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APPEALS, INSUFFICIENT RECORD, GRAVITY KNIFE.

ALTHOUGH THE OPERATION OF THE KNIFE WAS DEMONSTRATED AT TRIAL, THERE WAS NO RECORD EVIDENCE THAT THE KNIFE POSSESSED BY DEFENDANT WAS A GRAVITY KNIFE, RELATED CONVICTION REVERSED UNDER A WEIGHT OF THE EVIDENCE ANALYSIS (SECOND DEPT).

The Second Department, under a weight of the evidence analysis, determined that the proof did not support the jury's finding that the weapon possessed by defendant was a gravity knife:

Penal Law § 265.00(5) defines a "[g]ravity knife" as a "knife which has a blade which is released from the handle or sheath thereof by the force of gravity or the application of centrifugal force which, when released, is locked in place by means of a button, spring, lever or other device." "[A] gravity knife, as so defined, requires that the blade lock in place automatically upon its release and without further action by the user" … . …

Although an officer demonstrated the operation of the knife at trial, the record contains "no contemporaneous description of what the jury saw" during that demonstration … . Further, there is no other evidence in the record that established whether or how the blade locked. In short, the People failed to create a record proving that the knife satisfied the statutory definition of a gravity knife … . Thus, the weight of the evidence before us does not support a finding that the defendant's knife was, in fact, a gravity knife … . People v Sauri, 2019 NY Slip Op 02359, Second Deplt 3-27-19

ARREST, HANDCUFFS, NO PROBABLE CAUSE.

HANDCUFFING THE DEFENDANT PENDING IDENTIFICATION BY THE UNDERCOVER OFFICER AMOUNTED AN ARREST WITHOUT PROBABLE CAUSE, MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined handcuffing the defendant pending identification by the undercover officer amounted to an arrest without probable cause. Defendant's motion to suppress the identification and the buy money should have been granted:

The hearing court expressly determined that the police detention of defendant was supported by reasonable suspicion, but that probable cause did not exist until the undercover officer who allegedly bought drugs from defendant made an identification. Because the record provides no reason for the officers to have concluded that

defendant, a suspect in a street drug sale, was armed or dangerous, or likely to resist arrest or flee, handcuffing him was inconsistent with an investigatory detention and elevated the intrusion to an arrest not based on probable cause … . Accordingly, the undercover officer's identification of defendant and the buy money recovered as a result of the unlawful arrest should have been suppressed, and defendant is entitled to a new trial preceded by an independent source hearing … . People v Perez, 2019 NY Slip Op 01822, First Dept 3-14-18

ATTEMPT, MURDER.

DEFENDANT'S INSTRUCTING ANOTHER TO KILL HIS WIFE AND HER MOTHER DID NOT COME NEAR ENOUGH TO ACCOMPLISHING MURDER TO SUPPORT THE ATTEMPTED MURDER CONVICTIONS (FOURTH DEPT).

The Fourth Department, reversing the attempted murder convictions, determined the evidence did not demonstrate that the defendant came near enough to accomplishing murder to support the convictions. The defendant, who was in jail, gave detailed instructions to kill his wife and her mother to another inmate, who immediately informed jail authorities:

"Acts of preparation to commit an offense do not constitute an attempt . . . There must be a step in the direct movement towards the commission of the crime after preparations have been made . . . Likewise, acts of conspiring to commit a crime, or of soliciting another to commit a crime do not per se constitute an attempt to commit the contemplated crime" … . Consequently, the People must establish that defendant "engaged in conduct that came dangerously near commission of the completed crime" … . …

The evidence establishes only that defendant planned the crimes, discussed them with the inmate in the next cell and with that inmate's girlfriend, and exchanged notes about them. Thus, inasmuch as " several contingencies stood between the agreement in the [jail] and the contemplated [crimes],' defendant[] did not come very near' to accomplishment of the intended crime[s]" … . Where, as here, the evidence fails to establish that defendant took any action that brought the crime close to completion, no matter how slight … , the evidence is not legally sufficient to support a conviction of attempt to commit that crime … . People v Lendof-Gonzalez, 2019 NY Slip Op 01904, Fourth Dept 3-15-19

ATTORNEYS, APPEALS, INEFFECTIVE ASSISTANCE.

DEFENDANT WAS NOT AFFORDED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL, DESPITE COUNSEL'S LIMITED COMMUNICATION WITH DEFENDANT, COUNSEL'S NOT ACTING UNTIL THE APPEAL WAS ON THE DISMISSAL CALENDAR, AND COUNSEL'S SUBMISSION OF A MINIMAL BRIEF WITH SIX LINES OF TEXT IN THE STATEMENT OF FACTS AND NO CITATIONS TO THE RECORD, WHICH INCLUDED A 4000 PAGE TRIAL TRANSCRIPT (CT APP)

The Court of Appeals, in a full-fledged opinion by Judge Stein, over two separate, extensive dissenting opinions, determined defendant was not afforded ineffective assistance by his appellate counsel. The majority acknowledged that the appellate brief was "terse" and was not a model to be emulated, but noted the brief raised substantive issues that were addressed by the Appellate Division on the merits. The failure to raise the harsh and excessive sentence issue, and the failure to seek review by the Court of Appeals did not constitute ineffective assistance:

FROM JUDGE RIVERA'S DISSENT:

… [D]efendant maintains that counsel was ineffective because he initially failed to perfect the appeal, causing the Appellate Division to place the matter on the court's Dismissal Calendar, thus risking the loss of defendant's only appeal as of right … .

