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CRIMINAL

COURT OF APPEALS

People v Silburn, 4/3/18 – **Self-Representation / Psychiatric Proof Notice**
The Court of Appeals majority held that the defendant's request to proceed pro se and with standby counsel was equivocal and properly denied without a searching inquiry by Kings County Supreme Court, but noted that the better practice would have been for the trial court to ask if the defendant wanted to defend himself without standby counsel. The Court addressed a second issue, holding that the notice requirement of CPL 250.10 regarding psychiatric evidence applied to a challenge to the voluntariness of a confession. Any error in excluding unnoticed psychiatric evidence was deemed harmless. Judge Wilson dissented. He would have granted a new trial based on the conclusion that the defendant's initial unequivocal request to proceed pro se was combined with, not conditioned on, the request for standby counsel. The *Silburn* majority had freed trial courts from engaging in any particular catechism, while unfairly imposing a precise one on defendants, who reasonably expect that their requests for standby counsel will be granted, the dissenter opined. He added that trial courts should not impose a blanket policy against standby counsel. As to the notice issue, Judge Wilson reasoned that, read in context, the reference in CPL 250.10 to "any other defense" encompassed only mens rea-type or affirmative defenses, not the voluntariness of a confession. But he also viewed any error as harmless. Judge Rivera dissented separately, agreeing with Judge Wilson's opinion and noting the strong, longstanding trend to appoint standby counsel to protect the rights of pro se defendants and the integrity of the criminal justice system. Appellate Advocates (Alexis Ascher, of counsel) represented the appellant.
http://www.nycourts.gov/reporter/3dseries/2018/2018_02286.htm

FIRST DEPARTMENT

People v Douglas, 4/5/18 – **No Accomplice Corroboration / New Trial**
The defendant was convicted in Bronx County of assault and gang assault charges and sentenced as a persistent violent felony offender to an aggregate term of 25 years to life. The First Department reversed as a matter of discretion in the interest of justice. The People's case against the defendant was based almost entirely on accomplice testimony. The lack of an accomplice corroboration charge warranted a new trial. Further, defense counsel's nonstrategic failure to request the instruction constituted ineffective assistance. The Office of the Appellate Defender (Joseph Nursey, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_02397.htm

SECOND DEPARTMENT

People v Wahaab, 4/4/18 – ***Sandoval* Ruling / Reversal**

The Second Department reversed a burglary conviction because of an erroneous *Sandoval* ruling by Kings County Supreme Court. At trial, the court allowed the defendant to be cross-examined about a prior robbery conviction which, at that time, was the subject of a pending appeal. The People conceded that, to impeach the defendant's credibility, they could not examine him about the underlying facts of an unrelated criminal conviction that was on appeal. *See People v Cantave*, 21 NY3d 374, 381. The error was not harmless. A new trial was ordered. Appellate Advocates (Anna Pervukhin and Kendra Hutchinson, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2018/2018_02332.htm

People v Wright, 4/4/18 – **Double Jeopardy / Weapon Charge Dismissed**

The defendant pro se contended that his Kings County conviction of second-degree criminal possession of a weapon subjected him to double jeopardy. Prior to trial, he had pleaded guilty in Nassau County to possessing the same gun that was used in the instant robbery. At trial, no proof was offered to show that the defendant did not continuously possess the weapon. Thus, his possession of the same gun, on a certain date in Kings County and six days later in Nassau County, constituted a single offense for which he could be prosecuted only once.

http://nycourts.gov/reporter/3dseries/2018/2018_02347.htm

Matter of Smith v Annucci, 4/4/18 – **Prison Discipline / Determination Annulled**

The petitioner was charged with smuggling a typed letter to another inmate and enclosing various religious publications and inspirational comments. After a hearing, he was found guilty of violating rules prohibiting smuggling and governing correspondence. Upon the petitioner's administrative appeal, the penalty was reduced, but the hearing officer's determination of guilt was affirmed. The petitioner pro se commenced the instant Article 78 proceeding. The Second Department held that the charges were not supported by substantial evidence. The misbehavior report did not specify the guideline or instruction regarding correspondence that the petitioner allegedly violated. Moreover, in his capacity as inmate facilitator for the Nation of Islam office at the Green Haven Correctional Facility, the petitioner had the duty to send religious materials to other inmates.

