CRIMINAL

COURT OF APPEALS

DECISION OF THE WEEK

People v Neulander, 10/22/19 –

PEOPLE'S APPEAL / EGREGIOUS JUROR MISCONDUCT

Juror misconduct warranted reversal of a murder conviction The Fourth Department properly reversed an Onondaga County Court order denying a CPL 330.30 motion to set aside the verdict on the basis of the misconduct. So held a unanimous Court of Appeals, in an opinion authored by Judge Wilson. Juror 12 exchanged hundreds of texts about the case. After being selected to serve, she received a text from her father: "Make sure he's guilty!" During trial, a friend texted to ask if juror 12 had seen "the scary person" (i.e. the defendant). Another friend texted, "I'm so anxious to hear someone testify against Jenna (the defendant's daughter)," and, "My mind is blown that the daughter isn't a suspect." Juror 12 repeatedly lied to hide her misconduct. The COA rejected the contention that the misconduct was outweighed by the proof of guilt. Affirming a conviction where a juror engaged in dishonesty of such magnitude would undermine the public's confidence in the fairness of trials. Alexandra Shapiro represented the respondent.
http://www.nycourts.gov/reporter/3dseries/2019/2019_07521.htm

People v Deleon, 10/22/19 –

LARCENY / MAILBOX FISHING / INSUFFICIENT PROOF

The evidence before a Bronx County grand jury indicated that the defendant was apprehended before he extracted a "fishing" device—a water bottle coated in a sticky substance so that envelopes would adhere to it—from a mail collection box, into which a task force had furtively inserted two envelopes containing money orders worth more than $3,000. There was no proof that a money order stuck to the device. Supreme Court dismissed a count charging attempted 3rd degree grand larceny and reduced to attempted petit larceny the charge for attempted 4th degree grand larceny, on the ground that the People failed to present the requisite proof of intent with regard to the property value elements of the crimes. The First Department reversed, reinstating the original charges. That was error, the COA held in a unanimous memorandum opinion. The charges required proof that the defendant came dangerously near commission of the completed crime, which meant taking property worth more than $3,000 or $1,000. However, there was no evidence demonstrating: the monetary value of items attached to the fishing device; the volume of mail in the mailbox; the defendant's ability to procure the money orders; the immediate reusability of the device; or any intent by the defendant to keep "fishing." The Legal Aid of NYC (Andrea Yacka-Bible, of counsel) represented the appellant. *[In an Oct. 22 NY Law Journal article, counsel was quoted as stating that the decision was a win for low-income defendants. "This is a classic example of prosecutors overcharging our clients with crimes that expose them to harsh state prison sentences."]*
http://www.nycourts.gov/reporter/3dseries/2019/2019_07522.htm

People v Rodriguez, 10/24/19 –
LARCENY / STOLEN CHECK / SUFFICIENT PROOF
At issue in the appeal was the sufficiency of evidence to establish 3rd degree grand larceny of proceeds of a stolen check, where the defendant exercised dominion and control over the funds, deposited by another person into his bank account, but not over the check itself. The COA affirmed a First Department order upholding the NY County Supreme Court judgment of conviction.
http://www.nycourts.gov/reporter/3dseries/2019/2019_07644.htm

People v Cubero, 10/24/19 – **JUSTICE CENTER / NO QUESTION OF LAW**
In a prosecution by the Justice Center for the Protection of People with Special Needs, the defendant was convicted in Sullivan County Court of several counts, including 1st degree endangering the welfare of an incompetent or physically disabled person. Defense counsel did not interpose a constitutional challenge to Executive Law § 552, which created the Justice Center and vested it with the authority to prosecute crimes involving abuse or neglect of persons with disabilities. The appellate record was silent as to whether the DA granted the special prosecutor authority to prosecute this case, so as to render the proceedings constitutional. The Third Department declined to remit for fact-findings and affirmed the conviction. A dissenting justice opined that the Appellate Division had inherent authority to remit for further proceedings to develop the record on the issue of the DA's consent The COA affirmed. The appeal presented no reviewable question of law, and the alleged ineffective assistance argument was better addressed in a CPL 440.10 motion. In a concurring opinion, Judge Rivera observed that the appeal presented a reviewable question of law—whether the Appellate Division may remit to create a record so as to reach a defendant's unpreserved claim.
http://www.nycourts.gov/reporter/3dseries/2019/2019_07641.htm