… [C]ounsel failed to communicate at all with his client in the three years following his appointment to represent defendant, and only as a late-day response to the Dismissal Calendar notification. … * * *

The failings of the brief are substantial. … The brief is barely 20 double-spaced pages, including separate pages for the cover, tables of contents and cases, CPLR 5531 statement, and issues presented. … Inexplicably, at the end of the facts section, appellate counsel inserted a photocopy of a six-page letter from trial counsel to the judge requesting an adjournment. The factual recitation consists of two pages and six lines of text. There is not a single citation in this section to the record on appeal, as required by the First Department's Local Rule § 120.8 (b)(4) which requires an appellant's brief to include a statement of facts "with appropriate citations to the . . . record." This hardly seems adequate given defendant appealed from a judgment following a three-month joint trial with two co-defendants, resulting in a trial transcript spanning over 4,000 pages, and involving multiple serious counts, including murder. In contrast, the People submitted a brief over 175 pages long, with 60 pages solely devoted to the facts. People v Alvarez, 2019 NY Slip Op 02383, CtApp 3-28-19

ATTORNEYS, RIGHT TO COUNSEL.

DEFENDANT WAS HOUSED FIVE HOURS AWAY FROM THE COURT AND HIS ATTORNEY, REPEATED REQUESTS TO MOVE DEFENDANT CLOSER WERE GRANTED BUT NOT COMPLIED WITH, DEFENDANT MOVED TO WITHDRAW HIS PLEA AT SENTENCING, GIVEN THE POSSIBILITY DEFENDANT HAD EFFECTIVELY BEEN DEPRIVED OF HIS RIGHT TO COUNSEL, INQUIRY INTO THE VOLUNTARINESS OF OF THE PLEA SHOULD HAVE BEEN CONDUCTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the sentencing judge should have inquired into the voluntariness of defendant's guilty plea before accepting it. The defendant had been housed more than one hundred miles from the court and his attorney. Repeated requests to move the defendant closer to allow consultation with his attorney were granted but not complied with. When the court set the matter down for trial anyway, the defendant pled guilty:

The Supreme Court ordered that the defendant be moved to Rikers Island, or at a minimum, a correctional facility closer to the court. The court issued numerous orders over the following two weeks directing that the defendant be moved, none of which was complied with. Each appearance required the defendant to travel at least five hours each way. Defense counsel continued to argue that the Department of Corrections and Community Supervision was violating the defendant's constitutional rights to consult with his attorney and to defend this case. The court noted that it would be nearly impossible to hold a jury and try the case under these conditions. The court nevertheless stated that the trial would commence, regardless of where the defendant was housed. The very next court date, the defendant agreed to plead guilty.

Two weeks later, at the sentencing, the defendant made an application to withdraw his plea, contending that he had entered the plea involuntarily, given the circumstances and his lack of access to his counsel. The Supreme Court denied the application without engaging in any inquiry of the defendant, other than to comment on the favorable plea offer secured by defense counsel.\

Under the circumstances, it cannot be said that the Supreme Court was able to make an informed determination as to the question of the voluntary nature of the defendant's plea without conducting such an inquiry. The record substantiates the defendant's claim that his plea was effectively coerced by the ongoing violation of his Sixth Amendment right to counsel and, thus, a genuine factual issue as to the voluntariness of the plea existed that could only be resolved after a hearing. Under these circumstances, the court should have conducted a hearing to

explore the defendant's allegations in order to make an informed determination … . People v Hollmond, 2019 NY Slip Op 02354, Second Dept 3-27-19

ATTORNEYS, INEFFECTIVE ASSISTANCE, MOTION TO VACATE JUDGMENT.

HEARING NECESSARY ON THAT ASPECT OF DEFENDANT'S MOTION TO VACATE THE JUDGMENT OF CONVICTION WHICH ALLEGED INEFFECTIVE ASSISTANCE OF COUNSEL, DEFENDANT ALLEGED DEFENSE COUNSEL TOLD THE JURY DEFENDANT WOULD TESTIFY WITHOUT FIRST CONSULTING WITH DEFENDANT (FOURTH DEPT).

The Fourth Department, reversing County Court, determined defendant was entitled to a hearing on that aspect of his motion to vacate the judgment of conviction on ineffective assistance of counsel grounds. Defendant alleged defense counsel told the jury that defendant would testify without first consulting with defendant:

We … conclude … that defendant is entitled to a hearing with respect to whether counsel was ineffective in telling the jury that defendant would testify at trial. In support of his motion, defendant submitted his own affidavit stating that his trial counsel never discussed with him whether testifying would be a good or bad idea, and that he never told counsel that he would testify at trial, and that trial counsel nevertheless told the jury that defendant would testify. Defendant's account is supported by the affirmation of defendant's appellate counsel, who stated that trial counsel admitted that defendant did not tell him before trial that he would testify. Thus, defendant's allegations are potentially supported by other evidence, and "it cannot be said that there is no reasonable possibility that [they are] true" … . We therefore conclude that a hearing is required to afford defendant an opportunity to prove that trial counsel did not discuss with him whether he would testify before informing the jury that defendant would do so, and that there was no strategic or tactical explanation for telling the jury that defendant would testify … . People v Pendergraph, 2019 NY Slip Op 02212, Fourth Dept 3-22-19

COMPETENCY.

CONFLICTING PSYCHIATRIC EVALUATIONS REQUIRED A COMPETENCY HEARING, EVEN IF ONE OF THE PSYCHIATRISTS HAD CHANGED HIS OR HER MIND (THIRD DEPT).

The Third Department, over a dissent, determined a hearing was required to assess defendant's competency to stand trial because conflicting reports from the two psychiatric evaluations. The fact that one of the psychiatrists apparently changed his or her opinion was deemed irrelevant. The matter was sent back for a reconstruction hearing:

… [T]here can be no dispute that, after receiving conflicting examination reports, County Court failed to conduct a competency hearing. Although the People rely on defense counsel's representation that the psychiatric examiner who filed a report stating that defendant was not competent to stand trial had changed his mind, this representation and subsequent withdrawal of the request for a hearing did not relieve the court of its statutory duty to conduct a hearing pursuant to CPL 730.30 (4) for the purpose of determining defendant's mental capacity to stand trial … . We agree with the dissent that, pursuant to CPL 730.30 (2), a competency hearing need not always be held "[w]hen the examination reports submitted to the court show that each psychiatric examiner is of the opinion that the defendant is not an incapacitated person" (emphasis added). However, we do not agree that CPL 730.30 (2) applies when the record demonstrates that the court has been provided with two conflicting examination reports, even if the defendant's attorney represents that one of the examiners has since changed his or her opinion.