http://nycourts.gov/reporter/3dseries/2018/2018_02330.htm

THIRD DEPARTMENT

People v Friday, 4/5/18 – **Speedy Trial / Indictment Dismissed / Albany County**

In Albany County Court, the defendant moved to dismiss the indictment on statutory speedy trial grounds, arguing that the People timely declared readiness for trial, but exceeded the six-month limit when they obtained a three-week adjournment to secure the testimony of a police detective scheduled for a mandatory training program. The People made no effort to learn whether the witness could switch to another training program and thus failed to show that they exercised due diligence to make the witness available. The adjournment period was chargeable to the People, the Third Department held, and the trial court (Lynch, J.) had erred in denying the defendant's motion. The convictions of drug possession charges were reversed, and the indictment was dismissed. Paul Connolly represented the appellant.

http://nycourts.gov/reporter/3dseries/2018/2018_02367.htm

People v Pichardo, 4/5/18 – **Conspiracy Charge / Count Dismissed / Albany County**
The defendant pro se contended that the count of the indictment charging him with second-degree conspiracy should be dismissed. Such count neither alleged an overt act nor included factual allegations describing such an act, as required by Penal Law § 105.20. The jurisdictionally defective count had to be dismissed, the Third Department concluded. In other respects, the Albany County Court judgment of conviction (Lynch, J.) was affirmed.
http://nycourts.gov/reporter/3dseries/2018/2018_02365.htm

People v Pettus, 4/5/18 – **No Accomplice Charge / New Trial / Albany County**
In a prosecution for drug possession charges, Albany County Court (Herrick, J.) failed to instruct the jury that a key witness was an accomplice as a matter of law. The subject witness was charged with a crime based on the same facts upon which the defendant was prosecuted. Although the issue was not preserved, the Third Department exercised its interest of justice jurisdiction, since the failure to deliver the instruction deprived the defendant of a fair trial. The People's case relied almost exclusively on the accomplice's testimony, and thus the error was necessarily harmful. The judgment was reversed, and a new trial was ordered. Catherine Barber represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_02366.htm

People v Hall, 4/5/18 – **Right to Present Defense / New Trial / Albany County**
The limitations imposed by Albany County Court (Herrick, J.) on the introduction of evidence concerning the pre-*Miranda* portion of the defendant's interrogation violated her constitutional right to present a defense, the Third Department held. The evidence was relevant and material to the defendant's state of mind, the voluntariness of her confession, and why she confessed falsely—to protect her son from a drug possession charge, when confronted with information regarding his criminal activities. The probative value outweighed the potential for prejudice. The error was not harmless, where the confession was the key evidence, and the recording sought might have led the jury to give more credence to the defendant's testimony. John Ferrara represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_02368.htm

People v Myers, 4/5/18 – **Flawed Waiver of Right to Counsel / New Trial**
Before allowing the defendant to proceed pro se, Greene County Court failed to ensure that he validly waived his right to counsel. The defendant unequivocally expressed his intention to defend himself, but the court failed to conduct a timely and sufficiently searching inquiry. The defendant's understanding regarding self-representation was not tested, and he was not warned of inherent risks and disadvantages of such course. Indeed, the trial court made comments creating the illusion that proceeding pro se was in the defendant's best interest. Thus, his waiver of the right to counsel was ineffective, and the matter was remitted for a new trial. Bruce Evans Knoll represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_02361.htm

People v Chin, 4/5/18 – **Defective Plea / Reversal**
In Broome County Court, the defendant pleaded guilty to second-degree attempted assault. Comments at sentencing cast doubt on his guilt. He said, "I was sorry that the person got hurt. I didn't mean to hurt him. I was just trying to protect my family inside my home." Despite such statements raising a possible justification defense, the plea court did not delve into the matter. The judgment was reversed and the

matter remitted. The People had improperly relied on *People v Pearson*, 110 AD3d 1116 (County Court had no duty to inquire concerning potential intoxication defense based on comments made by defendant during sentencing proceeding, not plea colloquy). That case predated *People v Pastor*, 28 NY3d 1089 (Court of Appeals observed that defendant said nothing—during plea colloquy or sentencing proceeding—that negated element of crime or raised possible justification defense), and should no longer be followed, the Third Department declared. Mitchell Kessler represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_02363.htm

