerry Elgarten, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_01629.htm

THIRD DEPARTMENT

People ex rel. Allen v Yelich, 3/15/18 – **DELINQUENCY DECLARATION / SENTENCE SNAFU**
In 2005, the defendant was sentenced as a second felony offender. He absconded in 2010 during post-release supervision, was declared delinquent in 2011, and was then arrested in New Jersey on unrelated charges. The sentencing court there specified that his sentences were to run concurrently to the sentence imposed for the New York "parole violation." The defendant served his time in New Jersey for his crimes there and in 2016 was returned to a New York jail. After pleading guilty to violating post-release supervision, the defendant filed a CPLR Article 70 habeas corpus petition claiming that he was wrongfully denied credit for his New Jersey incarceration. During the pendency of the appeal, he began post-release supervision, so habeas corpus relief was not available. In the interests of justice, the Third Department converted the case to a CPLR Article 78 proceeding. *See* CPLR 103 (c). The reviewing court held that DOCCS had properly declined to credit the defendant for his New Jersey incarceration, since a declaration of delinquency interrupts a defendant's sentence until his return to a DOCCS institution. *See* Penal Law § 70.40 (3) (a).
http://nycourts.gov/reporter/3dseries/2018/2018_01686.htm

FOURTH DEPARTMENT

People v Ruiz, 3/16/18 – **EXPERT TESTIMONY IMPROPER / NEW TRIAL**
The defendant was convicted in Genesee County Court, upon a jury verdict, of sexual abuse in the first degree and other sexual crimes. Although the defendant failed to preserve his contention that the testimony of the People's expert was improper, in the interest of justice, the Fourth Department held that the errant testimony deprived him of a fair trial and warranted reversal. Testimony concerning child sexual abuse accommodation syndrome had long been admissible. However, the expert witness did not

merely educate the jury about the syndrome. Instead, she was presented to prove that the victim was sexually abused. That illicit purpose was reinforced by the prosecutor's summation, which urged the jury to conclude that the defendant's interactions with the victim fit the expert's description of a typical perpetrator's modus operandi. The Legal Aid Bureau of Buffalo (Erin Kulesus, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_01722.htm

People v Owens, 3/16/18 – **Motion to Reopen Wrongly Denied / New Trial**
The defendant was convicted of attempted assault and other charges for shooting at his estranged wife. Not until the People's summation was a surveillance video—which had been admitted during the People's case-in-chief—played in court and fully viewed by defendant. Defense counsel had had the video, but had not seen all salient portions. The video contradicted aspects of the wife's testimony and undermined the People's case. Thus, the defendant moved to reopen the proof to recall the estranged wife for cross-examination. The application was denied. On appeal, the defendant argued—and the People conceded—that the trial court had erred in denying the motion. The appellate court held that the defendant was denied meaningful representation and a fair trial. A new trial was granted. The Monroe County Public Defender (Kelly Foss, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_01712.htm

People v Freeman, 3/16/18 – **Justification Charge Denied / New Trial**
The defendant was convicted of attempted murder and other charges. He argued that County Court erred in refusing to charge the jury on the defense of justification. The reviewing court agreed. It would not have been irrational for the jury to credit the defendant's account of the incident. Even where a defendant's version was "extraordinarily unlikely," a trial court was required to deliver the justification charge. A new trial was ordered as to the attempted murder conviction and other charges. However, a murder conviction as to another victim was upheld. The Monroe County Public Defender (Timothy Davis, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_01702.htm

People v Hardy, 3/16/18 – **Substitute Counsel Denied / New Trial**
A judgment convicting the defendant of multiple drug possession charges was reversed and a new trial granted. Orleans County Court had failed to make at least some minimal inquiry in response to the defendant's request for substitute assigned counsel, even though the defendant had filed a grievance against counsel. The trial court had violated the defendant's right to counsel, and he was therefore entitled to a new trial with new counsel. The Legal Aid Bureau of Buffalo (Benjamin Nelson, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_01837.htm

People v Henry, 3/16/18 – **Murder / Reduced from First to Second Degree**
The defendant was convicted of murder in the first degree. The proof was legally insufficient to establish that the defendant pulled the trigger during the home-invasion robbery, the Fourth Department held. The conviction was reduced to second-degree murder, and the matter was remitted for sentencing. Two justices dissented. The Monroe County Public Defender (James Hobbs, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_01833.htm

People v Carrigan, 3/16/18 – **Sexual Offense / Flawed Indictment**
Onondaga County Court erred in denying the defendant's motion for a trial order of dismissal with respect to two counts of the indictment, charging him with the use of a child in a sexual performance. The defendant contended that the indictment failed to provide him with sufficient notice of the time periods during which he allegedly committed those acts. *See People v Keindl*, 68 NY2d 410, 419. However, the defendant's conviction of two additional counts of the same crime was upheld. The Hiscock Legal Aid Society (John Gilsenan, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_01733.htm

