CRIMINAL

COURT OF APPEALS

DECISION OF THE WEEK

People v Williams, 3/31/20 – **LCN AND FST / ERRANT *FRYE* DENIAL**

The trial court abused its discretion as a matter of law in refusing to hold a *Frye* hearing to assess the general acceptance within the scientific community of Low Copy Number (LCN) DNA evidence and the Forensic Statistical Tool (FST) used by the Office of the Chief Medical Examiner of NYC, a unanimous COA held. But the error was harmless. At trial, the People presented evidence as to DNA testing conducted to provide a link between the defendant and a gun. The testing revealed that there was a mixture of DNA from at least two contributors on the firearm. The statistical analysis conducted using the FST yielded the conclusion that it was millions of times more likely that the DNA mixture contained contributions from the defendant and one unknown, unrelated person, rather than from two unknown, unrelated persons. A defense expert stated that there were no generally accepted guidelines for the testing, analysis, or interpretation of LCN evidence and that the FST had not been adequately subjected to validation or peer review.

Judicial caution should govern the admission of developing scientific evidence in criminal proceedings, the COA declared. The motion court relied on unsound trial court opinions. Scientific community approval—not judicial fiat—was the litmus test. However, *sound* prior judicial opinions regarding general acceptance of scientific evidence could validate a trial court's decision to admit evidence without a *Frye* inquiry. The People ignored the defense expert opinion that LCN's enhancements of very minute amounts of genetic material could result in inaccurate results; and the motion court disregarded scholarly skepticism about LCN testing. A *Frye* hearing should also have been held as to the FST, a proprietary program developed and controlled by the OCME—an invitation to bias. OCME's secretive approach did not reflect proper quality assurance standards. Judge Fahey authored the majority opinion. Chief Judge DiFiore wrote a concurrence in which Judges Garcia and Feinman joined. The Center for Appellate Litigation (Mark Zeno, of counsel) represented the appellant.
http://www.nycourts.gov/reporter/3dseries/2020/2020_02123.htm

People v Delorbe, 3/31/20 – ***PEQUE* CLAIM / UNPRESERVED / CONCURRENCE**

Due process compels a trial court to apprise a defendant that, if he or she not a U.S. citizen, the defendant may be deported as a consequence of a guilty plea to a felony. *People v Peque*, 22 NY3d 168. The instant defendant failed to preserve his *Peque* claim. A year before the plea proceeding, the People provided him with a generic notice of immigration consequences. The notice adequately alerted the defendant about immigration consequences. When he pleaded guilty to attempted 2nd degree burglary, Supreme Court did not mention immigration consequences, and he made no inquiry about the matter. At sentencing, the defendant did not seek to withdraw his plea or inquire about a possible immigration impact. Judge Garcia wrote the majority opinion. Judge Wilson concurred in the result via an opinion in which Judges Rivera and Fahey joined. The trial court's *Peque*

responsibility could not be met by a prosecutor providing a form to the defendant. The instant plea proceedings violated *Peque.* The only issue was preservation. The generic notice did not permit an assessment as to the defendant's salient knowledge at the time of his plea. However, his own motion papers conclusively proved that he knew that his plea carried the possibility of deportation. That awareness was sufficient. Knowledge was not required as to the specific adverse consequence that would definitely or likely result from the plea.
http://www.nycourts.gov/reporter/3dseries/2020/2020_02126.htm

FIRST DEPARTMENT

People v Trammell, 4/2/20 – **SELF-REPRESENTATION / ERRANT DENIAL**
The defendant appealed from a judgment of NY County Supreme Court, convicting him of multiple counts of robbery in the 1st and 3rd degrees. The First Department reversed and ordered a new trial, because the defendant was deprived of his right to represent himself. His insistent entreaties were erroneously and summarily rejected. While paying lip service to the defendant's rights, the court foisted counsel on him. If concerned that defendant would subvert the trial, the lower court should have conducted a dispassionate inquiry. Instead, the trial court ordered 730 examinations and assigned successive defense counsel, notwithstanding valid complaints about counsel's flaws. The defendant was repeatedly found fit to proceed, yet the court continued to deny his requests and ignore his complaints. A belated finding that the defendant intended to disrupt the proceedings could not legitimize earlier denials of requests to proceed pro se. Harmless error analysis did not apply. The Legal Aid Society of NYC (Andrew Fine and Frances Gallagher, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_02190.htm

People v Ochoa, 4/2/20 – **YO / LOADED FIREARM / NOT ARMED FELONY**
The defendant appealed from a judgment of Bronx County Supreme Court, convicting him of 2nd degree CPW, upon his plea of guilty. The First Department vacated the sentence and remanded for a further youthful offender determination. The lower court erred in finding the defendant presumptively ineligible for YO, based on his commission of an armed felony. Under CPL 720.10, an armed felony required possession of a deadly weapon. Since a loaded firearm was not always a deadly weapon, the defendant's conviction for possessing a loaded firearm was not an armed felony. He was eligible for YO status without any presumption of ineligibility. The Office of the Appellate Defender (Kami Lizarraga, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_02156.htm