Given the circumstances present here, reconstruction of defendant's mental capacity at the time of his violation hearing should be possible by means of "contemporaneous observation and records" … . People v Vandegrift, 2019 NY Slip Op 01854, Third Dept 3-14-19

DARDEN HEARING, EVIDENCE.

THE PEOPLE DID NOT PRESENT EXTRINSIC EVIDENCE AT THE DARDEN HEARING THAT THE INFORMANT EXISTED, THEREFORE THE SUPPRESSION MOTION WAS GRANTED AND THE INDICTMENT DISMISSED (FOURTH DEPT).

The Fourth Department determined the evidence submitted by the People at the Darden hearing did not establish the existence of an informant with extrinsic evidence. Therefore the motion to suppress was granted and the indictment dismissed. The People presented only a death certificate purporting to demonstrate the informant was dead. No extrinsic evidence of the existence of the informant was presented:

The People must produce a confidential informant for an ex parte hearing upon defendant's request where, as here, they rely on the statements of the confidential informant to establish probable cause (… People v Darden, 34 NY2d 177, 181 [1974] …). …

There are, however, exceptions to the requirement that the People produce a confidential informant for a Darden hearing. If the People succeed in making a threshold showing that the informant "is unavailable and cannot be produced through the exercise of due diligence" … , they are permitted instead to establish the existence of the informant by extrinsic evidence … .

Even assuming, arguendo, that the People succeeded here in making such a threshold showing, we conclude that they nevertheless failed to establish the existence of the informant by extrinsic evidence … . The evidence establishes only that a deposition was executed in the name of the alleged confidential informant, that the police obtained a search warrant using the deposition, and that a death certificate was later issued for a person having the same name as the confidential informant. There is no evidence that the alleged informant actually made the statements attributed to her … . The People could have met their burden by offering the testimony of a police witness, which is evidence that is explicitly contemplated in Darden. Yet, they did not. Without it, there is nothing to refute the possibility that the police fabricated the statements in the informant's purported deposition in order to conceal the fact that information critical to the probable cause inquiry was instead obtained through illegal police action. People v Givans, 2019 NY Slip Op 02220, Fourth Dept 3-22-19

DNA, MOTION FOR TESTING, MOTION TO VACATE JUDGMENT.

PEOPLE DEMONSTRATED THE RAPE KIT AND BLOOD AND SALIVA EVIDENCE RELATED TO A 1988 PROSECUTION HAD BEEN DESTROYED AND DEFENDANT DID NOT DEMONSTRATE THE AVAILABILITY OF THE EVIDENCE WOULD HAVE CHANGED THE VERDICT, MOTION FOR DNA TESTING AND MOTION TO VACATE THE CONVICTION PROPERLY DENIED (FIRST DEPT).

The First Department determined defendant's motion for DNA testing and his motion to vacate his conviction were properly denied. Defendant had been convicted of sodomy in 1988. After a successful habeas corpus petition, a second trial was held and defendant was again convicted. After the habeas corpus petition had been filed, but before it was docketed, the NYPD destroyed the rape kit and blood and saliva samples. No DNA testing had been done on the evidence:

Any defendant, regardless of the date of conviction, may move for DNA testing on specified evidence. The court shall grant the application if it determines that had a DNA test been conducted on the evidence and had the results of that evidence been admitted at trial, "there exists a reasonable probability that the verdict would have been more favorable to the defendant" (CPL 440.30[1-a][a][1]). Defendant bears the burden of making the "reasonable probability" showing … . Where the People assert that the evidence to be tested has been destroyed or cannot be located, the statute provides that the people must make "a representation to that effect" and submit "information and documentary evidence in the possession of the people concerning the last known physical location of such specified evidence" (CPL 440.30[1-b][b]). It is the People's burden to show that the evidence could no longer be located and was thus no longer available for testing … .

We find that the People met their burden. …

… .[W]e find that defendant has not carried his burden of establishing that, even had he been able to secure the original evidence and perform DNA testing on it, there is a reasonable probability that the verdict would have been different … . People v Dorsey, 2019 NY Slip Op 01526, First Dept 3-5-19

GUILTY PLEAS, SENTENCE-PROMISE.

INABILITY TO IMPOSE THE PROMISED SENTENCE REQUIRED THAT DEFENDANT'S GUILTY PLEA BE VACATED (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant's motion to vacate his plea because the promised sentence could not be imposed should have been granted:

… [D]efendant is entitled to vacatur of the plea because his negotiated plea included a promise of shock incarceration, and that promise cannot be honored because shock incarceration is only available for persons convicted of controlled substance or marijuana offenses … . Since the guilty plea was induced by an unfulfilled promise, we vacate the plea in its entirety. The SCI was part and parcel of the negotiated plea. Therefore, we restore defendant to his preplea status and reinstate the indictment … . People v Golden, 2019 NY Slip Op 02027, First Dept 3-19-19

IDENTIFICATION, ATTORNEYS, PROSECUTORIAL MISCONDUCT, APPEALS.

EVIDENCE DEFENDANT'S STEPFATHER APOLOGIZED TO THE ROBBERY VICTIM FOR THE DEFENDANT'S ACTIONS AND THE TESTIMONY ABOUT AN ANONYMOUS INFORMANT'S IDENTIFICATION OF THE DEFENDANT SHOULD NOT HAVE BEEN ADMITTED, PROSECUTOR SHOULD NOT HAVE ENCOURAGED INFERENCE OF GUILT BASED ON FACTS NOT IN EVIDENCE, APPELLATE ISSUES CONSIDERED IN THE INTEREST OF JUSTICE (SECOND DEPT).

