CRIMINAL

COURT OF APPEALS

DECISION OF THE WEEK

People v Alvarez, 3/28/19 – **EFFECTIVE APPELLATE REP.? / TWO DISSENTS**

Nineteen-year-old Omar Alvarez was convicted of conspiracy, murder, and other counts relating to activities of a drug trafficking gang. He was sentenced to 66⅔ years. The Court of Appeals affirmed the denial of a coram nobis petition, which alleged that appellate counsel was ineffective in failing to seek a sentence reduction in the interest of justice. In addition, counsel filed a subpar brief and failed to communicate with the client and to notify him of the Appellate Division decision and to seek leave to appeal. The majority found that counsel provided meaningful representation and could have had a sound reason to forgo the sentence issue. The dissenters, Judges Wilson and Rivera, could discern no valid reason for refraining from raising that issue. Judge Wilson reflected that appellate counsel should have sought a reduction in the sentence to 40 years to life so that, decades hence, the Parole Board could consider whether the defendant had been rehabilitated. He noted the "atrocious quality" of the brief, which Judge Rivera said took four years for counsel to file and did not reflect a competent grasp of facts, law, or procedure. The essential inquiry was not whether a better result might have been achieved, Judge Rivera opined, but whether counsel's actions were those of a reasonably competent appellate attorney. She also observed that the failure to communicate with the defendant was a basic violation of his professional obligation.
http://www.nycourts.gov/reporter/3dseries/2019/2019_02383.htm

People v Martin, 3/28/19 – **DEFENDANT'S ADMISSION / HARMLESS IF ERROR**

The defendant challenged a judgment convicting him of drug possession crimes. The question presented by the appeal was whether the defendant's admission to the police, that he lived in the apartment that was the subject of a search warrant for drugs, was properly found admissible under the pedigree exception to *Miranda*, even though the admission was the product of custodial interrogation that was likely to elicit an incriminating response. The Court of Appeals assumed, without deciding, that Supreme Court erroneously permitted such testimony, and it held that such error was harmless.
http://www.nycourts.gov/reporter/3dseries/2019/2019_02386.htm

FIRST DEPARTMENT

People v Dunham, 3/26/19 – ***MOLINEUX* ID EXCEPTION / NOT JUST UNIQUE MO**

The defendant appealed from a judgment of Bronx County Supreme Court convicting him of 2nd degree CPW and resisting arrest. The First Department affirmed. The offenses for which the defendant was being tried included a gunpoint robbery, of which he was ultimately acquitted. At trial, the defendant contended that he did not commit the robbery and that he did not possess the silver pistol allegedly found in his possession upon arrest. A witness's testimony, that the defendant broke her car window with a silver metal object shortly after the robbery, was not admitted to demonstrate propensity and was probative of

his identity as the robber and possessor of the weapon, the appellate court held. The *Molineux* identity exception was not limited to a unique modus operandi.
http://nycourts.gov/reporter/3dseries/2019/2019_02265.htm

People v Benjamin, 3/26/19 – **RESENTENCE DATE / PREDICATE FELONY**
The defendant appealed from an order of New York County Supreme Court, which denied his CPL 440.20 motion to set aside a 1997 sentence. The First Department affirmed. In 2016, the defendant was resentenced on a 1991 conviction. He then sought to be relieved of his persistent violent felony offender status on the ground that the resentencing had upset the sequentiality of his convictions. However, such request was foreclosed by *People v Thomas*, ___ NY3d ___ (2/19/19), which held that, for predicate felony purposes, the relevant date is that on which sentence was first imposed on a prior conviction.
http://nycourts.gov/reporter/3dseries/2019/2019_02261.htm

People v Arias, 3/26/19 – ***PEQUE* / PRESERVATION REQUIREMENT**
The defendant appealed from a judgment of New York County Supreme Court, convicting him of 3rd degree criminal possession of marijuana. The First Department affirmed. The defendant did not establish that the narrow exception to the preservation requirement applied to his claim pursuant to *People v Peque,* 22 NY3d 168. The record established that he was informed of the potential for deportation when he was served with a notice of immigration consequences in the presence of his attorney long before his guilty plea. *See People v Delorbe* 165 AD3d 531, *lv granted* 32 NY3d 1125 (issue presented: whether First Department properly grafted preservation requirement onto *Peque* error, simply because one year earlier, prosecution handed defendant generic form advising of potential immigration consequences).
http://nycourts.gov/reporter/3dseries/2019/2019_02270.htm

