CRIMINAL

SECOND DEPARTMENT

DECISION OF THE WEEK

People v Carlson, 8/22/18 – MANSLAUGHTER OVERTURNED / JURY POOL TAINTED

For several months prior to his death, the victim occupied a cabin near the defendant's rural Orange County farm, and the men became acquainted. After a night of drinking, the victim confessed to the defendant that there was a warrant for his arrest in connection with the rape of a minor. Subsequently, the defendant was asked to help police apprehend the victim. When the victim appeared at the defendant's home and accused him of assisting the police, an altercation ensued. The defendant shot the victim fatally in the head and was indicted on murder and manslaughter charges. During jury selection, the prosecutor repeatedly used the term "statutory rape" to describe the victim's alleged criminal conduct. The defendant objected. His defense was based on justification, and he was concerned that the term "statutory rape" may have been interpreted by jurors to imply that the victim was not violent. County Court failed to issue curative instructions to the entire jury pool, and the defendant was subsequently convicted of 1st degree manslaughter. The Second Department held that the failure to properly instruct the jury pool deprived the defendant of his fundamental right to a fair trial. Thus, the conviction was reversed, and a new trial was ordered. Benjamin Ostrer represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_05859.htm

People v Bailey, 8/22/18 – ANONYMOUS TIP / SUPPRESSION

An anonymous tipster told police about a man with a gun. That led police to stop a vehicle and order the defendant out of the car at gunpoint. A firearm was recovered during a frisk of the defendant. Following a jury trial, he was convicted of weapon possession charges. The Second Department held that police lacked reasonable suspicion to stop the vehicle based only on the anonymous tip from an individual who did not say how he knew about the gun and did not supply any basis for police to believe that he had inside information about the defendant. Thus, the firearm should have been suppressed. The Queens County convictions were reversed, and the charges were dismissed. Appellate Advocates (Michael Arthus, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_05856.htm

People v Novotny, 8/22/18 – SENTENCE / SIGNIFICANT REDUCTION

In Putnam County, the defendant was charged under two SCI's with 3rd degree criminal possession of a controlled substance. Upon his pleas of guilty, he was sentenced to two consecutive seven-year terms, plus two years' post-release supervision, and a $5,000 fine as to one of the counts. The Second Department found that the defendant's purported waivers of his right to appeal were unenforceable. In light of his age and lack of experience with the criminal justice system, the colloquies were insufficient. Thus, the appellate court reviewed the defendant's contention that his sentence was excessive. After he violated his plea agreements by failing to successfully complete drug treatment, the County Court was required to impose appropriate sentences. However, given the plea offers originally extended, the defendant's personal circumstances, the nature of his crimes, and the Probation Department's recommendation of probation, the sentence was excessive. The appellate court reduced the determinate terms to four years, served concurrently, and vacated the fine. Yasmin Daley Duncan represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_05870.htm

THIRD DEPARMENT

People v Pendell, 8/23/18 – **SEXUAL OFFENSES DISMISSED / DISSENT ON PHOTOS**
The defendant, then 48 years old, was charged with various crimes based on sexual contact with a 14-year-old girl he met through an online adult dating service. While awaiting prosecution, he approached another inmate about having the victim murdered. A second indictment ensued, and the indictments were consolidated. Following a jury trial in Columbia County Court, the defendant was convicted of 2nd degree rape (nine counts), 2nd degree criminal sexual act, possessing a sexual performance by a child (four counts), and 2nd degree criminal solicitation. On appeal, he argued that the convictions for possessing a sexual performance were not supported by legally sufficient evidence because the underlying photographs did not depict genitalia. Pursuant to the relevant statutory provision, sexual conduct means the lewd exhibition of the genitals. Since the photographs relevant to three counts depicted only the victim's bare chest, the Third Department dismissed such counts. The majority rejected arguments that consolidation of the indictments was improper; the evidence of crimes in each indictment was material and admissible in the trial on the charges in the other indictment. In a lengthy dissent, one justice observed that the People failed to establish that the photographs admitted were true, accurate, and unaltered reproductions of those recovered from the defendant's cell phone and computer. Such testimony was crucial, given that photographs are vulnerable to manipulation. By not demanding strict adherence to foundational requirements, County Court abdicated its role as gatekeeper. The rules of evidence were meant to protect the criminally accused from prejudice and to safeguard the integrity of the truth-finding process. The photographs played a central role in the People's overall case, since the substantive questioning of all of witnesses was "shockingly minimal," the dissenter stated. Matthew Hug represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_05899.htm

