

## CRIMINAL

### FIRST DEPARTMENT

***People v Shabazz*, 5/21/20 – RUDOLPH / VACATUR**

The defendant appealed from a judgment of NY County Supreme Court, convicting him of attempted 1<sup>st</sup> degree assault (two counts), 2<sup>nd</sup> degree CPW (two counts), and 3<sup>rd</sup> degree criminal possession of a controlled substance, and sentencing him to an aggregate term of five years. The First Department modified to the extent of vacating the sentence and remanding for a youthful offender determination. As the People conceded, based on *People v Rudolph*, 21 NY3d 497, the defendant was entitled to resentencing for an express YO determination. Legal Aid Society of NYC (Paul Wiener, of counsel) represented the appellant.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_02974.htm](http://nycourts.gov/reporter/3dseries/2020/2020_02974.htm)

### SECOND DEPARTMENT

***People v Burns*, 5/20/20 – MODIFIED / CONCURRENT**

The defendant appealed from a Queens County Supreme Court judgment, convicting her of three counts of 2<sup>nd</sup> degree manslaughter and two counts of 2<sup>nd</sup> degree assault, upon a jury verdict, and sentencing her to concurrent indeterminate terms of 5 to 15 years on the manslaughter convictions, to run consecutively to concurrent 7-year terms on the assault convictions, followed by post-release supervision. The Second Department modified. All sentences would run concurrently, since the assault and manslaughter crimes arose out of the same operative facts—the defendant’s act of recklessly driving her car into another vehicle. *See* Penal Law § 70.25 (2). Appellate Advocates (Anjali Biala, of counsel) represented the appellant.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_02933.htm](http://nycourts.gov/reporter/3dseries/2020/2020_02933.htm)

***People v Thorpe*, 5/20/20 – PEOPLE’S APPEAL / SUPPRESSION**

The People appealed from an Orange County Court order granting suppression. The Second Department affirmed. The defendant, who was charged with 2<sup>nd</sup> degree burglary and other offenses, moved to suppress physical evidence and statements. The hearing evidence established that, an hour after receiving a report of a burglary, an officer stopped the defendant as he walked in the rain in the vicinity of the crime, because he matched a description of “a suspect in dark clothing.” Earlier, the defendant had walked away from a marked police car. When the officer asked him for identification, the defendant began to put his hand in his pants pockets, and the officer stopped him and told him to place his hands on his head. The officer then saw bulges in the defendant’s pants pockets, patted the outside of his clothing, felt a bulge, put his hands into the defendant’s pockets, and pulled out a large sum of cash. The motion court properly held that, after the pat-down, the further intrusion was unlawful, since the facts did not supply probable cause.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_02941.htm](http://nycourts.gov/reporter/3dseries/2020/2020_02941.htm)

***People v Ward*, 5/20/20 – SEARCH WARRANT / VALID**

The defendant appealed from a judgment of Orange County Court, convicting him of 1<sup>st</sup> degree criminal possession of a controlled substance, upon his plea of guilty. The appeal brought up for review an order denying suppression. The Second Department affirmed. The defendant argued that the search warrant was invalid on its face because it was addressed in part to members of the Sheriff's Special Operations Group, which included corrections officers, who are not authorized to execute search warrants. *See* CPL 690.25 (1). The defendant was right that the warrant was improperly addressed to that group. But minor defects should not invalidate an otherwise valid warrant; and the limited role in the execution of the warrant played by the Special Operations Group did not invalidate the search. Such participation constituted no greater intrusion on the defendant's privacy than that authorized by the search warrant. Further, the defendant's inculpatory statement was spontaneous, not triggered by police questioning or conduct which could reasonably could have been expected to elicit a declaration.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_02943.htm](http://nycourts.gov/reporter/3dseries/2020/2020_02943.htm)

## THIRD DEPARTMENT

***People v Maldonado*, 5/21/20 – ADVERSE POSITION / VACATUR**

The defendant appealed from a judgment of Albany County Supreme Court, convicting her of 1<sup>st</sup> degree criminal sale of a controlled substance and sentencing her, as a second felony offender, to 15 years' imprisonment, plus post-release supervision. The Third Department vacated the sentence and remitted for assignment of new counsel and new proceedings. On the scheduled sentencing date, the defendant expressed dissatisfaction with counsel and moved pro se to withdraw her guilty plea. On an adjourn date, defense counsel made several statements detrimental to the defendant. A conflict of interest arose at that point; the sentencing court was required to relieve counsel. On a subsequent date, still represented by original counsel, the defendant was sentenced. Supreme Court deprived the defendant of her right to effective assistance of counsel in connection with the motion to withdraw her guilty plea. Two justices dissented. Francisco Calderon represented the appellant.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_02953.htm](http://nycourts.gov/reporter/3dseries/2020/2020_02953.htm)

