

## CRIMINAL

### FOURTH DEPARTMENT

***People v Sylvester*, 11/20/20 – DA’S ERRANT PROOF / REVERSED**

The defendant appealed from a judgment of Niagara County Court, convicting him of attempted 2<sup>nd</sup> degree murder and 2<sup>nd</sup> degree CPW. The Fourth Department reversed and ordered a new trial. County Court erred in permitting the prosecutor to present evidence of a prior uncharged shooting under the theory that defense counsel opened the door to such evidence by the cross-examination of a law enforcement witness. The cross did not create a misleading impression warranting further explanation. In any event, it was error to permit the People to supplement their direct case with four additional witnesses. Such proof far exceeded that necessary to confirm the salient facts. Moreover, the prosecutor deprived the defendant of a fair trial by impeaching two of his own witnesses in violation of CPL 60.35. The People were amply warned that each relevant witness would testify as she ultimately did, and thus they assumed the risk of the adverse testimony.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_06891.htm](http://nycourts.gov/reporter/3dseries/2020/2020_06891.htm)

***People v Salone*, 11/20/20 – ERRANT COP’S OPINION / REVERSED**

The defendant appealed from a judgment of Ontario County Court, convicting him of 1<sup>st</sup> degree manslaughter. The Fourth Department reversed and ordered a new trial. The trial court erred in allowing: (1) a police officer to opine that a homicide was committed, since that usurped the jury’s fact-finding function; and (2) testimony about the victim’s personal background, which was immaterial to any issue at trial.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_06903.htm](http://nycourts.gov/reporter/3dseries/2020/2020_06903.htm)

***People v Pinnock*, 11/20/20 – FREAK ACCIDENT / NOT CRIME**

The defendant appealed from an Ontario County Court judgment, convicting him of criminally negligent homicide and another crime. The Fourth Department dismissed the indictment. The verdict against the weight of evidence. There was no proof that the defendant knew that the inspection sticker on the truck he had just purchased was forged. The severity of mechanical problems could not have been known without removal of an affected tire. Even if the defendant had realized that the tire might come off, he could not have foreseen the ensuing freak accident—the tire coming to rest in the road, and causing a truck to overturn and fall on a car, killing its driver.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_06884.htm](http://nycourts.gov/reporter/3dseries/2020/2020_06884.htm)

***People v Crittenden*, 11/20/20 – CRIMINAL CONTEMPT / REDUCED**

The defendant appealed from a Monroe County Supreme Court judgment, convicting him of 1<sup>st</sup> degree criminal contempt. The Fourth Department reduced the contempt convictions to a 2<sup>nd</sup> degree offense. The People did not adduce legally sufficient evidence that the defendant intentionally violated that part of the protective order that required him to stay away from the protected person, who was supposed to be on a week-long trip away from his house when the defendant arrived there.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_06901.htm](http://nycourts.gov/reporter/3dseries/2020/2020_06901.htm)

***People v Barrett*, 11/20/20 – CRIMINAL CONTEMPT / REDUCED**

The defendant appealed from a judgment of Livingston County Court, convicting him of 1<sup>st</sup> degree criminal contempt (two counts) and other crimes. The People failed to establish that the predicate offense of 2<sup>nd</sup> degree criminal contempt involved a violation of an order of protection that included a stay-away provision. *See* Penal Law § 215.51 (c).

[http://nycourts.gov/reporter/3dseries/2020/2020\\_06899.htm](http://nycourts.gov/reporter/3dseries/2020/2020_06899.htm)

***People v Gatling*, 11/20/20 – SORA / NO FINDINGS**

The defendant appealed from a Wayne County Court order, which determined that he was a level-two risk. The Fourth Department reserved decision and remitted. County Court failed to comply with the statutory requirement to set forth the findings of fact and conclusions of law upon which it, based its determination. Filling out the standardized form order and indicating, without elaboration, that the court was adopting the Board of Examiners' case summary and risk assessment instrument, was not enough.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_06921.htm](http://nycourts.gov/reporter/3dseries/2020/2020_06921.htm)

## FAMILY

### FOURTH DEPARTMENT

***M/O Lane v Rawleigh*, 11/20/20 – CUSTODY PETITION / REINSTATED**

The father appealed from an order of Allegany County Family Court, which dismissed his custody modification petition. The Fourth Department reversed. Family Court erred in granting the mother's motion to dismiss based on the father's alleged failure to comply with a provision regarding mental health treatment in a previous order. That provision was no longer in effect. Further, Family Court lacked the authority to order counseling as a prerequisite to custody or visitation. The petition was reinstated.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_06926.htm](http://nycourts.gov/reporter/3dseries/2020/2020_06926.htm)

***M/O Gasdik v Winiarz*, 11/20/20 – RELOCATION / UNSOUND**

The mother appealed from an order of Cattaraugus County Family Court, which granted the father's petition to relocate with the child to North Carolina. The Fourth Department held that the challenged determination lacked a sound and substantial basis in the record. The father did not show that the proposed move would improve the child's life. While the father had great job opportunities, he would face a greater cost of living and could not afford to buy the home he envisioned. Further, he presented no proof regarding better educational opportunities in NC, and he had no family there. The only factor supporting his request was a chance for a fresh start away from the area where he and the mother had struggled with opiate addiction. The appellate court remitted for Family Court to fashion an appropriate visitation schedule.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_06918.htm](http://nycourts.gov/reporter/3dseries/2020/2020_06918.htm)

***M/O Betts v Moore*, 11/20/20 – RELOCATION / HEARING NEEDED**

The mother appealed from an order of Ontario County Family Court, which dismissed her petition seeking permission to relocate with the child to Monroe County. The Fourth

Department reversed. Family Court erred in ruling without a hearing. The application sufficiently alleged that the relocation would be in the child's best interests, where the mother had specific career advancement opportunities via her Monroe County employer; and the child had been accepted into an advanced ballet school there.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_06907.htm](http://nycourts.gov/reporter/3dseries/2020/2020_06907.htm)

***Timothy M.M. v Doreen R.***, 11/20/20 – EMANCIPATION / HEARING NEEDED

The father appealed from an order of Oneida County Family Court. Without a hearing, Family Court dismissed his petition seeking to terminate child support on the ground that the two subject children had constructively emancipated themselves. Factual issues existed as to whether the children's refusal to visit the father was justified, where such stance was apparently based on their purported knowledge of his sexual abuse of their stepsister. The petition was reinstated.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_06886.htm](http://nycourts.gov/reporter/3dseries/2020/2020_06886.htm)