People v Allende, 10/22/19 – **PEOPLE'S APPEAL / NO QUESTION OF LAW**
In an appeal from a NY County conviction, the First Department held that the evidence did not establish the display of what appeared to be a firearm as to the conviction of 1st degree robbery. The COA dismissed the People's appeal on jurisdictional grounds. CPL 450.90 provides that an appeal to the COA from an intermediate appellate court order reversing or modifying a judgment of conviction may be taken only if the reversal or modification was on the law alone or upon the law and such facts which, but for the determination of law, would not have led to reversal or modification. The challenged order, which was based on an unpreserved issue, did not fit within that provision; and the Appellate Division's characterization of its own holding was not binding. Judges Rivera and Wilson dissented. The Center for Appellate Litigation (Megan Byrne, of counsel) represented the respondent.
http://www.nycourts.gov/reporter/3dseries/2019/2019_07523.htm

FIRST DEPARTMENT

People v Calderon, 10/24/19 – ***VENTIMIGLIA* / NEW FACTS / MATERIAL STAGE**
The defendant appealed from a judgment of NY County Supreme Court, convicting him of 2nd degree assault and other crimes. The First Department reversed and ordered a new trial and a de novo *Ventimiglia* hearing. The defendant's absence from the pretrial hearing violated his right to be present at all material stages of trial, including ancillary proceedings. The trial court conducted an initial *Ventimiglia* hearing to address the prosecution's *Molineux* application, but postponed issuance of a ruling. When the trial court was set to issue its ruling, defense counsel stated that the defendant should be present. The People sought to include new factual details, regarding a prior assault by the defendant against a former girlfriend that were purportedly critical for the jury to understand why the instant victim feared him. The trial court allowed the prosecutor to elicit testimony from the witness. In light of the new facts, the defendant should have been given the opportunity to be present. He was in the best position to deny the new facts or present details to aid his defense. The Legal Aid Society of NYC (Allen Fallek, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_07707.htm

SECOND DEPARTMENT

People v Smith, 10/23/19 – **MISTRIAL / NO MANIFEST NECESSITY**
The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 2nd degree CPW and another crime. The Second Department reversed and dismissed the indictment. The convictions arose from an incident in which police allegedly recovered a loaded firearm from the defendant's waistband in a traffic stop. During jury deliberations, after the alternate jurors were dismissed, two jurors reported that juror 11 told the panel that a "lawyer friend" advised him they should focus on whether they believed that a gun was present in the car. The People and the defense agreed that juror 11 had committed misconduct. After the juror's discharge, defense counsel urged that the trial should proceed, but the People would not consent to proceeding, and the trial court declared a mistrial. Defense counsel objected again, urging the court to conduct an inquiry of the entire panel. The request was denied, and a retrial was held. When a mistrial is declared without the consent of, or over the objection of, a defendant, a retrial is precluded unless there was manifest necessity for the mistrial or the ends of public justice would otherwise be defeated. Even if there are substantial reasons to grant a mistrial, the court must explore appropriate alternatives. The defendant wanted to proceed with the remaining 11 jurors and to poll the jurors to see if they could render an impartial verdict. Moreover, a curative instruction could have been considered. Patrick Megaro represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_07622.htm

People v Hernandez, 10/23/19 – **SPEEDY TRIAL / FALSE ASSURANCE**
The defendant appealed from a judgment of Queens County Supreme Court, convicting him of attempted 2nd degree murder and 1st degree assault. The Second Department reversed, vacated the plea, and remitted. After the defendant's CPL 30.30 motion was

denied, he entered a plea of guilty, induced in part by the promise that, on appeal, he would retain the right to challenge the denial of his statutory speedy trial motion. However, a defendant who pleads guilty forfeits such right. The defendant was entitled to withdraw his guilty plea, since it was predicated on a false assurance. Appellate Advocates (A. Alexander Donn, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_07605.htm
[Eff. Jan. 1, 2020, CPL 30.30 claims will survive guilty pleas. For a memo on the topic: https://www.ils.ny.gov/files/Appellate/Resources/Reviewability%20of%2030.30%20Claims%20in%20Plea%20Appeals.pdf]

People v Torres, 10/23/19 – **SORA / ERRANT UPWARD DEPARTURE**
The defendant appealed from an order of Queens County Supreme Court, designating him a level-three sex offender. The Second Department reversed and adjudicated him a level two. Where the People seek an upward departure, the SORA court must determine whether the alleged aggravating circumstances are not adequately taken into account by the SORA Guidelines and whether the People proved the circumstances by clear and convincing evidence. If so, the SORA COURT must exercise its discretion to upwardly depart or not. In the instant case, the People contended that a departure was warranted, because a few months before the charged crime, the defendant committed an uncharged sex offense against a different victim who allegedly was 15 years old at the time. But the only evidence of age was a statement in a police report; and such proof of age was not supported by a detailed victim statement or otherwise corroborated. Appellate Advocates (Kathleen Whooley, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_07629.htm

