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Sent: Thursday, December 28, 2017 12:35 PM

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Subject: Decisions of Interest

CRIMINAL

Court of Appeals

People v Smith (12/19/17) – **RIGHT TO COUNSEL VIOLATION / PROPER RELIEF**

In a People's appeal, the Court of Appeals held that the First Department correctly determined that the trial court had denied the defendant's right to counsel as to the People's motion to compel the defendant to submit to a buccal swab. The pretrial proceedings concerning the DNA test were a critical stage of the proceedings. There was no express or complied consent to the People's request for a DNA sample, either by the defendant or retained counsel. When the defendant subsequently appeared before the court, unrepresented, he expressly denied consent and requested counsel to advise him on the People's motion. The trial court rejected this request and instead sought the defendant's acquiescence in the DNA test. This was error, the Court of Appeals found. However, dismissal of the indictment was not appropriate corrective action, since it exceeded what was necessary and appropriate. *See* CPL 470.20. Vacatur of the defendant's guilty pleas was the proper remedy. The indictment was reinstated and the matter remitted to Supreme Court. Judge Rivera authored the majority opinion. Judge Garcia dissented in an opinion in which Judges Stein and Fahey concurred. The Center for Appellate Litigation (Matthew Bova, of counsel) represented the respondent.
http://www.nycourts.gov/reporter/3dseries/2017/2017_08798.htm

Second Department

People v Francois (12/20/17) – **CHALLENGE FOR CAUSE / NEW TRIAL**

During voir dire, in response to questioning by defense counsel, a prospective juror indicated that she felt that, "you are never in the right if you respond to aggression with physical violence," and that it was possible that her belief could influence how she would decide the assault case. When the trial court asked the prospective juror if her religious beliefs had affected her verdict when she previously served on a criminal jury, she said that she was an atheist. The reviewing court held that such statements revealed a state of mind likely to preclude an impartial verdict. The trial court failed to obtain the requisite unequivocal assurance; and a collective inquiry, as to whether "everybody here" could be fair and impartial, was insufficient. Since defense counsel had exhausted the allotted peremptory challenges, the judgment of conviction was reversed. Appellate Advocates (Samuel Brown, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2017/2017_08844.htm

People v Blaylock (12/20/17) – **ISSUES SURVIVING VALID WAIVER / CPL 730.30 EXAM**

The defendant's valid waiver of his right to appeal did not preclude his contention that Supreme Court

had erred in failing to order a CPL 730.30 examination before imposing sentence, since such contention implicated the voluntariness of the guilty plea. However, the waiver did preclude appellate review of the defendant's application to dismiss the indictment on the ground that he had been deprived of his statutory right to testify before the grand jury. Gerard Hanshe represented the appellant.
http://nycourts.gov/reporter/3dseries/2017/2017_08841.htm

People v Collins (12/20/17) – **SORA Hearing / Ineffective Assistance of Counsel**
The defendant was classified as a presumptive level-three sex offender. At the risk assessment hearing, the People advocated for all the points assessed by the Board of Examiners of Sex Offenders. Defense counsel erroneously asserted that there was no basis to challenge the presumptive level and failed to seek a downward departure. County Court designated the defendant a level-three sex offender. The defendant was deprived of meaningful representation, the Second Department held, reversing the order and remitting the matter for a new hearing. Richard Herzfeld represented the appellant.
http://nycourts.gov/reporter/3dseries/2017/2017_08866.htm

Third Department

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People v Saunders (12/21/17) – **SORA Classification – Reduction to Level Two**
The People requested that the defendant be classified as a presumptive level-two sex offender. Madison County Court classified the defendant as a level-three offender, based on the addition of 20 points because he was less than 20 years old when he committed the crime. However, the maximum number of points that could be allocated to such risk factor was 10. Moreover, the trial court had erred in assigning 15 points based on the defendant's history of drug or alcohol abuse. Nothing in the record indicated that the defendant had a pattern of drug or alcohol abuse, as contemplated by the SORA risk assessment guidelines. Thus, the Third Department classified the defendant as a level-two offender. John Cirando represented the appellant.
http://nycourts.gov/reporter/3dseries/2017/2017_08908.htm