People v Velo, 4/2/20 – **SOCIAL MEDIA POSTS / ILL-ADVISED**
The defendant appealed from a judgment of NY County Supreme Court, convicting him of 1st degree coercion, 3rd degree assault, and other crimes. The First Department affirmed. The trial court properly admitted the defendant's social media posts, including a music video reenacting part of the crime and containing admissions to elements of crimes. If probative value outweighed potential prejudice, any error was harmless. Overwhelming

evidence included the defendant's recording of the incident and voice messages admitting that he threatened and punched the victim.
http://nycourts.gov/reporter/3dseries/2020/2020_02182.htm

SECOND DEPARTMENT

People v Weeks, 4/1/20 – **UNLAWFUL IMPOUNDMENT / SUPPRESSION**
The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 2nd degree CPW. The appeal brought up for review denial of a motion to suppress physical evidence. The Second Department reversed and dismissed the indictment. The defendant parked his vehicle in a visitor's parking spot outside of a precinct station house and entered to recover the belongings of a previously arrested friend. After the defendant provided identification, an officer searched his name in a police database, saw that he had an outstanding bench warrant, arrested him, and impounded his vehicle. During an inventory search, police discovered two weapons. The defendant was charged with several crimes and moved to suppress the physical evidence on the ground that the impoundment of the vehicle was unlawful. The waiver of the right to appeal was unenforceable. The People failed to establish the lawfulness of the impoundment and inventory search. The vehicle was legally parked. While an officer testified that the vehicle was impounded to safeguard against burglary, there was no evidence as to a history of burglary in the area, nor any evidence as to an NYPD impoundment policy, what the policy required, or whether the arresting officer complied with the policy. Appellate Advocates (Leila Hull, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_02198.htm

FAMILY

FIRST DEPARTMENT

Matter of Angel L. (Victor M.), 4/2/20 – **NEGLECT / PETITION REINSTATED**
The ACS appealed from an order of Bronx County Family Court, which granted the motion of the respondent to dismiss neglect petitions. The First Department reversed, reinstated the petitions, and remitted for completion of the fact-finding hearing. There was sufficient evidence to establish that the respondent, who controlled the family's finances and thereby deprived them of necessities, was a person legally responsible for the children. The proof indicated that: he abused the mother within earshot of the children; they feared him; and he made sexual comments to them. Thus, a reasonable inference could be drawn that they were placed at imminent risk of harm.
http://nycourts.gov/reporter/3dseries/2020/2020_02180.htm

THIRD DEPARTMENT

Abel XX. (Jennifer XX.), 4/2/20 – **AFC AS PETITIONER / INADMISSIBLE HEARSAY**
The mother appealed from St. Lawrence County Family Court orders, which adjudicated the four subject children to be neglected. When the petitioner decided to withdraw its Article 10 petitions against the mother, Family Court asked the AFC whether he would be prepared to go forward on the petitions if they were not dismissed. The AFC said yes and presented evidence. The Third Department reversed and dismissed. It was proper for Family Court to decline to dismiss the petitions and allow the AFC to proceed on the petitions. *See* Family Ct Act § 1032 (b) (Article 10 proceeding may be initiated by person at court's direction). Notwithstanding his laudable efforts, the AFC failed to present sufficient evidence of educational and medical neglect. Family Court erred in relying upon a caseworker's hearsay testimony about her conversations with school officials. Although there was no objection, the appellate court could not uphold a neglect finding supported solely by inadmissible evidence. Similar infirmities existed as to proof of medical neglect. The Rural Law Center of NY (Kelly Egan, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_02129.htm

Jennifer VV. v Lawrence WW., 4/2/20 – **AFC / INEFFECTIVE IN APPEAL**
The father appealed from a Saratoga County Family Court order, which granted the mother's application to modify a prior order. The Third Department withheld decision. Initially, the AFC indicated that he would not file a brief, because the children were too young to express their wishes. The reviewing court ordered him to file a brief. Counsel complied and opined in his brief that affirmance was in the clients' best interests. The AFC failed to fulfill his obligations under 22 NYCRR 7.2 (d). The 10-year-old was old enough to express her wishes, and the six-year-old's level of maturity and verbal abilities had to be assessed. Even if the AFC could properly substitute his judgment, he had to tell the appellate court about the children's wishes, if they so authorized. Further, the AFC apparently did not meet with the children during the appeal, thus failing to counsel them and elicit their current wishes. Because the AFC rendered ineffective assistance, he was relieved. Tammy Arquette represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_02136.htm

Jessica D. v Michael E., 4/2/20 – **CUSTODY / MISGUIDED EVALUATOR**
The mother appealed from a Schenectady County Family Court order, which dismissed her custody modification petition. The Third Department reversed and remitted. Under a 2008 order, the father had sole custody of the parties' then one-year-old child, and the mother's visitation was suspended. In 2018, she initiated the instant proceeding to establish a relationship with the child. As the trial court found, she proved a change in circumstances: she had acquired stable housing and employment; had not abused drugs for several years; and had regained custody of other children with a different father. The total denial of visitation was drastic and should be rare. Here that outcome flowed from undue weight given to a flawed forensic report. The evaluator deemed the mother's life chaotic and opined that she could not add anything positive to the child's life. Such thinking, as to a parent who made great strides in achieving stability, was wrongheaded. Further, the father was largely to blame for the child's antipathy toward the mother, yet the evaluator

acquiesced in that parent's desire to thwart a mother-child relationship. That the mother had outbursts in court was irrelevant. Too much time had passed to make a visitation determination. Upon remittal, Family Court should consider therapeutic visitation and solicit the recommendation of a different forensic evaluator. Karen Crandall represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_02133.htm

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