SECOND CIRCUIT

United States v Lloyd, 8/20/18 – **PLEA ERROR / HARMLESS**
The defendant pleaded guilty in District Court – Northern District to possession of a firearm in furtherance of a drug trafficking crime, as well as to a drug charge. On appeal, he contended that the plea colloquy regarding the firearm charge was defective, and sought to vacate the plea. The Second Circuit held that District Court erred in failing to ensure that the defendant understood the nature of the charge. The court did not read the elements of the crime or invite the defendant to describe in his own words what he did; and the government did not alert the court to deficiencies in the allocution. These were significant failures, the appellate court stated, expressing concerns about "the tendency of some courts…to stray from rigorous compliance with the Rule [Rule 11 governing the entry of guilty pleas]." The reviewing court urged "the District Court in the strongest possible terms to take steps…to ensure…compliance with Rule 11 and to avoid casting unnecessary doubt on the voluntary and knowing nature of the guilty pleas it accepts." However, there was no reasonable probability that, but for the error, this defendant would not have entered the guilty plea. The defendant also contended that the trial court failed to determine that there was a sufficient factual basis for the plea. The reviewing court rejected such assertion, finding relevant facts in admissions made at the change-of-plea hearing and in the presentence report.
http://www.ca2.uscourts.gov/decisions

United States v Zodhiates, 8/21/18 – **CELL PHONE RECORDS / "GOOD FAITH" EXCEPTION**
The parents were civil union partners and had one child, age seven. The civil union was dissolved; and parent A, the biological mother, was awarded custody. She thwarted parental access by parent B. After custody was transferred to parent B, parent A fled with the child to Nicaragua. The defendant was convicted in District Court – Western District of conspiring with a parent A to take the child out of the country in order to obstruct the exercise of parental rights by parent B, in violation of the International Parental Kidnapping Crime Act. The defendant contended that the trial court erred in declining to suppress inculpatory information garnered from his cell phone records via a subpoena under the Stored Communications Act. During the pendency of the appeal, *Carpenter v United States*, 138 S Ct 2206, held that an individual maintains a legitimate expectation of privacy in the record of his physical movements, as captured through cell service location information, and thus a warrant is generally needed to obtain such information. In the instant case, the Second Circuit observed that the "good faith" exception covered searches conducted in objectively reasonable reliance on appellate precedent existing at the time of the search. At the relevant time, the third-party doctrine permitted the government to obtain the phone bill records by subpoena. Thus, the appellate court upheld the denial of suppression.
http://www.ca2.uscourts.gov/decisions

FAMILY

FIRST DEPARTMENT

Matter of Alexander Z. (Anne Z.), 8/23/18 – **NEGLECT UPHELD / PRECEDENT CLARIFIED**
The mother appealed from a Family Court Act Article 10 order of disposition of New York County Family Court. The appeal brought up for review a fact-finding order, which held that she had neglected the subject children. The First Department held that a preponderance of the evidence supported the finding of neglect. Contrary to the mother's contention, she did not negate neglect by participating in rehabilitative programs after the petitions were filed. In any event, the mother had absented herself from the fact-finding hearing and failed to present any evidence on her own behalf, permitting the court to draw the strongest negative inference against her. Letters attesting to her participation in outpatient therapy and counseling were submitted to the court after it had already issued its neglect finding, but were properly considered in the dispositional order. The First Department's holding in *Matter of Iris B.*, 304 AD2d 301, upon which the mother relied, was inapplicable. In *Iris B.*, the appellate court cited the respondent's voluntary, regular participation in a rehabilitative program *at the time of the fact-finding hearing* in finding that there was no indication of imminent danger to the child's welfare by reason of her drug abuse. Although not reflected in the *Iris B.* decision, that respondent was a resident of a rehabilitative facility *at the time the neglect petition was filed*, as revealed by a review of that record by the *Alexander Z.* court. Moreover, the *Iris B.* fact-finding hearing occurred within two months of the filing of the petition, not two years later, as in the instant case.
http://nycourts.gov/reporter/3dseries/2018/2018_05904.htm

