CRIMINAL

COURT OF APPEALS

DECISION OF THE WEEK

People v Hardy, 10/15/20 – **INFORMATION / NO FACTUAL AMENDMENT**

The Court of Appeals held that the lower courts erred in permitting the amendment of an erroneous date in an information, which failed to allege that the subject crime occurred within the duration of the underlying order of protection. The Appellate Term affirmed a conviction for criminal contempt, finding that courts had the inherent authority to permit factual amendments that did not surprise or prejudice the defendant. *See People v Easton,* 307 NY 336. That was error. Thus, the challenged order was reversed, and the amended information was dismissed. *Easton* interpreted amendments under a defunct statutory landscape. The instant matter was governed by the CPL, which sets forth clear rules for amending each type of accusatory instrument. For complaints and informations, the Legislature did not permit factual amendments regarding time, place, or names. That made sense. Such instruments commenced a criminal action based on an affiant who was not an officer of the court and whose testimony had not been vetted by a grand jury. Thus, only an affiant should be permitted to alter the factual allegations. The instant amendment implicated a fundamental defect and presented a nonwaivable jurisdictional issue. Judge Wilson authored the majority opinion. Judge Garcia dissented, opining that a typographical error was properly corrected and did not rise to the level of a jurisdictional defect. Judge Rivera separately dissented, opining that a reviewable issue was presented, but agreeing with Appellate Term's reasoning. Appellate Advocates (Ronald Zapata, of counsel) represented the appellant.

http://www.nycourts.gov/reporter/3dseries/2020/2020_05803.htm

FIRST DEPARTMENT

People v Ford, 10/15/20 –

UNANIMOUS VERDICT? / REVERSED / INTEREST OF JUSTICE

The defendant appealed from a Bronx County Supreme Court judgment, convicting him of 1st degree manslaughter. The First Department reversed in the interest of justice and ordered a new trial. Upon consent, the trial court rejected a verdict of guilty of the lesser included offense of 2nd degree manslaughter, based on a verdict sheet notation that the vote on that count was divided. That was error. The court should have polled the jury to see if the guilty verdict—which was announced in court by the foreperson—was unanimous. Under these circumstances, the later guilty verdict as to the greater offense should not be allowed to stand. The Office of the Appellate Defender (Anastasia Heeger, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2020/2020_05824.htm

People v Herbin, 10/13/20 –
PREDICATE FELONY / REVERSED / INTEREST OF JUSTICE
The defendant appealed from a NY County Supreme Court judgment, convicting him of certain drug crimes and sentencing him as a second felony offender. The First Department modified. Because the predicate felony had been reversed, the defendant sought vacatur of the sentence. Such claim was not preserved and should have been presented in a CPL 440.20 motion, but relief was granted in the interest of justice. The Center for Appellate Litigation (Arielle Reid, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_05701.htm

People v Sylvester, 10/13/20 – **PREDICATE FELONY / EQUIVALENT**
The defendant appealed from a judgment of resentence, rendered by NY County Supreme Court, for a drug possession felony. The First Department affirmed. The plea court properly adjudicated the defendant a second felony drug offender. His federal robbery conviction was equivalent to NY larceny by extortion. Both statutes required proof that a defendant intended to commit a larceny and to permanently deprive the victim of property. Further, the defendant's prior North Carolina conviction was akin to our 3rd degree burglary. Although only our statute included the word "knowingly", a NC prosecutor was required to show that the defendant lacked permission to enter or a good-faith belief that he had consent to do so.
http://nycourts.gov/reporter/3dseries/2020/2020_05702.htm

People v Anonymous, 10/13/20 – **AMMUNITION / DISMISSED**
The defendant appealed from a judgment of NY County Supreme Court, convicting him of unlawful possession of ammunition, unlawful possession of marijuana, and other offenses. The First Department modified. Under the NYC Admin. Code, the People had to prove that the defendant was not authorized to possess a pistol or revolver. They failed to do so; the ammunition count was dismissed. By operation of CPL 160.50 (5), the marijuana charge was also dismissed. The Center for Appellate Litigation (Anjali Pathmanathan, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_05689.htm

People v Perez, 10/13/20 – **COUNSEL / NOT ADVERSE**
The defendant appealed from a judgment of NY County Supreme Court, convicting him of 2nd degree robbery. The First Department affirmed. At sentencing, counsel expressed surprise that, per the presentencing report, the defendant was dissatisfied with the guilty plea. Such comment did not disparage the defendant's desire to withdraw his plea, expressed in a Probation interview.
http://nycourts.gov/reporter/3dseries/2020/2020_05698.htm

People v Harley, 10/15/20 – **440.10 MOTION / NOT NEW EVIDENCE**
The defendant appealed from a Bronx County Supreme Court order, which summarily denied his CPL 440.10 motion to vacate a judgment convicting him of 1st degree robbery and 2nd degree assault. The First Department affirmed. Defense counsel had interviewed the witness at issue shortly after the defendant's arrest. Even if her proposed testimony was

new evidence, it was only vaguely exculpatory and too tenuous to create the required probability of a different verdict.
http://nycourts.gov/reporter/3dseries/2020/2020_05823.htm