The Second Department, reversing defendant's conviction, reaching the appellate issues in the interest of justice, determined that improperly admitted evidence warranted a new trial, noting that the prosecutor also acted improperly. The identity of the defendant was a key issue in this robbery case. The victim (Fernandez) should not have been allowed to testify that the defendant's stepfather told the victim he was sorry for what defendant had done and returned the victim's keys. Also, the investigating detective should not have been allowed to testify that an anonymous informant had identified the defendant:

There was no showing that the defendant participated in or was in any way connected to his stepfather's actions … .

… [T]he testimony of an investigating detective recounting a conversation with an anonymous informant, a nontestifying witness, violated the defendant's rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution… . The informant reportedly was an eyewitness to the crime and identified the defendant by name. The testimony "went beyond the permissible bounds of provid[ing] background information as to how and why the police pursued [the] defendant" … . …

Upon retrial, we remind the People that, on summation, a prosecutor may not "improperly encourage[ ] inferences of guilt based on facts not in evidence" … . Here, there was no evidence to support the prosecutor's assertion that Fernandez had identified the defendant as the robber "immediately" by recognizing a distinctive "dot" on the defendant's face. People v Gonsalves, 2019 NY Slip Op 01792, Second Dept 3-13-19

IDENTIFICATION.

SHOWUP IDENTIFICATION TESTIMONY SUPPRESSED, CONVICTIONS REVERSED (FOURTH DEPT).

The Fourth Department, reversing defendant's convictions, determined that the showup indentification testimony should have been suppressed. The showup took place 90 minutes after the occurrence of the crime, in a hospital parking lot, where defendant was handcuffed and flanked by officers. The victim had already identified the defendant in a hospital-room showup procedure:

We conclude that, "[g]iven the identification made by the victim" during the first showup, the noncomplainant witness's identification conducted far from the scene of the crime "is not rendered tolerable in the interest of prompt identification" … . The identification was also unjustified insofar as the noncomplainant witness was not present at the hospital as a victim … . The People have proffered no reason that a lineup identification procedure would have been unduly burdensome under the circumstances … . Absent any exigency or spatial proximity to the crime scene, and given that the showup occurred "approximately 90 minutes after the occurrence of the crime, while defendant was handcuffed and" flanked by police, we conclude that, under the totality of the circumstances, the second "showup identification procedure was infirm" … . …

Inasmuch as the witness who identified defendant in the second showup procedure did not testify at the Wade hearing, "the People did not establish that [he] had an independent basis for [his] in-court identification

of defendant" … , and "there is no evidence upon which this Court can base such a determination" … . We therefore conclude that defendant is entitled to a new Wade hearing on that issue … . People v Knox, 2019 NY Slip Op 02230, Fourth Dept 3-22-19

INDICTMENTS, AMENDEMENT.

AMENDMENT OF THE INDICTMENT ON THE EVE OF TRIAL CHANGED THE THEORY OF PROSECUTION FROM ACTUAL POSSESSION OF A WEAPON TO CONSTRUCTIVE POSSESSION OF A WEAPON, CONVICTION REVERSED (SECOND DEPT).

The Second Department, reversing defendant's conviction and dismissing the indictment, determined that the People should not have been allowed to amend the indictment on the eve of trial. The indictment charged defendant with possession of a weapon when he visited his girlfriend on October 20. The People sought to amend the indictment to allege possession of a weapon on October 22, when the weapon was found pursuant to a search of defendant's residence:

By seeking, on the eve of trial, to amend the indictment to include the days following the purported incident with the former girlfriend, the People changed the theory of their case from the defendant's actual possession of a weapon, as witnessed and attested to by the former girlfriend, to constructive possession, meaning his exercise of dominion or control over an area of the defendant's residence where a loaded weapon was found … . Defense counsel, in opposing the amendment, asserted that he had relied upon the indictment and the VDF [voluntary disclosure form] prepared by the District Attorney's Office, giving the date of the offense as October 20, 2015, in preparing for the case, including defense counsel's efforts to prove, through time cards and testimony, that it was impossible for the defendant to have been at his former girlfriend's apartment at the time of the incident on October 20, 2015. As such, defense counsel presented evidence that the defense had been substantially undermined by the amendment of the indictment and that, effectively, he was forced to forgo an alibi-type defense … . People v McLean, 2019 NY Slip Op 02356, Second Dept 3-27-19

JAIL PHONE CALLS.

RECORDED JAIL PHONE CALLS MAY NOT HAVE RELATED TO THE OFFENSE WHICH WAS THE SUBJECT OF THE TRIAL, CONVICTION REVERSED (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined recordings of jail phone calls made by the defendant should not have been admitted in this criminal possession of a weapon case. It was possible the recordings related to a subsequent weapons charge, not the charge before the jury:

… [T]he timing and content of the telephone calls made it highly unlikely that the defendant was referencing his September 2014 arrest for the instant offense, rather than his subsequent arrest on the unrelated gun possession charge. Moreover, in addition to the lack of relevance of this evidence to the charges in this case, the jury was unaware of the defendant's subsequent May 2015 arrest, and therefore was unable to properly evaluate the weight to be accorded to the recordings as evidence of the defendant's guilt of the instant offense. Thus, there was a substantial risk that the jury would be misled into believing that the defendant's admissions in the telephone recordings referred to the instant offense. The admission of the recordings into evidence placed the defendant in the untenable position of deciding whether to accept this misleading narrative that the telephone recordings referred to the instant offense or disclose his later arrest on a similar gun possession charge, which disclosure itself would have caused him undue prejudice … . People v Robinson, 2019 NY Slip Op 01799, Second Dept 3-13-19

JURY INSTRUCTIONS, CROSS-RACIAL IDENTIFICATION.