SECOND DEPARTMENT

Matter of Puyi Tam v Lubatkin, 8/22/18 – **RELIEF SOUGHT / DEFECTIVE SERVICE WAIVED**
The mother commenced a UIFSA proceeding in Kings County Family Court seeking an order of filiation and support. The NYC Corporation Counsel effectuated personal service on the respondent prior to and at the first appearance in Family Court. The copies of the petition served omitted several attachments. At the first appearance, the respondent affirmatively waived jurisdictional defenses. He later became aware of the apparent defect and requested missing exhibits. Although he did not receive the exhibits, he continued to participate in the proceedings without objecting. The personal jurisdiction issue did not emerge until more than a year later, when the court sua sponte halted an evidentiary hearing and directed the parties to submit briefs on the matter. The respondent then sought to dismiss the petition, and Family Court granted the motion. The mother and the child appealed. The Second Department reversed and remitted. By affirmatively seeking relief and participating in the proceedings, despite his awareness of the defect in service, the respondent waived his claim regarding personal jurisdiction.
http://nycourts.gov/reporter/3dseries/2018/2018_05850.htm

Matter of Malachi M. (Mark M.), 8/22/18 – **VERBAL ABUSE / NO NEGLECT**
The Second Department disagreed with a finding by Kings County Family Court that the father neglected a child for whom he was legally responsible by verbally abusing the mother. While it was inappropriate for the adults to argue in the boy's presence, the evidence was insufficient to establish that, because of the verbal abuse, the child's physical, mental, or emotional condition was impaired or in imminent danger becoming impaired. Additionally, the child's out-of-court statement that he did not feel safe being alone with the father was not corroborated by additional evidence and was insufficient to support the finding of neglect. Catherine Bridge represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_05846.htm

Matter of Hugee v Gadsden, 8/22/18 – **CUSTODY CASE / *ANDERS* BRIEF REJECTED**
In a Kings County Family Court custody case, the mother's assigned attorney filed an *Anders* brief and sought to be relieved. Counsel was relieved. However, upon an independent review of the record, the Second Department concluded that a non-frivolous issue existed as to whether the Family Court erred in granting the father's motion, at the close of the mother's case, to dismiss her petition for failure to make out a prima facie showing of changed circumstances since the prior custody order. A review of the record by the Appellate Division could not substitute for "the single-minded advocacy of appellate counsel." Therefore, new counsel was assigned.
http://nycourts.gov/reporter/3dseries/2018/2018_05844.htm

FOURTH DEPARTMENT

Matter of Nevin H. (Stephanie H.), 8/22/18 – **DOMESTIC VIOLENCE / NO NEGLECT**
The mother appealed from an order of Onondaga County Family Court, which found that she neglected the subject children. She contended that the evidence was legally insufficient, and the Fourth Department agreed. The petitioner agency alleged that the mother neglected the children by exposing them to domestic violence. She allowed her paramour into her house several times, despite his history of violence against her; and in the presence of the children, she was again subjected to domestic violence. While exposure of children to domestic violence may form the basis for a neglect finding, there must be proof of actual harm, or imminent danger of harm, to the children. *See Nicholson v Scoppetta*, 3 NY3d 357. In this case, the proof only showed that the children were present when the domestic violence occurred, but did not prove impairment, or imminent danger of impairment, of the children. The appellate court reversed and dismissed the petition. Hiscock Legal Aid Society (Philip Rothschild, of counsel) represented the mother.
http://nycourts.gov/reporter/3dseries/2018/2018_05891.htm

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