People v Ray, 3/16/18 – **Illegal Weapon Possession / Sentence Reduced**
Upon a jury verdict in Erie County Supreme Court, the defendant was convicted of criminal possession of a weapon in the second degree. The Fourth Department found unduly harsh and severe the sentence of 25 years to life imposed on the defendant as a persistent violent felony offender. The court reduced the sentence to 16 years to life, citing these factors: (1) the defendant did not fire, or even directly possess, the loaded handgun found in a car he was driving; (2) there was no evidence that he knew that his co-defendant intended to use the weapon unlawfully; and (3) although the defendant had multiple prior felonies, he had no history of violence. The Legal Aid Bureau of Buffalo (Nicholas DiFonzo, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_01796.htm

FAMILY

SECOND DEPARTMENT

Matter of Joshua C., 3/14/18 – **Sexual Abuse Proof Lacking – JD Finding Vacated**
A Queens County Family Court order adjudicated the appellant to be a juvenile delinquent, based in part on a finding that he had mouth-to-mouth contact with the complainant, which constituted first-degree sexual abuse. However, the complainant testified that, when the appellant tried to kiss him on the lips, he pushed the appellant's face away. The Second Department held that such proof was legally insufficient. The Legal Aid Society of New York (Tamara Steckler and Marianne Allegro, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_01602.htm

Matter of Secaira v Caluna, 3/14/18 – **Custody / Valid Waiver of Service of Process**
The father filed for sole custody of the subject child. Twice, the mother executed documents purporting to waive service of process. Each time, the waivers were found deficient. Queens County Family Court dismissed the father's custody petition based on his failure to timely serve the mother with the petition. That was error. The Second Department observed that no substantial right of a party was prejudiced by the inartful waiver language; and the trial court should have disregarded any mistake and conducted a hearing on the petition. *See* CPLR 2001. Thus, the matter was remitted. Due to certain remarks made by the Court Attorney Referee, the hearing was to be held before a different Referee. Bruno Bembi represented the appellant.

http://nycourts.gov/reporter/3dseries/2018/2018_01609.htm

FOURTH DEPARTMENT

Matter of Ruth H. (Marie H.), 3/16/18 – **FOSTER CARE OKAY FOR KIDS, BUT NOT CAT**
After a Family Ct Act § 1027 hearing, Oswego County Family Court found that temporary removal of the children was in their best interests, based upon the parents' failure to provide adequate nutrition and their uninhabitable home. The trial court also determined that the petitioner agency had failed to make reasonable efforts to prevent the removal; and the court ordered the agency to find a foster home for the family cat. The agency appealed. The Fourth Department concluded that the agency did make reasonable efforts by providing considerable assistance during the months prior to the filing of the neglect petition. The support to the parents included public assistance for rent, medical treatment, food stamps, and weekly caseworker meetings. Further, the trial court erred in ordering the petitioner to find a home for the cat. Family Court lacks jurisdiction over personal property.
http://nycourts.gov/reporter/3dseries/2018/2018_01840.htm

Matter of Sorrentino v Keating, 3/16/18 – **CUSTODY / WRONG TO MAKE MOTHER MOVE**
Monroe County Family Court granted the parents joint legal custody and shared physical custody of their child and required the mother to relocate and maintain a residence within 35 minutes' drive of the father's residence, rather than her current distance of 90 miles. The mother and AFC appealed. The Fourth Department agreed with them that the mother should have primary physical custody and not be required to relocate. The father traveled extensively for work and was absent from his home—an apartment in the dormitory on a college campus where he worked—for five to six weeks at a time. The mother had a job with no travel obligations and a support system in her community, and she had always been the primary caregiver for the child. Kathryn Friedman and Tanya Conley represented the mother and child, respectively.
http://nycourts.gov/reporter/3dseries/2018/2018_01848.htm

ETHICS

ADVISORY COMMITTEE ON JUDICIAL ETHICS

Opinion 17-164 – CRIMINAL APPEAL / JUDICIAL LAPSES
A County Court judge ("appellate judge") who presided over an appeal from a judgment of conviction rendered in a court of limited jurisdiction sought an opinion from the State Advisory Committee on Judicial Ethics about his/her ethical obligations concerning lapses by the trial judge. When the trial judge failed to timely provide a Return needed for the appeal to County Court, the appellate judge ordered him to do so within 20 days. The appellate judge followed up with a letter to the trial judge, who responded that he was too busy to comply. Three more months elapsed with no action, extension request, or explanation by the trial judge. Further, for more than two years, the trial judge had reportedly failed to decide two post-conviction motions in the same underlying case. The Advisory Committee observed that a judge is required to take action when he/she possesses information indicating a substantial likelihood

that another judge had committed a substantial violation of the Rules Governing Judicial Conduct. The trial judge had reportedly expressed indifference and defiance as to his judicial duties; and his/her protracted inaction regarding the direct appeal and the motions had had a detrimental effect on the defendant. If proved, the described conduct would demonstrate a profound indifference to judicial duties and the rule of law—elements that went to the trial judge's fitness to continue in office. Thus, the appellate judge should report the trial judge's conduct to the Commission on Judicial Conduct.
http://www.nycourts.gov/ip/judicialethics/opinions/17-164.htm

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