

CRIMINAL

FIRST DEPARTMENT

***People v Rodriguez*, 5/14/19 – CHALLENGE FOR CAUSE / REVERSAL**

The defendant appealed from a judgment of NY County Supreme Court, convicting him of failure to verify registration information as a sex offender. The First Department reversed and remanded for a new trial. The trial court erred in denying the defendant’s challenge for cause to a prospective juror. The panelist made a statement reflecting a state of mind likely to preclude the rendering of an impartial verdict; and the court did not elicit an unequivocal assurance that the panelist could set aside any bias. The juror stated that he was “not sure” that he could be impartial in a case involving a registered sex offender. His general statement about needing to hear the facts did not address his ability to overcome the specific bias he had expressed. When there is any doubt about a prospective juror’s impartiality, trial courts should err on the side of excusing the juror, since at worst the court will have replaced one impartial juror with another. The Legal Aid Society of NYC (Lorraine Maddalo, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2019/2019_03734.htm

SECOND DEPARTMENT

***People v Nettles*, 5/15/19 – DARDEN HEARING / REMITTAL**

The defendant appealed from a judgment of Kings County Supreme Court, convicting him of criminal possession of a firearm, upon a jury verdict. The Second Department held that Supreme Court erred in denying a *Darden* hearing. Such a hearing is necessary where there is insufficient evidence of probable cause without information from the confidential informant. The hearing is meant to: (1) ensure that the CI actually exists and gave police information sufficient to establish probable cause; and (2) protect the informant’s identity. Such task is generally accomplished by producing the CI for in camera examination. In the instant case, the detective’s on-the-scene observations during controlled buys fell short of probable cause without the CI’s information. The matter was remitted for a *Darden* hearing, and the appeal was held in abeyance. Appellate Advocates (Samuel Barr, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2019/2019_03816.htm

***People v Hill*, 5/15/19 – CONFLICT OF INTEREST / REVERSAL**

The defendant appealed from a judgment of Westchester County Court, convicting him of 1st degree manslaughter and 2nd degree CPW. The Second Department reversed and vacated the plea. The defendant was charged under the relevant indictment with 2nd degree murder and two weapons possession counts. He was later charged under another indictment with assault. Defense counsel represented the defendant as to both indictments. Following a pretrial hearing on the murder case, counsel learned that he had a conflict of interest. On unrelated charges, his law office represented the prosecution’s witness, who was to testify that he saw the defendant shoot the instant homicide victim. The Second Department held that the defendant was denied effective assistance of counsel when the attorney—who was

relieved as counsel in the murder case because of the conflict of interest but remained on the assault case—made a plea offer with respect to the murder indictment. *See People v Solomon*, 20 NY3d 91, 96. Gary Eisenberg represented the defendant.

http://nycourts.gov/reporter/3dseries/2019/2019_03810.htm

***People v Aniano*, 5/15/19 – INCLUSORY COUNTS / DISMISSED**

The defendant appealed from a judgment of Nassau County Supreme Court, convicting him of aggravated vehicular homicide (two counts) and other crimes. As the People conceded, the counts for vehicular manslaughter, reckless driving, and operating a motor vehicle while under the influence of drugs, had to be dismissed as inclusory concurrent counts. Jonathan Edelstein represented the appellant.

http://nycourts.gov/reporter/3dseries/2019/2019_03797.htm

***People v King*, 5/15/19 – SENTENCE MODIFIED / CONCURRENT TERMS**

The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 2nd degree murder and 2nd degree CPW (two counts) and imposing a term of 25 years to life, to run consecutively to concurrent 5-years terms. The Second Department held that the murder sentence must run concurrently with the other terms. The evidence failed to establish that the defendant possessed the gun for an unlawful purpose unrelated to shooting at the intended victim, resulting in the death of the victim, or that his possession of a gun was separate and distinct from his shooting of the victim. Appellate Advocates (De Nice Powell, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2019/2019_03813.htm

***People v Taylor*, 5/15/19 – SENTENCE MODIFIED / CONCURRENT TERMS**

The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 1st degree criminal sexual act and 1st degree criminal impersonation, and sentencing him to a term of eight years, to run consecutively to a term of 2 to 4 years. Because the sexual act crime constituted one of the offenses, and a material element, of the other offense, the sentences had to run concurrently. Appellate Advocates (Leila Hull, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2019/2019_03823.htm