People v Cotto (12/14/17) – **Defective Plea / Reversal**
This decision, involving vacatur of a guilty plea as not knowing, voluntary and intelligent, was discussed in the last Decisions of Interest. In the appeal, the appellant was represented by Karin Marris.
http://www.nycourts.gov/reporter/3dseries/2017/2017_08759.htm

Fourth Department

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People v Solivan (12/22/17) – **Suppression Granted / Indictment Dismissed**
The defendant sat inside a parked vehicle lacking a valid inspection. An officer approached the vehicle, saw a knife on the floorboard, asked the defendant to exit, and searched his person, discovering marihuana in his pocket. There was no predicate for such protective frisk. Monroe County Court also erred in refusing to suppress evidence found inside the vehicle, since the People failed to establish that the purported inventory search was valid. The plea of guilty of criminal possession of a weapon in the second degree was vacated, and the indictment was dismissed. David Abbatoy, Jr. represented the appellant.
http://nycourts.gov/reporter/3dseries/2017/2017_09021.htm

People v Pottinger (12/22/17 – **CPL 440.10 Motion / Issues of Fact Warranted Hearing**
A police investigation report revealed that two alibi witnesses had made statements supporting the defendant's alibi. In a CPL 440.10 motion, the defendant asserted that trial counsel had failed to investigate the witnesses and present their testimony. The defendant also submitted his own affidavit and a sworn statement from one of the alibi witnesses. Based on such submissions, Monroe County Court should have granted a hearing. The Fourth Department observed that effective assistance encompasses a reasonable investigation and preparation of defense witnesses. Further, the defendant had made a prima facie showing of actual innocence. The order denying the 440 motion was reversed and the matter remitted for a hearing. The Monroe County Public Defender (David Juergens, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2017/2017_08972.htm

People v Blauvelt (12/22/17) – **Grand Jury Proceeding / Prosecutor Impaired Integrity**
In the People's appeal, the reviewing court held that Cayuga County Court had properly dismissed an indictment against two defendants charged with gang assault and other crimes. The prosecutor had impaired the integrity of the grand jury proceeding in several ways. He repeatedly asked leading questions, and he introduced hearsay evidence. Further, without any good-faith basis, the prosecutor improperly asked one defendant if he had used illegal drugs on the night in question. Finally, the prosecutor acted as an unsworn witness in stating personal opinions. The Fourth Department held that the People should be granted leave to resubmit the charges to another grand jury and noted that the prosecutor had offered to recuse himself and seek the appointment of a special prosecutor. Adam Van Buskirk and Scott Brenneck represented the defendants-respondents.
http://nycourts.gov/reporter/3dseries/2017/2017_08948.htm

People v Jiles (12/22/17) – **Cell Phone Site Location / No Warrant Needed**
Without a warrant, the People obtained the defendant's historical cell phone site location information, contained in the business records of his service provider, which placed his phone within a certain cell site sector, when he used the phone close in time to the subject murder. The acquisition of such information was not a search requiring a warrant, the court concluded. The defendant's use of the phone constituted a voluntary disclosure of his general location to his service provider. There was no sufficient reason to afford the information at issue greater protection under the State Constitution than it was provided under the U.S. Constitution. The judgment of conviction of murder was affirmed. Jonathan Edelstein represented the appellant.
http://nycourts.gov/reporter/3dseries/2017/2017_08944.htm

People v Smith (12/22/17) – **Waiver of Right to Appeal / Divided Court**
In a memorandum decision, the reviewing court held that the record failed to establish that the defendant understood that the right to appeal was separate and distinct from the rights automatically forfeited by a plea of guilty; but the sentence was affirmed. Two judges disagreed as to the waiver, opining that the oral colloquy, coupled with the written waiver, was adequate. The Oneida County Public Defender (David Cooke, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2017/2017_08949.htm