SECOND CIRCUIT

USA v Arrington, 10/18/10 – **RIGHT TO COUNSEL / REVERSED**
The defendant appealed from a District Court–WDNY judgment, convicting him of murder and other crimes. The Second Circuit ordered a new trial, based on ineffective assistance of counsel. A defendant has a right to conflict-free representation. When sufficiently apprised of a possible conflict, the trial court must determine whether the attorney had an actual or potential conflict or no genuine conflict. In most cases, the defendant may validly waive a conflict. Here the conflicts arising from counsel's prior representation of the co-defendant were waivable. Counsel's duty to the co-defendant compromised his ability to represent the defendant. When the co-defendant refused to waive the conflict, counsel insisted on severing the trials and offered to have the defendant tried first, thereby surrendering the strategic advantage of learning the Government's proof as to the co-defendant before the defendant's trial. The defendant's conflict waiver was not binding, where he was not fully advised about the disadvantages flowing from the conflict.
http://www.ca2.uscourts.gov/decisions/isysquery/d779a68a-75b0-404a-afe4-511d016a121d/2/doc/17-4092_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/d779a68a-75b0-404a-afe4-511d016a121d/2/hilite/

FAMILY

FIRST DEPARTMENT

Matter of Julio G.R., 10/24/19 – **CONSENT ORDER / NO APPEAL**
The respondent appealed from an order of Bronx County Family Court, which awarded the petitioner sole custody of the child and granted him certain visitation. The Second Department dismissed the appeal. Since the respondent consented to the order, he was a not an aggrieved party. *See* CPLR 5511 (an aggrieved party may appeal from any appealable judgment or order). Although the respondent maintained that his consent was not knowingly or voluntarily given, his remedy was to move to vacate or resettle the order in Family Court.
http://nycourts.gov/reporter/3dseries/2019/2019_07696.htm

SECOND DEPARTMENT

Louie L. V. (Virzhiniya T. V.), 10/23/19 – **NEGLECT / REVERSED**
The mother appealed from an order of Kings County Family Court, which found neglect and placed her under the supervision of ACS. The Second Department reversed and remitted for a new fact-finding hearing. The child was removed after ACS filed a neglect petition alleging that the mother used excessive corporal punishment. The mother sought the return of the child, and a hearing was held. Although finding no imminent risk, Family Court determined that it would be in the child's best interests to remain in the father's custody. During the neglect fact-finding hearing, the court admitted transcripts of § 1028 hearing testimony. Family Court Act § 1028 hearings are not intended to replace fact-finding hearings. The evidentiary standards are different. Under § 1046, only competent, material, relevant evidence may be admitted at a fact-finding, whereas § 1028 hearing proof need not be competent. A § 1028 determination should not be deemed an indication of whether abuse or neglect will be found based on a preponderance of the evidence. CPLR 4517, which governs the admissibility of prior testimony in a civil action, was applicable. *See* Family Court Act § 165. Prior trial testimony of a witness may be used by any party for any purpose against another party if the witness is dead or otherwise unavailable. In this matter, Family Court did not make the requisite finding and thus should not have admitted the § 1028 hearing transcripts. The error was not harmless, where the opinion rested on the caseworker's testimony, which contained hearsay statements. Lewis Calderon represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_07592.htm

THIRD DEPARTMENT

Matter of Amy TT. v Ryan UU., 10/24/19 – **CONSENT ORDER / NO APPEAL**
The father appealed from an order of Ulster County Family Court, regarding modification of a custody/visitation order and issuance of an order of protection, all of which were entered consistent with a stipulation by the parties. The Third Department dismissed the appeals, since no appeal lies from an order entered upon consent. To the extent that the

father claimed that his consent was involuntary, such a claim could be raised and addressed in Family Court in the context of a motion to vacate the underlying consent orders.
http://nycourts.gov/reporter/3dseries/2019/2019_07659.htm

RAISE THE AGE

People v Jacob S., 10/9/18 – **NO SEXUAL CONDUCT / IMPROPER QUESTIONING**
The defendant was charged with certain sexual abuse offenses as an AO in the Youth Part, Orange County. In an unpublished decision, the criminal action was ordered removed to Family Court. The defendant suffered from Asperger's Syndrome, anxiety, ADHD, and pervasive development disability. The court held that the DA failed to prove by a preponderance of the evidence that the defendant unlawfully engaged in sexual conduct, as defined in Penal Law § 130.00, and thus failed to rebut the presumption of removal. The defendant's statement to an investigator was tainted by many factors, including: the manner in which the adolescent was questioned; the role of his father in pushing him to admit touching his sister, rather than protecting his son's interests; the prosecutor's improper reliance on prior JD matters in arguing against removal; and the defendant's apparent inability to understand the situation and the consequences of his statements. Moreover, there was no supportable basis for depriving this adolescent—who suffered from cognitive, emotional, and other mental limitations—of the opportunity to utilize specially tailored rehabilitative services available through Family Court. The People were entitled to file a motion to prevent removal based on extraordinary circumstances.

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