SECOND DEPARTMENT

People v Hollmond, 3/27/19 **– PLEA COERCION / RIGHT TO COUNSEL**
The defendant appealed from a judgment of Kings County Supreme Court convicting him of 1st degree manslaughter and 2nd degree attempted murder (two counts). The appeal brought up for review the summary denial of his motion to withdraw his plea of guilty. The Second Department remitted for a hearing with new counsel. Before trial, the defendant was housed at prisons 100 to 132 miles from the court. Counsel urged that he be transferred to a downstate facility; and the court so ordered, but DOCCS failed to comply. Despite the defendant's inability to consult with his attorney and defend the case, Supreme Court stated that the trial would commence, regardless of where the defendant was housed. On the next court date, the defendant agreed to plead guilty. Two weeks later at sentencing, he moved to withdraw his plea, contending that he had entered the plea involuntarily. The lower court denied the application without any inquiry. Yet the record substantiated the claim that the plea was effectively coerced by the ongoing violation of the defendant's Sixth Amendment right to counsel. A genuine factual issue existed as to the voluntariness of the plea. Appellate Advocates (Lynn Fahey, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_02354.htm

People v McLean, 3/27/19 – **CPW DISMISSED / CHANGE IN THEORY**
The defendant appealed from a judgment of Nassau County Supreme Court, convicting him of 2nd degree CPW. The Second Department reversed. The matter arose from an allegation by the defendant's former girlfriend that he arrived at her apartment one day carrying a revolver. He was arrested that day. The original indictment accused the defendant of possessing a loaded weapon at the girlfriend's apartment. On the eve of trial, an amendment to the indictment changed the theory of the case, from the defendant's actual possession of the weapon on the day of arrest, to his constructive possession of a loaded weapon found in his residence two days later. Counsel contended that the defense had been undermined by the amendment. The appellate court agreed and held that the trial court should have denied the motion to amend the indictment. The judgment was reversed and the indictment dismissed. Jillian Harrington represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_02356.htm

People v Sauri, 3/27/19 **– GRAVITY KNIFE CONVICTION / AGAINST WEIGHT**
The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 3rd degree CPW. The Second Department previously granted a stay of execution of the judgment pending appeal. The appellate court vacated the conviction and dismissed the charge. The conviction was based on possession of a gravity knife, but the record did not establish that the weapon was a gravity knife. Although an officer demonstrated the weapon's operation at trial, the record contained no contemporaneous description of what the jury saw. Further, there was no other evidence establishing whether, or how, the blade locked. Appellate Advocates (Melissa Lee, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_02359.htm

FOURTH DEPARTMENT

People v Pendergraph, 3/22/19 – **440.10 MOTION DENIED / REVERSED**
[This is an expanded version of the case summary in the last DECISIONS OF INTEREST.] The defendant appealed from order of the Onondaga County Court which denied his CPL 440.10 motion seeking to vacate a judgment of conviction of 2nd degree murder and 2nd degree CPW. The Fourth Department reversed and remitted. A hearing was needed to determine whether counsel was ineffective in telling the jury that the defendant would testify. The defendant's affidavit stated that counsel never discussed with him whether taking the stand would be a good or bad idea, and the defendant never told counsel that he would testify at trial. This account was supported by the affirmation of appellate counsel, based on trial counsel's admission that the defendant did not tell him before trial that he would testify. The remittal hearing would afford the defendant an opportunity to prove that trial counsel did not discuss with him whether he would testify before informing the jury that the defendant would do so, and that there was no strategic or tactical reason for telling the jury that the defendant would testify. Hiscock Legal Aid Society (Piotr Banasiak, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_02220.htm

FAMILY

FIRST DEPARTMENT

Matter of Camille L. (Dawn F.), 3/26/19 – **PROTECTIVE ORDER / MOOT**
The mother, a respondent in an Article 10 proceeding, appealed from a temporary order of protection entered in Bronx County Family Court, which directed her to refrain from certain conduct against the subject child. The First Department dismissed the appeal as moot, since the order had expired by its own terms and was superseded by an order of fact-finding and disposition. The court rejected the mother's arguments regarding mootness, pursuant to *Matter of Veronica P. v Radcliff A.*, 24 NY3d 668, and *Matter of Hearst Corp. v Clyne*, 50 NY2d 707. In any event, good cause shown supported the order.
http://nycourts.gov/reporter/3dseries/2019/2019_02275.htm

