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CRIMINAL

COURT OF APPEALS

People v Teri W., 3/29/18 – **YO Sentence / 10 Years' Probation for Sexual Assault**
In New York County, following her plea of guilty to first-degree sexual abuse, the defendant was adjudged to be a youthful offender and sentenced to 10 years' probation. On appeal, she contended that such sentence illegally exceeded the five-year maximum for undesignated class E felonies. The First Department held that the sentence was legal, and a unanimous Court of Appeals affirmed. The youthful offender statute provides that the sentence must be one authorized for a person convicted of a class E felony. When the statute was enacted, the Penal Law did not differentiate between class E felonies. Subsequently, § 65.00 was amended to provide for a 10-year period of probation for felony sexual assault. Such provision did not include an exception for youthful offenders, the Court of Appeals stated. The Legal Aid Society of NYC (Lawrence Hausman, of counsel) represented the appellant.
http://www.nycourts.gov/reporter/3dseries/2018/2018_02210.htm

Matter of Abdur-Rashid v NYC Police Dept., 3/29/18 – **FOIL / Counterterrorism Secrecy**
The petitioners made a FOIL request. They asserted that the NYPD was targeting Muslim individuals and organizations, and they sought NYPD acknowledgement that they were under investigation and surveillance. When asked to disclose the relevant records, the NYPD responded that it could neither confirm nor deny the existence of such records. On appeal, the NYPD contended that disclosure of whether the records existed could compromise counterterrorism efforts. The Court of Appeals looked to federal precedent (and the so-called "Glomar response," named after a secrecy tactic first used by the CIA in the Cold War era). In upholding the NYPD position, the Court observed that no statutory language required an agency to certify the existence of records protected under law enforcement and public safety exemptions. The Chief Judge wrote the opinion, in which Judge Wilson concurred in part and dissented in part. Judges Stein and Rivera dissented. Omar Mohammedi represented the appellants.
http://www.nycourts.gov/reporter/3dseries/2018/2018_02206.htm

People v Perez, 3/27/18 – **Dissent / "A Dangerous Course" as to Police Encounters**
After Bronx County Supreme Court found that police were authorized to search the defendant, he was

convicted of first-degree robbery. The First Department affirmed, and the Court of Appeals sustained the challenged order in a memorandum decision. Judge Rivera wrote a lengthy dissent, in which Judge Wilson concurred, warning that the approach taken by the Court risked authorizing the escalation of police-initiated encounters. "[T]he Court is charting a dangerous course, one that has the potential to render appellate judicial review meaningless, imperil individual liberty, and diminish civil rights," the dissent declared. Salient facts included that, while conducting a "vertical patrol" in a NYC Housing Authority residential apartment, police had asked the defendant if he lived in the building and if he had a weapon. The defendant stood motionless and silent. Police saw a nondescript bulge in his shirtsleeve, a forcible detention and frisk ensued, and a machete was recovered. In the dissenters' view, the police intrusion was improper, since there was no information that the defendant was involved in criminal activity. While the defendant did not ask the Court to reconsider *People v DeBour*, the dissenters intimated that such precedent may indeed be ripe for reevaluation. The Legal Aid Society of New York City (Steven Miraglia, of counsel) represented the appellant.
http://www.nycourts.gov/reporter/3dseries/2018/2018_02118.htm

People v Boyd, 3/27/18 – **DISSENT / OPPORTUNITY TO PRESENT DEFENSE DENIED**
In another memorandum decision, the Court of Appeals upheld a Bronx County conviction, and Judges Rivera and Wilson joined forces in dissent. At issue in *Boyd* were illegal weapon possession convictions. The defendant had been charged with possession of a semi-automatic handgun and an air pistol (BB gun). At trial, the defendant admitted possessing the BB gun, but contended that the handgun belonged to a third party, who had thrown it under a parked van, where police found it. The third party admitted as much, but then recanted. After all proof was presented, the trial court granted the People's motion to dismiss the BB gun count. The Court of Appeals dissenters deemed that to be an abuse of discretion. They contended that the trial court denied the defendant a fair opportunity to defend against the State's accusations by submitting only the handgun counts—after the People and the defendant had presented evidence that the defendant possessed the BB gun. The trial court's ruling invited reverse nullification in the view of the dissenters; knowing that the defendant had admitted guilt as to the dismissed BB gun count, the jury could improperly have been encouraged to find him guilty of the more serious handgun charges. Marianne Karas represented the appellant.
http://www.nycourts.gov/reporter/3dseries/2018/2018_02120.htm

FIRST DEPARTMENT

People v Steinbergin, 3/27/18 – **REVERSAL / HANDCUFFS MADE DETENTION AN ARREST**
During a buy-and-bust operation, police made what the suppression court found to be an investigatory stop of the defendant based on reasonable suspicion, followed by a confirmatory identification that provided probable cause to arrest him for selling drugs. During the stop, but before the confirmatory identification, the police handcuffed the defendant. That elevated the detention to an arrest, and such action was improper, where: (1) the defendant was suspected of only a street-level drug sale; (2) there was no reason to believe that he was armed, dangerous, or likely to flee; and (3) there was no indication that he offered any resistance. On appeal, the People maintained that, at the time of the handcuffing, police had probable cause to arrest the defendant. However, New York County Supreme Court had ruled otherwise; and the Appellate Division was not empowered to review issues decided in the appellant's favor. *See* CPL 470.15 (1) (on appeal from criminal judgment, intermediate appellate court may determine any question of law or fact involving an error or defect in trial proceedings that may have

adversely affected appellant); *cf.* CPLR 5501 (a) (1) (on appeal from civil judgment, intermediate appellate court may review certain non-final orders that were favorable to appellant and adverse to respondent). The defendant's drug sale conviction was reversed, the motion to suppress granted, and the matter remanded for a new trial preceded by an independent source hearing. The Office of the Appellate Defender (Margaret Knight, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_02123.htm

