

CRIMINAL

FIRST DEPARTMENT

***People v Zi*, 12/26/19 – PRO SE / MENTAL ISSUES / SEARCHING INQUIRY**

The defendant appealed from a judgment of NY County Supreme Court, convicting him after a jury trial of 1st degree offering a false instrument and other crimes. The First Department reversed and ordered a new trial. Supreme Court granted the defendant's request to proceed pro se without a searching inquiry as to his mental capacity. A mentally ill defendant, though competent to stand trial, may not have the capacity to waive representation. On the one hand, a defendant's expressions of paranoia, distrust of an attorney, or belief that the police framed him are not necessarily red flags. On the other hand, a search inquiry may be needed—despite a 730 exam finding the defendant mentally fit to stand trial—where he acts irrational, volatile, or menacing in court. In this case, defense counsel requested a 730 exam, and an examining psychiatrist noted potentially delusional ideas. The trial court was not made aware of the 730 exam or possible delusions and did not conduct the required particularized assessment of the defendant's mental capacity. One justice dissented. The Center for Appellate Litigation (Scott Henney, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2019/2019_09353.htm

***People v Burgess*, 12/26/19 – COP MISCONDUCT / CROSS-EXAMINATION**

The defendant appealed from a NY County Supreme Court judgment, convicting him of 12 counts of 1st degree criminal possession of a forged instrument. The First Department reversed and ordered a new suppression hearing and trial. The lower court erred in denying the defendant's requests, at the hearing and trial, to cross-examine a police officer regarding allegations of misconduct made against the officer in a civil lawsuit. The officer allegedly arrested the lawsuit's plaintiff without suspicion of criminality and lodged false charges against him. Such allegations bore on the credibility of the officer, who was the only witness for the People at the hearing and trial. The Center for Appellate Litigation (Brittany Francis, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2019/2019_09364.htm

SECOND DEPARTMENT

***People v Melamed*, 12/24/19 – SEARCH WARRANT / NO PARTICULARITY**

The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 2nd degree residential mortgage fraud and other crimes, and from an order denying his motion to controvert a search warrant. The appeal from the order was not appealable (CPL 450.10; 450.15) but was brought up for review by the appeal from the judgment. The Second Department reversed and granted the application to controvert the search warrant and suppress evidence. The Fourth Amendment's particularity requirement prohibits a general exploratory search. Here the warrant permitted a search of all of the defendant's computers, hard drives, and computer files stored on other devices, without any constraints, other than a five-year date restriction. Where computer files are involved, an unbridled

exploratory search will likely violate privacy guarantees. As to paper documents, the warrant merely identified generic classes of items, permitting the OAG to search virtually all conceivable documents in the defendant's businesses, including those not involved in the suspected offenses. Indeed, the crimes charged in the indictment were not those identified in the supporting affidavit. The descriptions in the affidavit did not suffice; particularity is required in the warrant itself. Kevin Keating represented the appellant.

http://nycourts.gov/reporter/3dseries/2019/2019_09295.htm

***People v Herring*, 12/24/19 – VOP / SENTENCE REDUCED**

The defendant appealed from an Orange County Court judgment, revoking a sentence of probation and imposing an enhanced sentence of 6½ years' imprisonment, plus two years' post-release supervision, upon his previous conviction of 3rd degree criminal sale of a controlled substance. The Second Department reduced the sentence to 2½ years followed by the PRS. As a condition of his plea, the defendant waived the right to appeal and was sentenced to six months' incarceration plus five years' probation. A hearing on a VOP is a summary informal procedure and does not require strict adherence to rules of evidence. However, the finding of a violation must be based on a preponderance of the evidence and cannot rest entirely on hearsay. While the lower court would have been permitted to take judicial notice of the defendant's indictment for attempted murder, the evidence was presented after the close of evidence, and the defendant had no opportunity to be heard regarding the documents upon which the court relied. He did not challenge the finding of a violation based on using marijuana. Samuel Coe represented the appellant.

http://nycourts.gov/reporter/3dseries/2019/2019_09287.htm

THIRD DEPARTMENT

***People v Gillette*, 12/26/19 – METH MAKING / INSUFFICIENT PROOF**

The defendant appealed from a judgment of Cortland County Court, convicting him of 3rd degree unlawful manufacture of methamphetamine and other crimes. The Third Department reversed, based on legally insufficient evidence. One evening, police went to at an apartment in response to a report of possible criminal conduct. Upon arrival, they noticed a strong chemical odor. An occupant covered in black soot stated that someone had brought a meth lab to the apartment. The officers evacuated the occupants, who included the defendant. A search yielded meth labs, lab equipment, and items used to make meth. The defendant was not in possession of any seized items, and the People failed to prove constructive possession, where he did not live in, or have keys to, the apartment or keep any personal belongings there. Other occupants indicated that the defendant did not help make, or use, meth. Police did not observe any black soot on him. Proof that the defendant may have had control over batteries and salt was not enough. The indictment was dismissed. The Rural Law Center of NY (Kelly Egan, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2019/2019_09323.htm

