

CRIMINAL

FIRST DEPARTMENT

DECISION OF THE WEEK

Matter of People ex rel. Stoughton v Brann, 7/23/20 –

HABEAS CORPUS / INDIVIDUALIZED ASSESSMENTS

The First Department affirmed orders of NY and Bronx County Supreme Court, denying petitions for writs of habeas corpus. The two “mass” proceedings were brought on behalf of defendants incarcerated on Rikers Island, some of whom were awaiting trial, while others had been convicted and were alleged to have violated conditions of parole. The appellate court held that the petitioners failed to establish any violations under the U.S. or State Constitution and concluded: “It would be the better practice for habeas courts reviewing future cases while the pandemic persists to perform individualized assessments of those who petition the court for release [and]...consider, at the very least, each petitioner’s risk of flight as assessed by the state, the particular health factors asserted by the petitioner as documented by appropriate medical records and physician affirmations where practical, the specific conditions of the petitioner’s confinement at the time the petition is filed, and the environment into which the petitioner will be released and whether there is a plan in place to protect that person from contracting the virus and to monitor their health. With that data, courts hearing similar petitions will be in a good position to balance the competing interests at issue, and make decisions that recognize the potentially serious implications of confinement on detainees with underlying health conditions, but at the same time ensure the State’s ability to enforce the law against those who might not return to face justice once released.”

http://nycourts.gov/reporter/3dseries/2020/2020_04236.htm

People v Blue, 7/23/20 – **SPEEDY TRIAL / REMAND**

The defendant appealed from a 2018 order of NY County Supreme Court, which denied his CPL 440.10 motion. In the motion, he urged that his CPL 30.30 and constitutional rights to a speedy trial were violated, based on the passage of more than two years between the filing of the indictment and the People’s certificate of readiness. Supreme Court analyzed only the statutory speedy trial issue. Therefore, the First Department remanded for consideration of the constitutional argument. Pending the outcome, the appellate court held in abeyance the defendant’s appeal from the underlying 2015 judgment, convicting him of 2nd degree burglary (five counts) and sentencing him to an aggregate term of 25 years. The Office of the Appellate Defender (Christina Swarns and Joseph M. DaSilva, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2020/2020_04231.htm

APPELLATE TERM – FIRST DEPARTMENT

People v Matias, decided 7/16/20, posted 7/22/20 –

DISSENT / RARE CASE / INTEREST OF JUSTICE

The defendant appealed from a judgment of NY County Criminal Court, convicting him of public lewdness and exposure of a person. The Appellate Term, First Department affirmed. One judge dissented, invoking the court's broad interest-of-justice power to vacate a conviction where there is a grave risk that an innocent person has been convicted. *See* CPL 470.15 (3), (6); *People v Carter*, 63 NY2d 530, 536. The conviction rested on the complainant's uncorroborated testimony that, on a crowded subway train, the defendant exposed himself and openly masturbated while sitting next to the complainant and talking to his work supervisor, who was seated perpendicular to the complainant. The scenario was implausible, and the complainant's testimony was inconsistent and lacked detail. Further, the defendant's supervisor disputed the complainant's story in consistent, detailed, and more believable testimony.

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THIRD DEPARTMENT

People v Persen, 7/23/20 –

SENTENCE REDUCED / MINIMAL HISTORY, STEADY JOBS

The defendant appealed from a judgment of Fulton County Court, convicting him of 3rd degree CPW and 2nd degree menacing. The Third Department reduced the CPW sentence from 1½-4½ years in state prison to time served. The presentence investigation report recommended local jail time, based on the circumstances of the crime, the defendant's minimal criminal history, his status as a crime victim, certain mental health issues, his history of steady employment, and his close familial relationships. While otherwise affirming, the appellate court found that the lower court erred in denying suppression of a knife as the product of a search incident to an unlawful arrest for disorderly conduct. The People's suppression proof did not establish reasonable cause to believe that the defendant intended to cause public inconvenience, annoyance or alarm. Upset after the stabbing of his son, the defendant made disruptive statements in a tense exchange with the arresting officer. But there was no proof of public harm, so the arrest was invalid. Defense counsel was ineffective. At the suppression hearing, counsel asked only four questions, waived closing argument, and declined to submit a post-hearing memo; and the sole suppression argument in defense papers was premised on factually inaccurate information. Notwithstanding County Court's suppression error and counsel's defective performance, a new trial was not warranted in light of the overwhelming proof of guilt. There was no reasonable possibility that the constitutional errors might have contributed to the convictions. The Rural Law Center of NY (Keith Schockmel, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2020/2020_04204.htm