People v Darryl T., 3/29/18 –**CPL 330.20 HEARING WAIVER / INEFFECTIVE ASSISTANCE**
The defendant was charged in Bronx County with robbery in the first degree. He pleaded not responsible by reason of mental disease or defect. Defense counsel conceded that the defendant had a dangerous mental disorder, and he waived the defendant's right to an initial hearing. Two experts then determined that the defendant was a danger to himself and others, and he was committed to a psychiatric center. Thereafter, the defendant moved to withdraw his plea or have an initial hearing pursuant to CPL 330.20 (6). The application was denied. The First Department granted leave to appeal, reversed, and remanded. The required initial hearing—which determined the level of confinement and treatment to be imposed—was a critical stage of the proceedings. The defendant was deprived of effective assistance, where defense counsel waived the right to an initial hearing before the psychiatric reports were issued; and counsel forfeited the opportunity to cross-examine the experts, consult with an expert on the defendant's behalf, and call witnesses. Mental Hygiene Legal Service represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_02280.htm

THIRD DEPARTMENT

Matter of Strobel v Danielson, 3/29/18 – **MOTHER KILLED / CUSTODY STIPULATION**
After the father of the subject child murdered the mother, Chenango County Family Court granted sole custody to the maternal grandmother and visitation to the aunt, upon their consent. On appeal, the father contended that the approval of the stipulation, without a hearing and without his participation, violated his fundamental due process rights. The Third Department held that no hearing was needed where: (1) the death of the mother and father's murder conviction constituted extraordinary circumstances, conferring standing on the grandmother and aunt; (2) home studies provided insight into the suitability of the relatives; and (3) the father had not sought visitation. The preferred course would have been for Family Court to advise the father of the proposed stipulation and provide him with an opportunity to appear. But such failure was deemed harmless.
http://nycourts.gov/reporter/3dseries/2018/2018_02223.htm

Carter v Fairchild-Carter, 3/29/18 – **PRENUP AGREEMENT / FACT ISSUES AS TO OVERREACHING**
The husband moved for summary judgment to enforce the parties' prenuptial agreement. Clinton County Supreme Court denied the motion, and the Third Department affirmed. In her affidavit, the wife stated that, shortly before the wedding day, the husband presented her with a prenuptial agreement. On the advice of counsel, she insisted on revisions, to which the husband ostensibly acquiesced. While standing outside the County Clerk's Office the day before the wedding, the wife received the new agreement, but did not have the time or emotional wherewithal to read it before signing. Such facts gave rise to an inference of overreaching, the majority held. A concurring justice opined that it was the husband's affirmative misrepresentation of the value of certain real property that constituted overreaching.
http://nycourts.gov/reporter/3dseries/2018/2018_02230.htm

FAMILY

FIRST DEPARTMENT

Matter of Kaylin P. (Derval S.), 3/29/18 – **ARTICLE 10 / DERIVATIVE ABUSE AND NEGLECT**
New York County Family Court properly determined that the respondent sexually abused and neglected the subject child, for whom he was legally responsible; but the court erred in finding that he did not derivatively abuse or neglect his biological son. The victim, a girl, had detailed sexual abuse, as well as escalating domestic violence between her mother and the respondent. Such acts demonstrated such an impaired level of parental judgment as to create a substantial risk of harm for any child in the respondent's care. The fact that his son was not present when the mother was attacked did not preclude a finding of derivative abuse and neglect.
http://nycourts.gov/reporter/3dseries/2018/2018_02271.htm

SECOND DEPARTMENT

Matter of Bongocan v Javier L., 3/28/18 – **VISITATION / NOT BASED ON WORK SCHEDULE**
After a hearing, Queens County Family Court awarded the parties joint legal custody, primary residential custody to the mother, and visitation to the father, including overnights when the mother, a nurse, was working. The Second Department modified the order. Conditioning the father's parental access on the vagaries of the mother's work schedule was improper. Instead, the father should have two weekday overnight visits following weekends that he had the child, and three weekday overnight visits during other weeks. The AFC had failed to demonstrate that the record on appeal was no longer sufficient to determine the best interests of the child, pursuant to *Matter of Michael B.*, 80 NY2d 299, 218. A motion by the mother to strike stated portions of the AFC's brief, because they referred to matters dehors the record, was held in abeyance and referred to the panel that decided the visitation appeal.
http://nycourts.gov/reporter/3dseries/2018/2018_02148.htm

Shea v Miller, 3/28/18 – **DEFAULT ORDER / REASONABLE EXCUSE SHOWN**
The defendant appealed from an order of Suffolk County Supreme Court that denied her CPLR 5015 (a) (1) motion to vacate her default in appearing at a divorce trial. The Second Department had adopted a liberal policy with respect to vacating defaults in matrimonial actions. However, it was still incumbent on the defendant to demonstrate a reasonable excuse for her default and the existence of a meritorious defense. She had succeeded in establishing the first element: it was undisputed that she had never missed an appearance until a date in November 2014, when she failed to appear because her counsel was unaware that a trial was scheduled that day. The default was not willful. However, the defendant had failed to demonstrate a meritorious defense as to equitable distribution and child support issues, which were resolved after the inquest held upon her default. Thus, the ordered appealed from was affirmed.
http://nycourts.gov/reporter/3dseries/2018/2018_02157.htm

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