SECOND DEPARTMENT

People v Jerome Smith, 10/14/20 – **PHYSICAL INJURY / INSUFFICIENT PROOF**
The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 1st degree burglary, 2nd degree robbery, and other crimes. The Second Department modified. There was legally insufficient evidence to establish physical injury. The complainant said that she had a cut on her neck and scratches on her wrist and felt a little sore. The jury could not properly infer that she suffered substantial pain or impairment of her physical condition. The above-named convictions had to be reduced to 2nd degree burglary and 3rd degree robbery. The defendant should not have been adjudicated a persistent violent felony offender, since the People failed to establish that the 10-year period, between the sentence imposed for a prior felony in May 1992 and the present felony in October 2015, was sufficiently tolled. The defendant's claim that he was improperly frisked had merit. There was no evidence that the officer had a reasonable suspicion that the defendant was armed or posed a threat. While police received a report of a nearby burglary and the defendant matched the description of the perpetrator, there was no evidence that the crime involved a weapon and the perpetrator was armed. Even if the frisk was justified, the search of the defendant's pocket was not. But the error was harmless. Appellate Advocates (Alice Cullina, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_05782.htm

People v Jones, 10/14/20 – **31-MONTH DELAY / DUE PROCESS**
The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 1st degree robbery. The Second Department affirmed, rejecting the defendant's contention that his due process rights to a prompt prosecution and speedy trial were violated by the 31-month delay between discovery of the DNA evidence linking him to the robbery and his arrest. The right to prompt prosecution was equated with the constitutional right to a speedy trial and involved an examination of the extent of, and reason for, the delay; the nature of the charge; and whether there was a long period of pretrial incarceration and the defense was thereby impaired. The delay here was substantial. But the offense was serious; the defendant was not incarcerated on the instant charges; and he did not sustain any prejudice.
http://nycourts.gov/reporter/3dseries/2020/2020_05774.htm

People v Jermaine Smith, 10/14/20 – **JOINDER / COMPLETE NARRATIVE**
The defendant appealed from a judgment of Kings County Supreme Court convicting him of 2nd degree robbery, 3rd degree assault, and another crime. He was acquitted of a charge relating to a second robbery. The Second Department affirmed. Supreme Court properly denied the defendant's CPL 200.20 motion to sever; the joinder of both robberies in a single indictment was proper to complete the narrative of all the events charged and provide necessary background information. The jury instruction on robbery was erroneous, as the defendant urged. However, the effect of the error was to impose a higher burden on the

People. It was inappropriate for the prosecutor to interrupt the defense summation; the matter she sought to raise at a sidebar did not justify the disruption. However, the defendant was not deprived of a fair trial.
http://nycourts.gov/reporter/3dseries/2020/2020_05781.htm

FAMILY

FIRST DEPARTMENT

M/O Samiyah H. (Sammie H.), 10/15/20 – **DERIVATIVE NEGLECT / SOUND PROOF**
The respondents appealed from an order of fact-finding and disposition of Bronx County Family Court, which found that they derivatively neglected the older siblings of a neglected child. The First Department affirmed. As to the older children, the record contained the file of the relevant child-welfare agency regarding proceedings in Connecticut. The respondents objected that such evidence lacked a proper foundation, but the file was properly certified. Another objection by the respondents was that that the documents contained hearsay, yet they failed to identify the inadmissible hearsay allegedly relied upon by Family Court. Any error in the wholesale admission of the file was harmless because of the ample non-hearsay evidence, including unquestionably admissible CT court orders.
http://nycourts.gov/reporter/3dseries/2020/2020_05812.htm

SECOND DEPARTMENT

M/O Fouyalle v Jackson, 10/14/20 – **CUSTODY REVERSED / HEARING**
The father appealed from an order of Nassau County Family Court, which granted the mother's custody modification petition and denied his petition to enforce the prior order. The Second Department reversed and remitted. Custody determinations should generally be made only after a full hearing. Here the record demonstrated disputed factual issues so as to require an evidentiary hearing regarding the father's parental access. Further, in indefinitely suspending his access, the trial court improperly relied on hearsay statements and conclusions of the forensic evaluator and the children's therapist, whose opinions and credibility were untested by the parties. Hani Moskowitz represented the father.
http://nycourts.gov/reporter/3dseries/2020/2020_05749.htm

M/O Quevedo v Overholser, 10/14/20 – **NC ORDER / NO JURISDICTION**
The mother appealed from an order of Queens County Family Court, dismissing her petition to modify a North Carolina order. The Second Department affirmed. The NC order awarded custody of the subject child to the maternal grandmother, and the mother now sought custody. Family Court properly found that it lacked subject matter jurisdiction, after communicating with the NC Carolina court and learning that a custody petition remained pending there, and giving the parties an opportunity to make arguments about jurisdiction.
http://nycourts.gov/reporter/3dseries/2020/2020_05760.htm