***People v Dearstyne*, 5/21/20 – SUPPRESSION / NO JURISDICTION**

The defendant appealed from an order of Rensselaer County Court. Upon remittal from the Second Circuit, the trial court determined that the defendant's statements were voluntary. The Third Department dismissed the appeal. In 1986 at the age of 16, the defendant made incriminating statements regarding sexual offenses. His motion to suppress was denied, and he was convicted of several crimes after a jury trial. In 2015—19 years after affirmance of the conviction—the defendant filed a habeas corpus petition. District Court dismissed the petition, but the Second Circuit reversed and directed that the NY court adjudicate the voluntariness of the defendant's confession, including assessing whether police intentionally isolated him from his parents and engaged in coercive interrogation techniques. After a hearing, the confession was found to have been voluntary. Sua sponte, the Third Department raised the issue of appealability. In other cases where a suppression hearing occurred after entry of a judgment of conviction, the trial court was instructed to amend the judgment if the defendant did not prevail. *See e.g. People v Bilal*, 27 NY3d 961.

The Second Circuit did not so advise the remittal court. However, County Court could now amend the defendant's judgment of conviction to reflect the denial of suppression. Then the defendant could properly appeal as of right from the amended judgment.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_02951.htm](http://nycourts.gov/reporter/3dseries/2020/2020_02951.htm)

***People v Kalabakas*, 5/21/20 – HEARSAY / HARMLESS ERROR**

The defendant appealed from a judgment of Albany County Supreme Court, convicting him of multiple drugs and weapons charges. On hearsay grounds, he challenged testimony regarding the content of his iPhone, including statements attributed to a cohort. The Third Department affirmed the judgment, but agreed with the defendant that Supreme Court erred in admitting hearsay statements under the co-conspirator exception. Such evidence was admissible only where the People first made a prima facie case of conspiracy. *See People v Caban*, 5 NY3d 143. They did not do so. However, the error was harmless.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_02954.htm](http://nycourts.gov/reporter/3dseries/2020/2020_02954.htm)

## FAMILY

### FIRST DEPARTMENT

***Poppe v Poppe*, 5/21/20 – SUPERVISION / NOT NEEDED**

The mother appealed from an order of NY County Supreme Court, which denied her motion seeking to impose supervision of the father's parenting time and to set an amount of child support arrears due. The First Department affirmed. The trial court properly declined to require the supervision of visitation. The mother failed to establish that, in light of changed circumstances, it would not be in the children's best interests to adhere to the parties' settlement agreement. The father refuted allegations that his mental and physical impairments required supervision. His treating endocrinologist stated that his diabetes was well managed and did not impair him. In addition, the father submitted a U.S Tax Court opinion flowing from proceedings in which the mother represented him and raised as a defense to a tax deficiency that he suffered from Asperger's Syndrome. Thus, she was well aware of his diagnosis before the parties executed their settlement agreement. The trial court also properly declined to appoint an AFC. Regarding support arrears, the relevant provisions of the parties' agreement did not comply with the CSSA and thus were unenforceable. The mother did not include the issue of counsel fees in her notice of appeal, which limited the appeal to designated issues, so that issue was not properly before the appellate court.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_02985.htm](http://nycourts.gov/reporter/3dseries/2020/2020_02985.htm)

### SECOND DEPARTMENT

***Matter of Sultan v Khan*, 5/20/20 – SUPPORT / AFTER PAYEE'S DEATH**

The father appealed from an Orange County Family Court child support order. The Second Department affirmed. After the death of the mother, the local Support Collection Unit ceased collecting support from the father and returned wages previously garnished.

Thereafter, the maternal grandfather sought to be substituted as the support payee and enforce the support order. The Support Magistrate ordered that payments due were retroactive to the date of the petition. In objections, the grandfather urged that the date of the mother's death should instead be used. Family Court agreed. Since the obligation was owed to the child, the death of the payee spouse did not terminate the obligation. It would be contrary to the statutory scheme and public policy for the father to no longer be liable for unpaid support accrued after the mother's death, where he neither had custody nor sought to modify his support obligation.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_02929.htm](http://nycourts.gov/reporter/3dseries/2020/2020_02929.htm)

***Matter of Hodge v Hodges-Nelson*, 5/20/20 – UCCJEA / REMITTAL**

The mother appealed from an order of Queens County Family Court, which dismissed her petition to modify a 2016 custody order issued in NY, because the children had lived in Pennsylvania with the godmother since 2017. The Second Department reversed, reinstated the petition, and remitted. Under the UCCJEA, a NY court that made an initial custody determination had exclusive, continuing jurisdiction until relinquishing it. The summary dismissal was error. Upon a complete examination of the evidence, if Family Court determined that it retained jurisdiction, then the court could exercise jurisdiction or decline to do so, based on a finding that NY was an inconvenient forum. Allan Shafter represented the appellant.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_02926.htm](http://nycourts.gov/reporter/3dseries/2020/2020_02926.htm)