CROSS-RACIAL IDENTIFICATION JURY INSTRUCTION SHOULD HAVE BEEN GIVEN, ERROR HARMLESS HOWEVER (FIRST DEPT).

Although the error was deemed harmless, the First Department determined the cross-racial identification jury instruction should have been given:

The trial court denied defendant's request for a charge on cross-racial identification. Since then, the Court of Appeals decided People v Boone, which held that "when identification is an issue in a criminal case and the identifying witness and defendant appear to be of different races, upon request, a party is entitled to a charge on cross-racial identification" and the trial court must give the charge if a party requests it (30 NY3d 521, 526

[2017]). Since identification was an issue in this case and the victim and defendant were of different races, the motion court should have granted the request for the charge on cross-racial identification. However, we find the error harmless given that the video supports the victim's testimony about the incident and his familiarity with defendant. Further, the victim told police that the robber had an MTA connection, and defendant was arrested wearing an MTA jacket. The identification testimony was unusually strong and the evidence of defendant's guilt was overwhelming … . Also, there is no significant probability that defendant would have been acquitted but for this charge error … . People v Patterson, 2019 NY Slip Op 02154, First Dept 3-21-19

SEARCHES, CONSENT.

POLICE ENTERED HOME ILLEGALLY AND OBTAINED CONSENT TO SEARCH BY MISLEADING THE OCCUPANT, MOTION TO SUPPRESS PROPERLY GRANTED (FOURTH DEPT).

The Fourth Department, affirming Supreme Court's suppression of a weapon found in a home, determined the police illegally entered the home and gained consent to search by misleading the woman in the home:

Asked by defense counsel why he entered the home, the officer testified, "An individual who's known to carry guns entered that house running into that house actually, coming out acting nervous, there's a baby crying in the house, who is taking care of the baby?" …

… [T]he People correctly concede that the officer entered the home illegally. An illegal entry by the police requires the suppression of the fruits of an ensuing search notwithstanding a voluntary consent, unless the consent attenuates the taint of the illegal entry … . In determining whether the illegal entry is so attenuated, a court is required to consider a variety of factors, including: (1) the temporal proximity of the consent to the illegal entry; (2) whether there were intervening circumstances; (3) whether the purpose underlying the illegal entry was to obtain the consent or the fruits of the search; (4) whether the consent was volunteered or requested; (5) whether the person who gave consent was aware that he or she could refuse consent; and, most importantly, (6) the purpose and flagrancy of the misconduct … .

… The purpose of the illegal entry was to recover a gun that the officer presumed was hidden inside. Any consent obtained thereafter was not volunteered. It was requested, and the woman was not advised that she could refuse consent. … Most importantly, the officer engaged in flagrant misconduct. Without having witnessed any illegality, the officer entered a private residence without permission, after midnight, while a woman in that

residence was trying to feed her newborn child, and coerced her into consenting to a search of her home. People v Sweat, 2019 NY Slip Op 02240, Fourth Dept 3-22-19

SENTENCING, ILLEGAL, APPEALS.

PERIOD OF POSTRELEASE SUPERVISION CAN NOT BE IMPOSED ON AN INDETERMINATE SENTENCE, ILLEGAL SENTENCE CONSIDERED ON APPEAL EVEN THOUGH THE ISSUE WAS NOT RAISED BY EITHER PARTY (FOURTH DEPT).

The Fourth Department determined the period of postrelease supervision was not authorized for the indeterminate sentence imposed on the tampering with physical evidence conviction:

Supreme Court imposed a period of postrelease supervision in connection with defendant's conviction of tampering with physical evidence. That was error inasmuch as a period of postrelease supervision is not authorized in connection with an indeterminate sentence (see Penal Law § 70.45 [1] …). Although the issue is not raised by either party, we cannot allow an illegal sentence to stand … . We therefore modify the judgment by vacating that period of postrelease supervision … . People v Harvey, 2019 NY Slip Op 02250, Fourth Dept 3-22-19

SENTENCING, ILLEGAL, APPEALS, ELECTRONIC MONITORING.

SENTENCING COURT DID NOT MAKE THE APPROPRIATE FINDINGS FOR THE IMPOSITION OF ELECTRONIC MONITORING, MATTER SENT BACK, BECAUSE THE LEGALITY OF THE SENTENCE IS IMPLICATED THE ISSUE NEED NOT BE PRESERVED FOR APPEAL (FOURTH DEPT).

The Fourth Department determined Supreme Court did not make the appropriate findings in support of imposing electronic monitoring as a condition probation. The matter was sent back. The court noted that the issue involves the legality of the sentence and therefore need not be preserved for appeal:

A sentencing court imposing probation may require the defendant, pursuant to the statute, to submit to electronic monitoring (see § 65.10 [4]). "Such condition may be imposed only where the court, in its discretion, determines

that requiring the defendant to comply with such condition will advance public safety, probationer control or probationer surveillance" (id.). Here, the court failed to make such a determination. To the contrary, it is evident from our review of the sentencing minutes that the court did not consider defendant or his actions to pose a threat to public safety. There may, however, be a legitimate purpose for the electronic monitoring based on probationer control or probationer surveillance. Therefore, we modify the judgment by striking the condition of probation requiring that defendant submit to surveillance via electronic monitoring and pay the fees associated therewith, and we remit the matter to Supreme Court to make a discretionary determination whether to impose electronic monitoring based on appropriate findings. People v Fitch, 2019 NY Slip Op 01973, Fourth Dept 3-15-19

SENTENCING, JUVENILE OFFENDER.

SURCHARGE, DNA DATABANK FEE, CRIME VICTIM ASSISTANCE FEE SHOULD NOT HAVE BEEN ASSESSED AGAINST A JUVENILE OFFENDER (FOURTH DEPT).