***People v Delvalle*, 5/15/19 – AFFIRMANCE / BUT ADMONISHMENT**

The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 1st degree criminal contempt and several other crimes. The Second Department affirmed. The defendant failed to preserve his contention that he was deprived of a fair trial by Supreme Court’s improper remarks to prospective jurors. While there was no mode of proceedings error, the appellate court expressed its “strong disapproval” of certain judicial remarks. In response to dismissed prospective jurors who said that they could not speak English, the court indicated that such jurors should take, or be required to take, English courses. Appellate Advocates (Meredith Holt, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2019/2019_03806.htm

THIRD DEPARTMENT

***People v Wade*, 5/16/19 – DISSENT / BAD PAROLEE SEARCH**

The People appealed from an order of Rensselaer County Court, which granted the defendant's motion to suppress evidence. The Third Department reversed. Two dissenters would have found the search improper. A parolee did not surrender his 4th Amendment rights. There had to be reasonable suspicion to validate the instant search. The question was whether the parole officer's conduct was reasonably related to the performance of his duty. The P.O. was authorized to visit the defendant's residence and do a search and inspection, and had already visited and approved the residence. The P.O. acknowledged that the search was prompted by information from a confidential informant as to possible narcotic activity; he had not previously used the informant as a source; he had no indication that the informant had purchased drugs at the residence; and he did not inquire as to the basis for the C.I.'s statement or seek to independently confirm the information.

http://nycourts.gov/reporter/3dseries/2019/2019_03851.htm

SECOND CIRCUIT

***USA v Jenkins*, 5/10/19 – SENTENCE VACATED / ERRANT JUDGE**

In a summary order, the Second Circuit vacated, for a second time, a sentence imposed on the defendant by the NDNY. In his first appeal, the defendant challenged the reasonableness of his sentence for possession and transportation of child pornography. The appellate court found unreasonable the 225-month term and the conditions of supervised release. There was no basis for the conclusion that the defendant was a high risk to reoffend, where he never spoke to, much less touched, a child. The case was remanded. District Court characterized as an "assumption" the defendant's status as a first-time offender. The defendant was resentenced to a 200-month term and supervised release, with slightly modified conditions. In the instant appeal, the reviewing court held that the lower court erred in the finding that the defendant had committed prior sexual offenses based on studies and statistics about sexually deviant behavior by child pornography offenders. By refusing to accept the defendant's clean past, the lower court placed the burden on him to prove that he had never committed another offense, with the suggestion that defendants might do so by submitting to a polygraph test. Resentencing was to be done by a different judge.

FAMILY

FIRST DEPARTMENT

***Matter of Royal P. (Danny P.)*, 5/16/19 – NEGLECT / NOT PROVEN BY DRUG USE**

The father appealed from an order of NY County Family Court, finding neglect. The First Department reversed and dismissed the petition. Proof that the father repeatedly misused a drug was prima facie evidence, but he rebutted the inference of neglect. The evidence failed to establish that the condition of the child was impaired or placed at imminent risk of impairment. The child was well cared for and healthy; his medical needs were addressed; and he was with a babysitter when the father used drugs or alcohol. Steven Feinman represented the appellant.

http://nycourts.gov/reporter/3dseries/2019/2019_03894.htm

SECOND DEPARTMENT

***Victor R.C.O. (Juan Angel Canales)*, 5/15/19 – SIJS / REVERSAL**

In a guardianship proceeding pursuant to Family Court Act Article 6, Nassau County Family Court granted the child's petition to have his brother appointed as his guardian, but denied the motion for SIJS relief. The child appealed. The Second Department reversed. The record showed that reunification with one or both parents was not viable due to parental neglect, and that it would not be in the child's best interests to return to Honduras. On many occasions, gang members there assaulted the boy, once causing a broken rib and scar on his head; and he had witnessed a drive-by shooting at his school that resulted in a schoolmate's death. Gang members tried to recruit the child, he refused to join, and gang members sometimes killed persons who would not join.

http://nycourts.gov/reporter/3dseries/2019/2019_03789.htm

Cynthia Feathers, Esq.

ILS Director of Quality Enhancement

For Appellate and Post-Conviction Representation

NYS Office of Indigent Legal Services

(518) 949-6131

Cynthia.Feathers@ils.ny.gov