FAMILY

DECISION OF THE WEEK

Heather NN. v Vinnette OO., 12/26/19 – **BROOKE S.B. STANDING / VISITATION**

The respondent appealed from an order of Broome County Family Court. She was the biological mother of a child born in 2008, following conception via artificial insemination, during a same-sex relationship between the parties. The petitioner was not related to the child and did not adopt her. When the parties separated in 2009, the child remained with the respondent, who allowed the petitioner to have parenting time for only two years. After *Brooke S.B. v Elizabeth A.C.C.* (28 NY3d 1) expanded the definition of “parent,” the petitioner—whose previous legal steps had failed—again sought parenting time. Family Court granted relief. The Third Department agreed that the petitioner qualified as a parent, given that the parties jointly planned for the child’s conception and birth and for raising her together. The respondent contended that the petitioner should not have parental access, in light of her history of criminal drug sales and domestic violence and her lack of relationship with the child. The court found no credible evidence that the petitioner was currently involved in criminal conduct and noted that a family offense petition against her had been dismissed. The most delicate issue was the absence of a current parent-child relationship and the child’s lack of awareness of the petitioner’s role in her early life. That was the respondent’s fault, though; the petitioner had fought long and hard to regain contact. Given the sensitive situation, Family Court designed a graduated schedule that would begin with therapeutic counseling and transition to supervised parenting time and then unsupervised contact. The visitation order was upheld, with minor adjustments.

http://nycourts.gov/reporter/3dseries/2019/2019_09325.htm

FIRST DEPARTMENT

Jamiyla S. J. v Kenneth D., 12/26/19 – **CUSTODY / CHANGE OF CIRCUMSTANCES**

The petitioner appealed from an order of NY County Family Court, which dismissed a custody petition. Family Court erred in finding no change of circumstances warranting a modification of the parties’ stipulation of shared custody. The respondent failed to disclose his conviction on drug charges and required drug treatment. That was a breach of the trust required in a shared custody arrangement, not a mere lapse in judgment. The matter was remanded for a “best interests” hearing. George Reed represented the appellant.

http://nycourts.gov/reporter/3dseries/2019/2019_09358.htm

SECOND DEPARTMENT

Cameron L. (Anonymous), 12/24/19 – **REMOVAL / NO IMMINENT DANGER**

The mother appealed from an order of Kings County Family Court, which granted the petitioner agency’s application to remove the child from her custody and placed her with the maternal grandmother, pending the outcome of the neglect proceeding. The Second Department reversed and directed the immediate return of the child. Upon a Family Ct Act § 1027 hearing, temporary removal is authorized where necessary to avoid imminent risk to the child. The court must balance risk with best interests and reasonable efforts made to

avoid removal. Imminent danger, which must be near or impending, was not present here, based on mere concerns about whether the mother would keep in contact with the petitioner or return to court for continued proceedings. Brooklyn Defender Services (Jessica Marcus and Noran Elzarka, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2019/2019_09268.htm

***Matter of Salvi v Salvi*, 12/24/19 – CUSTODY / HEARING NEEDED**

The mother appealed from a Westchester County Family Court order that modified a prior order and awarded the father sole legal custody of the parties' child. The Second Department reversed and remitted. Over the mother's objection and despite unresolved factual issues, the trial court failed to hold an evidentiary hearing and only took the partial testimony of one nonparty witness. Custody determinations should generally be made only after a plenary hearing. This general rule furthers the substantial interest—shared by the State, child, and parents—in ensuring that the custody proceeding generates a just and enduring result. John De Chiaro represented the appellant.

http://nycourts.gov/reporter/3dseries/2019/2019_09272.htm

THIRD DEPARTMENT

***Joseph PP. (Kimberly QQ.)*, 12/26/19 – PERMANENCY / SUA SPONTE REVERSAL**

The mother appealed from an order of Sullivan County Family Court. The petitioner's permanency hearing report sought to change the permanency goal from reunification with the mother to placement for adoption. Family Court so ordered, but also directed the petitioner to continue to make diligent efforts to strengthen the parental relationship. The Third Department sua sponte found that Family Court erred in modifying the permanency goal without directing the petitioner to commence a proceeding to terminate parental rights. Family Ct Act § 1089 provides that a court may impose one of five specified permanency goals, including placement for adoption—with the social services official who initiates a termination proceeding. Encouraging the mother to make further efforts toward reunification was understandable; but the statute did not permit the imposition of concurrent, contradictory goals. The matter was remitted.

http://nycourts.gov/reporter/3dseries/2019/2019_09347.htm

***Ellen TT. v Parvaz UU.*, 12/26/19 – AFC / CONFIDENTIALITY BREACH**

The father appealed from an order of Essex County Family Court, which modified a prior custody order. The Third Department reversed a provision allowing for overnight visitation with the mother's consent and pointedly expressed displeasure that the AFC, whose brief contained repeated references to the *Lincoln* hearing. Family Court's promise of confidentiality should not be lightly breached, and *Lincoln* hearing transcripts are sealed. The right to confidentiality belongs to the child and transcends the parents' rights. Children must be protected from openly choosing between parents or divulging intimate details of the parent/child relationships. Further, the instant breach of confidentiality—and of the children's trust—was exacerbated by the AFC's misrepresentations about their testimony.

http://nycourts.gov/reporter/3dseries/2019/2019_09328.htm