The Fourth Department, over a two-justice concurrence, determined that defendant juvenile offender waived his right to appeal but found that the surcharge, DNA databank fee and crime victim assistance fee should not have been imposed on a juvenile offender. The concurrence argued that the waiver of appeal precluded the challenge to the imposed fees, but the People waived defendant's appeal-waiver on that narrow issue:

As defendant contends and the People correctly concede, we conclude that the surcharge, DNA databank fee, and crime victim assistance fee imposed by County Court must be vacated because defendant is a juvenile offender … . People v Works, 2019 NY Slip Op 02247, Fourth Dept 3-22-19

SEX OFFENDER REGISTRATION ACT (SORA), INSUFFICIENT EVIDENCE OF CONTINUING COURSE OF CONDUCT.

DEFENDANT SHOULD NOT HAVE BEEN ASSESSED 20 POINTS FOR A CONTINUING COURSE OF SEXUAL MISCONDUCT, PROOF OF A SECOND INSTANCE OF SEXUAL MISCONDUCT WAS INSUFFICIENT, AN ALLEGATION IN AN INDICTMENT IS NOT, BY ITSELF, EVIDENCE THE INCIDENT OCCURRED (THIRD DEPT).

The Third Department, reversing Supreme Court, determined that defendant should not have been assessed 20 points for a continuing course of sexual misconduct, noting that a reference in an indictment is not sufficient proof:

Defendant pleaded guilty to one count of having sexual intercourse with the victim and claimed that he only had sex with the victim once. The People presented a sworn statement given to the police by the victim's mother in which she recounts that, when she confronted the victim concerning her relationship with defendant, the victim told her that they "had sex two times." Even assuming that this statement constitutes reliable hearsay … there is no indication by the victim as to when the acts of sexual contact occurred. Although the case summary states that the presentence investigation report reflects that acts of sexual contact occurred in May 2013 and September 2013, the only reference to a September 2013 act in that report is when it lists the charges contained in the indictment. Notably, "the fact that an offender was arrested or indicted for an offense is not, by itself, evidence that the offense occurred" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 5 [2006]). Inasmuch as there is no evidence in the record regarding when the second act of sexual contact occurred, we cannot say that there is clear and convincing evidence that two sexual acts occurred that were separated by at least 24 hours … . People v Hinson, 2019 NY Slip Op 02184, Third Dept 3-21-18

STANDING TO SUPPRESS DROPPED WEAPON, CROSS-EXAMINATION OF POLICE OFFICER RE: CIVIL SUIT.

MOTION TO SUPPRESS SHOULD NOT HAVE BEEN DENIED ON THE GROUND THAT DEFENDANT LACKED STANDING, OTHER GROUNDS FOR SUPPRESSION NOT RAISED BELOW COULD NOT BE CONSIDERED ON APPEAL, DEFENSE COUNSEL SHOULD NOT HAVE BEEN PRECLUDED FROM CROSS-EXAMINING A POLICE OFFICER ABOUT A CIVIL SUIT AGAINST HIM (FIRST DEPT).

The First Department, reversing defendant's conviction, determined that defendant's motion to suppress the weapon he dropped should not have been denied on the ground defendant lacked standing and defense counsel should not have been precluded from cross-examining a police officer about allegations made in a federal civil suit against him. The First Department noted it could not consider alternative grounds for suppression not raised below:

Two officers testified at the hearing to the effect that the pistol was recovered immediately after it fell from defendant's person. Since this Court lacks jurisdiction to affirm the denial of defendant's motion to suppress the pistol on the alternative ground that the police had reasonable suspicion to stop and frisk him, a ground upon which the hearing court did not rule, we "reverse the denial of suppression and remit the case to Supreme Court for further proceedings"… .

Defendant is also entitled to a new trial, because the trial court improperly precluded his counsel from cross-examining the only police officer who allegedly saw the pistol falling from his person about allegations raised in a federal civil action against the officer, which had settled. Counsel had a good faith basis for seeking to impeach the officer's credibility by asking him about allegations that he and other officers approached and assaulted the plaintiff in that case without any basis for suspecting him of posing a danger and filed baseless criminal charges against him … . Although trial courts "retain broad discretion" over the admission of prior bad acts allegedly committed by a police witness or other witness … , the court improvidently exercised its discretion by entirely precluding any cross-examination about the allegations at issue here without any valid … . People v Holmes, 2019 NY Slip Op 02033, First Dept 3-19-19

STREET STOPS, DEBOUR, SUPPRESSION OF DISCARDED WEAPON.

DEFENDANT'S FLIGHT WHEN APPROACHED BY POLICE IN PLAINCLOTHES AND DRIVING AN UNMARKED CAR DID NOT JUSTIFY PURSUIT, MOTION TO SUPPRESS WEAPON DISCARDED BY THE DEFENDANT SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Renwick, over two separate full-fledged dissenting opinions, determined that the police did not have justification for pursuing defendant when he ran as the police (in plainclothes driving an unmarked car) approached. The police had a report of a shooting by a black man wearing a black jacket. Defendant was wearing a gray jacket and was walking out of an apartment complex with a black man wearing a black jacket. Defendant's motion to suppress the weapon he discarded during the chase should have been granted:

"Flight alone, even if accompanied by equivocal circumstances that would justify a police request for information, does not establish reasonable suspicion of criminality and is insufficient to justify pursuit, although it may give rise to reasonable suspicion if combined with other specific circumstances indicating the suspect's possible engagement in criminal activity" … . "Police pursuit of an individual 'significantly impede[s]' the person's freedom of movement and thus must be justified by reasonable suspicion that a crime has been, is being, or is about to be committed" … . …

… [T]he radio report simply indicated a sole perpetrator with a vague description — black man in a black jacket. There was nothing at all about defendant that matched any aspect of the suspect in the radio report, except that he was black. Nor was defendant wearing a black jacket. He was wearing a gray jacket and was with a second individual, several minutes after the radio report of shots fired. The men did not appear to be fleeing the scene, but rather, were exiting an apartment complex. Thus, unlike the cases relied on by the People, defendant did not match any description, general or otherwise … . Further, there was insufficient evidence to support the conclusion that defendant knew Pengel and his colleagues were police officers… .