FAMILY COURT

Court of Appeals

DECISION OF THE WEEK

Matter of Lisa T. v King E.T. (12/19/17) – **TEMPORARY ORDER OF PROTECTION / RELIEF AVAILABLE FOR WILLFUL VIOLATION**

The petitioner-wife filed a family offense petition against her husband, who was the father of her child. A temporary order of protection was issued and then extended. The petitioner thereafter filed a violation petition alleging that the husband had contacted her in contravention of the temporary orders of protection. Following a hearing, Family Court dismissed the family offense petition based on insufficient evidence, but sustained the violation petition and issued a one-year final order of protection. The First Department affirmed. The Court of Appeals upheld the Appellate Division order, declaring that, under the plain language Family Court Act § 846-a, Family Court was empowered to issue a new order of protection based on a willful violation of temporary orders. Judge Stein wrote the majority opinion. Judge Wilson dissented, opining that, in the absence of a finding that a family offense had been committed, Family Court lacked the authority to issue a final order of protection as a sanction for a violation of a temporary protective order. Chief Judge DiFiore concurred in the dissent. Randall Carmel represented the respondent.

http://www.nycourts.gov/reporter/3dseries/2017/2017_08800.htm

Second Department

Matter of Darrell J. D. J. (Kenneth R.) (12/20/17) – **REVERSAL OF ABANDONMENT FINDING / NO INTENT TO FORGO PARENTAL RIGHTS**

The Dutchess County Social Services Department filed a petition against the father, alleging that he had abandoned his son and seeking to terminate his parental rights and transfer guardianship and custody of the child to the agency for the purpose of adoption. Family Court granted the petition. The reviewing court held that the agency had failed to prove by clear and convincing evidence that, during the relevant six-month statutory period, the father had evinced an intent to forgo his parental rights and obligations. Once possessing sufficient reason to believe that he might be the father, he acted to assert paternity, filed petitions for custody, visited the child, paid modest child support, and provided the caseworker with information about his circumstances. Thus, the order of fact-finding and disposition was reversed and the proceeding dismissed. Thomas Keating represented the appellant.

http://nycourts.gov/reporter/3dseries/2017/2017_08826.htm

Third Department

Matter of Korisa DD. v Michelle EE. (12/21/17) – **SIBLING VISITATION / IN VITRO FERTILIZATION**

After entering into an Embryo Donation Agreement, the petitioner gave birth to a son through in vitro fertilization, using ova donated by the respondent and sperm donated by the petitioner's husband. The following year, through the same fertilization process, the respondent gave birth to a son—who is the genetic sibling of the petitioner's child. The boys developed a close relationship. In 2014, the respondent relocated to Kentucky with the younger child; and an order on consent gave her joint custody of the child with the father, who resided in New York. The petitioner-mother and her husband commenced a proceeding on behalf of the older child, seeking sibling visitation, pursuant to Family Court Act § 651 (b) and Domestic Relations Law §§ 71 and 240 (1). The respondent moved to dismiss the petition based on

a lack of jurisdiction under the UCCJEA. Cortland County Family Court denied the motion. Permission to appeal was granted, and the Third Department affirmed. The issue of visitation concerned both children; New York was the home state of the older child; and Family Court had jurisdiction over the younger child via the consent order. Ronald Walsh represented the petitioner-mother and her husband.
http://nycourts.gov/reporter/3dseries/2017/2017_08909.htm

Matter of Mitchell v Regan (12/21/17) – **ORDER ON CONSENT/ NO APPEAL LIES**
Because the custody and protective orders from which the father appealed were entered on consent, they were not appealable. *See* CPLR 5511 (only an aggrieved party may appeal). The father's claim that his consent was not knowing or voluntary was not properly before the Appellate Division, since he had failed to make an application to vacate the underlying orders.
http://nycourts.gov/reporter/3dseries/2017/2017_08912.htm

Matter of Tina X. v John X. (12/21/17) – **FRIVOLOUS MOTION / SANCTION UPHELD**
In Madison County Family Court, the parties entered into a stipulation regarding custody of their three children. A month later, the mother moved to vacate the stipulation. The father and AFC opposed the motion and sought sanctions against the mother, pursuant to NYCRR 130-1.1. After a hearing, Family Court found that the mother's application was based on material misstatements, claiming coercion in the settlement proceedings, and imposed $3,500 in sanctions. The reviewing court affirmed.
http://nycourts.gov/reporter/3dseries/2017/2017_08914.htm