Natalya M. v Chanan M., 3/26/19 – **DIAMOND TRADER / INDIGENCY INCREDIBLE**
The father appealed from orders of New York County Family Court finding that he willfully violated a child support order entered on default and denying a downward modification. The First Department affirmed. The father never apprised the court or counsel that he would be unable to appear at trial. While he claimed that a serious illness prevented his attendance, he did not miss a single visit with his daughter before or after the court date. The father asserted that he was indigent, but Family Court found him incredible. By the father's own account, at the time of the hearing, he earned minimum wage, even though he had been an experienced trader and diamond dealer.
http://nycourts.gov/reporter/3dseries/2019/2019_02284.htm

THIRD DEPARTMENT

Matter of Aaron OO. v Amber PP., 3/28/19 **– CUSTODY / INEFFECTIVE ASSISTANCE**
The father appealed from an order of Schenectady County Family Court which dismissed his visitation petition. He and the respondent mother had three children. Since 2013, the father had been in prison, serving a sentence of 40 years to life. On appeal, he argued that he received ineffective assistance. The Third Department agreed and reversed. Counsel for the father was unaware of the applicable burden of proof and failed to produce evidence regarding the father-children relationships, instead delving into tangential or irrelevant issues. In short, counsel displayed an overall lack of focus and purpose in both advocacy and the presentation of evidence on the father's behalf. Furthermore, the father complained on the record that his counsel had not communicated with him between appearances. After summations began, the court granted the father's request to release counsel from representing him. For all these reasons, the appellate court remitted the matter for a new hearing and assignment of new counsel. Tim Monahan represented the father.
http://nycourts.gov/reporter/3dseries/2019/2019_02390.htm

Lionel PP. v Sherry QQ., 3/28/19 **– CUSTODY TRANSFER / REVERSAL**
The mother appealed from an order of Saratoga County Family Court, which granted the father's modification application and granted him primary physical custody and permission to relocate to NYC, based in part on the child's poor academic performance. The Third Department reversed. The custody court conditioned its order upon the child's enrollment in a specified academy. In the view of the appellate court, Family Court thereby erroneously elevated the child's matriculation at

the school to the sole dispositive factor as to best interests, rather than one factor to be considered. A new hearing was ordered. Monique McBride represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_02398.htm

Karla FF. v Robert FF., 3/28/19 – **NONFINAL ORDER / NO APPEAL AS OF RIGHT**
The respondent husband appealed from an order of Sullivan County Family Court, which denied his motion to dismiss the petitioner wife's family offense petition against him. Generally, family court litigants may only appeal as of right from a final order. *See* Family Ct Act § 1112 (a). The order denying the husband's motion to dismiss was an intermediate order, and an appeal as of right did not lie. Thus, the Third Department dismissed the appeal. While the instant appeal was pending, a hearing was held and the wife's petition was granted. An appeal from that dispositional order would bring up for review the denial of the motion to dismiss, the appellate court noted.
http://nycourts.gov/reporter/3dseries/2019/2019_02404.htm

RAISE THE AGE

People v MM. (2019 WL 1303815) (3/21/19) – **NO DISPLAY OF DEADLY WEAPON**
By three separate felony complaints, the defendant was charged with 1st degree robbery as an AO in the Youth Part in **Nassau County** Court. The People asserted that, in each case, the AO displayed a firearm or deadly weapon in furtherance of the offense, and that the term "display" encompasses whatever the victim perceives to be a firearm. The court was unpersuaded. Nothing in the plain language of the statute supported such expansive interpretation. Instead, to disqualify the cases from removal, the People had to show that the AO exhibited an actual firearm or deadly weapon. They failed to do so. In one case, the AO reached into his waistband while making a threat about shooting; and in another, he placed his hand in his pocket, as if he had a handgun. As to the third case, the supporting deposition stated that the defendant displayed "what appeared to be a black handgun" and threatened to shoot the deponent. Thus, the People did not prove by a preponderance of the evidence that the AO displayed a firearm or deadly weapon; and the matters would proceed toward automatic removal to the Family Court.

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