That defendant was with someone who matched an extremely vague, generic description of the suspect, which contained no information about the suspect's height or weight, was not sufficiently indicative of criminal activity on defendant's part … . People v Bilal, 2019 NY Slip Op 01673, First Dept 3-7-19

STREET STOPS, REASONABLE GROUNDS TO PULL OVER VEHICLE.

POLICE OFFICER HAD REASONABLE GROUNDS TO PULL OVER PETITIONER'S CAR AFTER THE CAR CROSSED THE FOG LINE WITH A BLINKER ON AND THEN MOVED BACK INTO THE LANE, REVOCATION OF DRIVER'S LICENSE FOR FAILURE TO SUBMIT TO A CHEMICAL TEST AFFIRMED (CT APP).

The Court of Appeals, over a dissent, determined the stop of defendant's car was based upon reasonable grounds to believe petitioner had violated Vehicle and Traffic Law 1128. Therefore the revocation of petitioner's license for refusing to submit to a chemical test was affirmed:

At the administrative hearing, testimony was elicited that, while on patrol at 1:00 AM on December 22, 2013, a police officer observed petitioner's vehicle "make an erratic movement off the right side of the road, crossing the fog line and [moving] off the shoulder [with the vehicle's] right front tire." Once the vehicle left the paved roadway — and with the right-hand turn signal on — the officer saw the vehicle immediately move left, returning to its original lane of travel. After observing that there was no animal or other obstruction of the roadway that would have explained the "erratic jerking action," the police officer pulled the vehicle over. During the stop, the officer noticed that petitioner smelled of alcohol and exhibited other signs of inebriation. Petitioner admitted that he "had a few drinks" and asked the officer to give him a ride home, failing field sobriety tests and a preliminary breath test given at the scene. At the precinct, despite receiving the appropriate warnings, petitioner refused to take a chemical test, resulting in an administrative license revocation hearing. The police officer's testimony at the hearing, articulating credible facts to support a reasonable belief that petitioner violated Vehicle and Traffic Law § 1128 (a) (failure to remain in lane), provided substantial evidence that he had probable cause to stop petitioner's vehicle … . Any negative or adverse inference that was drawn from petitioner's failure to testify at the administrative revocation hearing was permissible … . Matter of Schoonmaker v New York State Dept. of Motor Vehs., 2019 NY Slip Op 02259, CtApp 3-28-19

STREET STOPS, INCREDIBLE AS A MATTER OF LAW.

POLICE OFFICER'S ALLEGED OBSERVATION OF A DRUG DEAL WAS DEEMED INCREDIBLE AS A MATTER OF LAW, MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED, INDICTMENT DISMISSED (SECOND DEPT).

The Second Department determined defendant's motion to suppress evidence should have been granted and the indictment dismissed in this drug possession case. The police officer's (Borden's) testimony that he observed the drug transaction, which took place inside a car, through his rearview mirror, was incredible as a matter of law:

… [W]e find that the People failed to establish the legality of the police conduct in the first instance, as Borden's testimony was incredible and patently tailored to meet constitutional objections. Borden's claim that he observed the alleged transaction through his rearview mirror with sufficient clarity to see that the object passed between the occupants of the car was Suboxone strains credulity and defies common sense … . Rather, common experience dictates that the dashboard of the defendant's vehicle would have obscured Borden's view of a hand-to-hand transaction between the defendant and the front-seat passenger. Borden's testimony that the transaction occurred at a height sufficient for "public view" lacked credibility and suggested that his testimony was tailored to meet constitutional objections … . Moreover, the difference in size between the eight-inch by two-inch object Borden claimed to have seen passed between the occupants of the vehicle, and the two-inch by one-inch object recovered … , casts significant doubt on Borden's testimony that he recognized the object as Suboxone. Accordingly, exercising our independent power of factual review, we conclude that the defendant's motion to suppress the physical evidence recovered incident to his arrest should have been granted. People v Maiwandi, 2019 NY Slip Op 01618, Second Dept 3-6-19

STREET STOPS, STOP AND FRISK, 42 USC 1983.

STOP AND ARREST OF PLAINTIFF PURSUANT TO NYC'S STOP AND FRISK POLICY STATED VALID CAUSES OF ACTION PURSUANT TO 42 USC 1983 AGAINST THE POLICE OFFICERS AND THE CITY (FIRST DEPT).

The First Department determined the allegations describing the stop and arrest of the plaintiff pursuant to NYC's stop and frisk policy stated causes of action pursuant to 42 USC 1983 against the individual officers and the city:

The complaint, as amplified by plaintiff's opposition papers, alleges that, on February 13, 2013, plaintiff and a friend, both black men, were driving in a luxury sports car in the Bronx. They were not driving recklessly or violating any traffic laws. Nevertheless, they were pulled over by the police, and five or six officers, including the individual defendants, removed them from the car and searched them and the car. The police found marijuana in the friend's pocket, but recovered no other contraband, either in the car or on plaintiff's person. Nevertheless, plaintiff was arrested and held for two days. Charges against him were dismissed in October 2013.

The complaint alleges further that, during this time period, the New York City Police Department employed a "stop and frisk" policy, pursuant to which every year the police stopped hundreds of thousands of overwhelmingly and disproportionately minority persons, including black men, and subjected them to searches, for no reason other than that they were in supposedly high-crime areas. The complaint alleges that the "stop and frisk" policy, rather than some constitutionally cognizable cause, was the reason plaintiff was detained, searched, and arrested. To prove the existence of this policy, plaintiff submitted, among other things, the New York City Bar Association's 24-page "Report on the NYPD's Stop-and-Frisk Policy," dated May 2013, which examined the policy and made recommendations for its reform and the protection of city residents' civil liberties.