Matter of Christy T. v Diana T. (12/21/17) – **CUSTODY / STANDARDS IN PARENT V NONPARENT DISPUTE**
Pursuant to an order on consent, the mother and maternal grandmother shared joint legal custody, with the grandmother having primary physical custody. The mother petitioned for custody. After a hearing, Madison County Family Court dismissed the modification petition, finding no change in circumstances. That was error. Where a finding of extraordinary circumstances was not made in the prior order granting custody to a nonparent, a petitioner parent is not required to prove a change in circumstances. The maternal grandmother met her threshold burden of establishing extraordinary circumstances. However, the record was inadequately developed for the reviewing court to determine what custody disposition was in the child's best interests. Thus, the petition was reinstated, and the matter was remitted. Lawrence Brown represented the appellant.
http://nycourts.gov/reporter/3dseries/2017/2017_08916.htm

Matter of Kristina L. v Elizabeth M. (12/21/17) – **ORDER OF PROTECTION / INTIMATE RELATIONSHIP**
Saratoga County Family Court properly granted an order of protection in a family offense proceeding. The definition of "intimate relationship" in Family Court Act § 812 (1) (e) encompassed persons like the instant parties. They had struck up a friendship in a women's trauma support group. The petitioner lived with the respondent rent-free in exchange for acting as a nanny for the latter's child. Text messages revealed that the parties were familiar with personal details about each other. Finally, the parties' personal and close relationship endured for six months. Family offenses were committed, and thus the challenged protective order was proper. Michelle Rosien represented the respondent.
http://nycourts.gov/reporter/3dseries/2017/2017_08917.htm

Fourth Department

Matter of Damone H., Jr. (Damone H., Sr.) (12/22/17) – **NO EXCESSIVE CORPORAL PUNISHMENT / NEGLECT FINDING REVERSED**

The child had minor bruises and scratches, and a neglect finding was made against the father in Erie County Family Court. The reviewing court reversed. When the child misbehaved, the father tried to grab him and accidentally caught him in the face with his hand. Although the use of excessive corporal punishment constituted neglect, a parent had a right to use reasonable physical force to instill discipline and promote the child's welfare. The petitioner agency had failed to establish that the father intentionally harmed the child, that his conduct was part of a pattern of excessive corporal punishment, or that the child was in imminent danger. David Pajak represented the appellant.

http://nycourts.gov/reporter/3dseries/2017/2017_09023.htm

Tuzzolino v Tuzzolini (12/22/17) – **MARITAL AGREEMENT / SET ASIDE AS UNCONSCIONABLE**

The parties were married in 1978 and entered into a separation agreement and modification agreement in 2013 and 2014, respectively. The agreements were incorporated into a judgment of divorce, from which the husband appealed. The appellate court held that the agreements were unconscionable and the product of the wife's overreaching and thus should be set aside. Relevant factors included that the wife was represented, but the husband was not; the wife failed to make full financial disclosure; her two pensions were not valued; the husband was required to transfer his interest in the marital residence and statements of net worth filed after execution of the agreements revealed that she had $740,000 in assets, whereas the husband had $77,000. The matter was remitted to Monroe County Supreme Court for a determination of equitable distribution and maintenance. Ronald Hull represented the appellant.

http://nycourts.gov/reporter/3dseries/2017/2017_08991.htm

Hsieh v Teng (12/22/17) – **DIVORCE / CPLR 5015 MOTION**

The husband made a motion pursuant to CPLR 5015 (a) (3) seeking to vacate certain terms of a judgment of divorce on the grounds of fraud or misrepresentation. The equitable doctrine of unclean hands was a viable defense in the face of an application for such equitable relief. Where the husband had not complied with provisions regarding child and spousal support and equitable distribution, Monroe County Supreme Court providently exercised its discretion in denying his motion. James Valenti represented the respondent. *(CPLR 5015, which also includes provisions for vacatur of judgments based on excusable default and newly discovered evidence, is sometimes invoked to set aside Family Court orders.)*

http://nycourts.gov/reporter/3dseries/2017/2017_09008.htm

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