## **THIRD DEPARTMENT**

***Matter of Carol E. v Robert E.*, 5/21/20 –**

**HELICOPTER PARENTS / THWARTED GRANDMOTHER**

The parents appealed from an order of Rensselaer County Family Court which granted an application of the paternal grandmother of the child, born in 2014. The Third Department affirmed. For a year, the grandmother babysat for the child two days a week, until the mother cut off contact because the grandmother would not comply with the parents' stringent child care requirements. A chance encounter in 2017 revealed that the child no longer recognized the grandmother. At the hearing, the grandmother proved that she had a strong bond with the child and that she had made reasonable efforts at reconciliation during the three-year period when access was denied. Clearly, the grandmother loved the child and had provided sound care—even though she declined to fill out the detailed, daily activity reports the parents demanded. The AFC supported visitation.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_02958.htm](http://nycourts.gov/reporter/3dseries/2020/2020_02958.htm)

## RAISE THE AGE

*People v E.S.B.*, decided 4/13/20, posted 5/18/20 –

### **REMOVAL / NOT IN INTERESTS OF JUSTICE**

The juvenile offender was charged with 1<sup>st</sup> degree assault and 1<sup>st</sup> degree gang assault. Counsel moved for removal to Family Court, pursuant to CPL 722.20 and 722.22. **Nassau County Court** denied the motion. The JO conceded that the incident, an alleged act of gang violence, resulted in serious injuries. The People indicated that the JO actively participated in the violent attack and presented proof of guilt. Defense counsel argued that the JO has no criminal record. In asserting that the JO would receive a “slap on the wrist” if his case was removed, the People mischaracterized the role of the Family Court and the potential dispositions available, the defense also urged. The court agreed with that point, but found that the JO failed to establish that removal was warranted, in light of the seriousness of the offenses, allegations that he violently kicked the complainant in the head, and the extent of the injuries caused.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_20112.htm](http://nycourts.gov/reporter/3dseries/2020/2020_20112.htm)

*People v K.F.*, decided 4/8/20, posted 5/18/20 –

### **EXTRAORDINARY CIRCUMSTANCES / NO REMOVAL**

The adolescent offender was charged with 1<sup>st</sup> degree robbery and 1<sup>st</sup> degree assault. The People filed a CPL 722.23 motion opposing removal, based on “extraordinary circumstances.” **Nassau County Court** determined that the case should be kept in the Youth Part. “Extraordinary circumstances” meant exceptional and highly unusual facts—a standard met only in rare cases. The court found several aggravating factors: the debilitating injuries sustained by the victim; the AO’s role in setting up and overseeing the drug sale meeting; and the victim’s sworn statement that the AO took advantage of his vulnerability to grab his money and flee the scene, while the victim and co-defendant continued a violent fight. Such factors outweighed the sole mitigating factor—that this was the AO’s only interaction with the criminal justice system.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_50562.htm](http://nycourts.gov/reporter/3dseries/2020/2020_50562.htm)

*People v M.M.H.*, decided 4/28/20, posted 5/18/20 –

### **EXTRAORDINARY CIRCUMSTANCES / NO REMOVAL**

The AO was charged with 2<sup>nd</sup> and 3<sup>rd</sup> degree CPW and criminal possession of a firearm. The People opposed removal, and **Nassau County Court** concluded that the case would remain in the Youth Part. In addition to the instant case, the AO also had a pending gang-related criminal matter. Since that incident occurred before the RTA went into effect, the AO was being prosecuted as an adult. He awaited sentencing after having pleaded guilty to attempted 1<sup>st</sup> degree assault. The criminal court judge had promised to adjudicate him as a YO, unless he was re-arrested prior to sentencing. In the instant case, a detective allegedly observed the AO—in an area known for gang activity—placing a silver handgun near the rear tire of a parked vehicle. The court rejected the People’s arguments that the AO’s Family Court records could be considered; but it had significant concerns about the AO’s conduct. After being offered leniency in the criminal matter, the AO was arrested again. He was unlikely to be amenable to services provided in Family Court and was likely to thwart efforts at rehabilitation. The court also considered Probation’s report regarding

the AO's many school suspensions, his failure to take advantage of services, and his father's inability to supervise him. The AO did not present mitigating factors.  
[http://nycourts.gov/reporter/3dseries/2020/2020\\_50563.htm](http://nycourts.gov/reporter/3dseries/2020/2020_50563.htm)