The foregoing states a cause of action under 42 USC § 1983 against the individual defendants … . At this procedural juncture, it is not necessary for plaintiff to allege that any of the individual defendants did any more than participate in his unlawful arrest.

By alleging the existence of an extraconstitutional municipal "stop and frisk" policy, and that the individual defendants unlawfully arrested plaintiff pursuant to that policy, the complaint states a cause of action under 42 USC § 1983 against the City … . Smith v City of New York, 2019 NY Slip Op 01828, First Dept 3-14-19

STREET STOPS, REASONABLE SUSPICION TO PULL OVER VEHILCE.

TRAFFIC STOP WAS SUPPORTED BY REASONABLE SUSPICION DESPITE THE DMV COMPUTER IMPOUNDMENT RECORD'S CAUTIONARY STATEMENT THAT THE VEHICLE SHOULD NOT BE CONSIDERED STOLEN (FOURTH DEPT).

The Fourth Department, over a two-justice dissent, determined the traffic stop was supported by reasonable suspicion even though the DMV impoundment record indicated the vehicle was not stolen:

Here, a New York State Trooper properly stopped the vehicle defendant was driving based on his check of Department of Motor Vehicles (DMV) computer records for the vehicle's license plate number, which revealed that the car had been impounded and thus should have been located in an impound lot … . …

Our dissenting colleagues conclude that the Trooper did not have reasonable suspicion to stop defendant's vehicle because the Trooper disregarded cautionary language in the DMV impoundment record stating that it "should not be treated as a stolen vehicle hit[, and] [n]o further action should be taken based solely upon this impounded response." We conclude, however, that the Trooper's testimony that the cautionary language was "generic," inasmuch as it even "comes up with stolen vehicles," and that, based on his experience, he interpreted the impoundment record as requiring him to conduct a further investigation because the vehicle "should not be out on the road," establishes that the stop was not unreasonable. Rather, we conclude that the impoundment record, coupled with the Trooper's explanation of its import, provided reasonable suspicion to stop the vehicle. In disregarding the Trooper's explanation that the cautionary language was "generic," the dissent would obligate us to find unreasonable any stops where that same message appears, irrespective of the facts surrounding the stop. We reject such a categorical determination. **People v Hinshaw, 2019 NY Slip Op 02252, Fourth Dept 3-22-19**

TRIAL IN ABSENTIA.

COURT DID NOT CONSIDER THE APPROPRIATE FACTORS BEFORE PROCEEDING TO TRIAL IN DEFENDANT'S ABSENCE, DEFENDANT HAD MADE ALL PRIOR APPEARANCES AND NO EFFORT WAS MADE TO SECURE HIS PRESENCE AT THE TRIAL (THIRD DEPT).

The Third Department, reversing defendant's conviction, determined County Court did not consider the appropriate factors before ordering the trial in defendant's absence. Defendant had made all prior appearances and no effort was made to secure his presence:

Defendant had been present at all prior appearances, and there was no explanation for his failure to appear at trial. Defendant's counsel stated that he had been calling defendant for a week without success. That morning, counsel had contacted local jails and hospitals looking for defendant. Despite counsel's request for an adjournment, County Court concluded that defendant had been warned of the consequences of failing to appear and had voluntarily decided to be absent. The court then issued a bench warrant and immediately began the trial.

County Court abused its discretion in conducting the trial in defendant's absence, as the record does not reflect that the court considered the appropriate factors. Nothing in the record indicates any difficulty in rescheduling the trial, fear that evidence or witnesses would be lost or that further efforts to locate defendant would be futile … . "Moreover, the fact that trial was commenced immediately after issuance of a bench warrant demonstrates only a minimal effort to locate defendant prior to trial" … . The court did not provide even a short adjournment for execution of the warrant or a determination as to whether defendant could be located within a reasonable time … . Because the court violated defendant's right to be present at his trial, we reverse. People v Smith, 2019 NY Slip Op 01858, Third Dept 3-14-19

YOUTHFUL OFFENDERS.

DEFENDANT WAS 17 WHEN HE COMMITTED THE CRIMES AND WAS CONVICTED OF MURDER IN 1992, THAT CONVICTION WAS OVERTURNED AND DEFENDANT PLED GUILTY TO MANSLAUGHTER IN 2016, ALTHOUGH DEFENDANT WAIVED HIS RIGHT TO APPEAL, HE WAS ENTITLED TO CONSIDERATION OF WHETHER HE SHOULD BE AFFORDED YOUTHFUL OFFENDER STATUS (FOURTH DEPT).

The Fourth Department remitted the matter for consideration whether defendant should be afforded youthful offender status. The original murder conviction was in 1992. Defendant was granted a new trial and pled guilty to manslaughter in 2016. The youthful offender issue survives a waiver of appeal:

Defendant was 17 years old at the time he committed the underlying crimes and, based on the record before us, he appears to be an eligible youth within the meaning of CPL 720.10 (2). Defendant was sentenced, however, without the benefit of an updated presentence report. The court obtained from defendant a waiver of an updated report, which is generally permissible where, as here, the "defendant had been continually incarcerated between the time of the initial sentencing and resentencing and at the time of . . . resentencing [the defendant] was afforded the opportunity to supply information about his [or her] subsequent conduct" … . Nonetheless, "[w]hen determining whether a defendant is an eligible youth, the defendant's status at the time of the conviction—in this case at the time of his plea of guilty—is controlling" … . The original presentence report prepared in 1992 on which the court relied is insufficient to establish that defendant was an eligible youth at the time he pled guilty to the manslaughter counts in 2016. We therefore hold the case, reserve decision, and remit the matter to Supreme Court to make and state for the record a determination whether defendant is an eligible youth within the meaning of CPL 720.10 (2) with the benefit of an updated presentence report and, if so, whether defendant should be afforded youthful offender status. People v Jarvis, 2019 NY Slip Op 02206, Fourth Dept 3-22-19