People v Rodriguez, 7/23/20 – **RESTITUTION / VACATED**

The defendant appealed from a judgment of Schenectady County Supreme Court, convicting him of attempted 3rd degree criminal sale of a controlled substance. Under the terms of the plea agreement, the defendant was required to serve time and to pay restitution. The appeal waiver was invalid. The plea court did not ensure that the defendant appreciated the rights he was relinquishing or understood the consequences of doing so. The written waiver stated that he was foreclosed from

pursuing collateral remedies. However, the sentence was not harsh and excessive. During sentencing, Supreme Court did not mention the amount of restitution, and in its order, the court committed a clerical error as to the amount. To correct the error, and because the court failed to set forth the time and manner for payment, the restitution order was vacated and the matter remitted for a new order. Martin McGuinness represented the appellant.

http://nycourts.gov/reporter/3dseries/2020/2020_04205.htm

***People v Burt*, 7/23/20 – ANDERS BRIEF / NEW COUNSEL**

The defendant appealed from a judgment of Schenectady County Court, convicting him of attempted 3rd degree criminal sale of a controlled substance. Appellate counsel filed an *Anders* brief. The Third Department found at least one issue of arguable merit regarding the validity of the appeal waiver, which might impact other issues that could be raised, such as the severity of the sentence. Thus, the appellate court assigned new counsel.

http://nycourts.gov/reporter/3dseries/2020/2020_04208.htm

SECOND CIRCUIT

***USA v Solano*, 7/22/20 – JURY CHARGE / MOTIVE TO LIE / PLAIN ERROR**

The defendant appealed from a District Court–EDNY judgment, convicting him of attempted possession of cocaine with intent to distribute. The Second Circuit vacated and remanded. The trial court erred by instructing the jury that “any” witness with “an interest in the outcome” of the trial had “a motive to testify falsely.” The prosecution arose out of events involving the defendant, a commercial truck driver. He was followed by law enforcement surveillance vehicles after he picked up a sealed container. The trial turned on whether he knew that the container held narcotics. The defendant did not object to the jury charge, but the issue could be reviewed because it involved a plain error affecting substantial rights. The appellate court had previously held that it was error to instruct a jury that a defendant’s interest in the outcome of a case created a motive to falsely testify; such charge eroded the presumption of evidence. There was a reasonable probability that this defendant was prejudiced by the errant instruction. The case turned on credibility assessments; and considerable circumstantial evidence supported his plausible testimony that he did not know that the container contained drugs.

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***United States v Diaz*, 7/22/20 –**

SEX OFFENDER REGISTRATION / CONCURRENCE / PUNITIVE

The defendant appealed from a judgment of District Court–SDNY, convicting him of failing to register as a sex offender under the Sex Offender Registration and Notification Act. The Second Circuit affirmed. A concurring opinion labeled as “quite mistaken” the controlling authority finding non-punitive SORNA and its equivalents. Instead, such public notification statutes were the “modern equivalent of branding and shaming.” Legislators were counting on the “invisible whip of public opinion” to deter future sex offenses. Sex offenders were banished literally and psychologically; could be forced to relocate to

different towns or states; and were often prevented from finding a home, getting a job, and reintegrating into society.

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Cynthia Feathers, Esq.

ILS | NYS Office of Indigent Legal Services

Director, Quality Enhancement for Appellate

And Post-Conviction Representation

80 S. Swan St., Suite 1147, Albany, NY 12210

(518) 949-6131 | Cynthia.Feathers@ils.ny.gov