People v Snowden, 4/5/18 – **People's Appeal / Error to Dismiss in Interest of Justice**
The defendant Code Enforcement Officer and codefendant Mayor were charged in Sullivan County with taking a bribe, official misconduct, and other crimes regarding the improper demolition of a Village of Monticello building containing asbestos. On the eve of trial, the defendant moved under CPL 240.10 to dismiss the indictment in the furtherance of justice. Supreme Court granted the motion, and the People appealed. The trial court abused its discretion. The case did not present "extraordinary or compelling circumstances" that "cried out for fundamental justice." Due to the building demolition, asbestos dust threatened public safety. Further, permitting a public servant to elude prosecution for abusing his position of power would not foster public confidence; but imposing sentence could serve a deterrent purpose. The challenged order was reversed, and the motion was denied.
http://nycourts.gov/reporter/3dseries/2018/2018_02369.htm

FAMILY

SECOND DEPARTMENT

Matter of John M.M. (Michael M.), 4/4/18 – **Article 10 / Dismissal Reversed**
Following the presentation of the petitioner's case, Queens County Family Court dismissed the agency's neglect petition against the father. The petition alleged that the father neglected the subject child by committing domestic violence against the mother in the child's presence. The Second Department held that the agency had presented a prima facie case. The evidence included hearsay testimony of a police officer, who testified that the mother described the father hurling an object at her head, choking her, and throwing her to the ground, causing her to lose consciousness. Certified hospital records corroborated her statements, including her report that the child, then 11 months old, was present during the assault. Since the court had terminated the neglect proceeding after the close of the petitioner's direct case, a continued fact-finding hearing was ordered so that the father could present his case and a new determination could be rendered.
http://nycourts.gov/reporter/3dseries/2018/2018_02326.htm

THIRD DEPARTMENT

Matter of Loretta RR. (Maryann SS.), 4/5/18 – **Custody / *Michael B.* Invoked / Remittal**
The respondents were the biological parents of a child born in 2013. The father and the petitioner were in a relationship when the child was conceived, and they cared for the child with no involvement by the

mother. Upon the father's death, the petitioner sought custody of the child, who was placed in foster care. After a hearing in Broome County Family Court, the petitioner's custody application was dismissed. During the pendency of the appeal, a Family Court order denied the foster parents' petition for custody and indicated that the petitioner had achieved stability and had a meaningful relationship with the child. In addition, DSS supported placement of the child in the petitioner's custody. Such new information indicated that the record on appeal no longer permitted intelligent appellate review of the custody order appealed from. *See Matter of Michael B.*, 80 NY2d 299, 318. Thus, the Third Department reversed the order denying custody to the petitioner and remitted the matter for further proceedings. Renee Albaugh represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_02373.htm

Matter of Mosher v Woodcock, 4/5/18 – **CHILD SUPPORT VIOLATION / INABILITY TO WORK**
The only issue on appeal from an order of Warren County Family Court was whether the father had successfully rebutted prima facie evidence that his violation of a child support order was willful. He testified that: (1) he had suffered two strokes; (2) he was fired from his last job due to memory loss and medical restrictions; (3) he could not work based on his disability; and (4) he had applied for Social Security Disability benefits. Days before the hearing to confirm the willfulness finding, the father was approved for disability benefits. The Third Department concluded that Family Court should have explored the new information and its impact on the father's ability to work. The matter was remitted. The Rural Law Center of New York (Kelly Egan, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_02380.htm

Saratoga County Support Collection Unit v Caudill, 4/5/18 – **SUPPORT / NO JURISDICTION**
The mother filed a child support violation petition against the father, but then withdrew it. Thus, the Support Magistrate dismissed her petition. However, the petitioner agency thereafter submitted an affidavit alleging that the father had failed to pay support, and Family Court found a willful violation and ordered the father to serve 150 days in jail. That was error. The order dismissing the mother's petition was final, since no objections were filed. Absent the filing of a new petition containing the requisite allegations of failure to obey a lawful order, Family Court had no subject matter jurisdiction to enforce a support order. The affidavit of a Support Collection employee did not constitute a petition. The orders appealed from were reversed on the law. Brian Quinn represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_02375.htm

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