NEW YORK APPELLATE DIGEST, LLC

Criminal Law
January 2019

"Criminal Law" Decision-Summaries Posted on the Website www.NewYorkAppellateDigest.com in January 2019.

Contents

Table of Contents

Table of Contents

ARREST, PROBABLE CAUSE.

ALTHOUGH THERE WAS PROBABLE CAUSE TO ARREST PLAINTIFF ON A SUBWAY FOR A TRANSIT VIOLATION, THE CONCURRENCE CALLED INTO QUESTION THE 'TRANSIT DATABASE' WHICH PROBABLY INCLUDES PERSONS WHOSE CRIMINAL CHARGES WERE SEALED AND DISMISSED, THE DATABASE DOES NOT PROVIDE A DISTINCT BASIS FOR ARREST (FIRST DEPT).

The First Department, over a concurrence, determined that there was probable cause to arrest the plaintiff based on the transit offense of passing between two subway cars on a moving train. Because there was probable cause, the majority did not reach the issue of the fairness or constitutionality of a so-called "transit database" which encompasses so-called "transit recidivists." The concurrence made it clear that plaintiff's designation as a "transit recidivist" did not provide the police with a separate basis to arrest plaintiff:

From the concurrence:

It must be said that plaintiff's designation as a transit recidivist did not give the officers a separate basis to arrest plaintiff … . The definition of "transit recidivist" at the time of plaintiff's arrest encompassed not only persons convicted of crimes, but those with prior arrests in the transit system or prior felony arrests within New York City … . This overbroad classification subverted the presumption of innocence and likely violated state sealing laws. …

… [T]he database was likely contaminated by sealed arrests and summons histories and, as such, ran afoul of provisions of the Criminal Procedure Law that require that the records of any criminal prosecution terminating in a person's favor or by way of noncriminal conviction be sealed … Statistics … indicate that in 2016 alone, over 50% of all criminal cases arraigned in New York City Criminal Court were terminated in favor of the accused, and accordingly entitled to sealing … . From 2007 through 2015 an average of 23% of all criminal summonses were dismissed for facial insufficiency … . Unless otherwise permitted by law, no one, including a private or public agency, can access a sealed record, except with a court order upon a showing that justice so requires.

The presence of arrest and summons data in the database also undercut the presumption of innocence insofar as persons were threatened with punishment on account of allegations that may have been unsubstantiated or dismissed.

…[T]his is not the first NYPD database to have included unlawfully broad data. NYPD previously recorded the name of every individual stopped and frisked as recently as 2010, until forced by a federal lawsuit to discontinue the practice.

Finally, there is little doubt that the "transit recidivist" database had a disproportionately negative effect on black and Hispanic communities, perpetuating this City's history of overpolicing communities of color. Vargas v City of New York, 2019 NY Slip Op 00370, First Dept 1-22-19

CELL-SITE LOCATION, EXPERT OPINION, JUDGES.

CELL PHONE COMPANY WITNESS WAS NOT AN ENGINEER AND SHOULD NOT HAVE BEEN ALLOWED TO TESTIFY AS AN EXPERT ABOUT HOW FAR DEFENDANT'S PHONE WAS FROM THE TOWER, POLICE OFFICER SHOULD NOT HAVE BEEN ALLOWED TO TESTIFY ABOUT THE VICTIM'S IDENTIFICATION OF THE DEFENDANT, JUDGE SHOULD NOT HAVE MARSHALED THE EVIDENCE TO FAVOR THE PROSECUTION, THESE ERRORS, AS WELL AS ADDITIONAL JUDICIAL ERRORS, CUMULATIVELY DEPRIVED DEFENDANT OF A FAIR TRIAL (FIRST DEPT).

The First Department, reversing defendant's conviction, described a number of errors which had the cumulative effect of depriving defendant of a fair trial. Those errors include: (1) the witness from the cell phone company was not an engineer and therefore could not provide competent expert opinion about where defendant's cell phone was in relation to the cell phone tower which picked up the signal; (2) a police officer should not have been allowed to testify that the victim had twice identified the defendant by name; (3) the charge to the jury improperly marshaled the identification evidence in a light favorable to the prosecution; (4) the court should have given the missing witness jury instruction for two lead detectives who had interviewed the victim and a witness; and (5) the judge should not have referenced the defendant's failure to testify (twice). With respect to the cell tower and identification evidence, the court wrote:

"[T]estimony on how cell phone towers operate must be offered by an expert witness" because an analysis of the possible ranges of cell phone towers and how they operate is beyond a juror's day-to-day experience and knowledge … . [The witness] was not an engineer and was not qualified, without an engineering background, to reach further conclusions about why defendant's cell phone hit the Starling Avenue tower, i.e. whether it was because it was closest or strongest … . …

The trial court also permitted a police officer to testify twice, over defense objection, that the victim had identified her attacker as "male Hispanic, bald, by the name of Jose Ortiz." This too was error. "Testimony by one witness (e.g., a police officer) to a previous identification of the defendant by another witness (e.g., a victim) is inadmissible" … . People v Ortiz, 2019 NY Slip Op 00221, First Dept 1-15-19

GUILTY PLEAS, ATTORNEYS, APPEALS.

DEFENSE COUNSEL GAVE DEFENDANT THE WRONG INFORMATION ABOUT THE MAXIMUM SENTENCE SHOULD HE GO TO TRIAL, DEFENDANT'S GUILTY PLEA WAS THEREFORE NOT VOLUNTARY, EXCEPTION TO THE PRESERVATION REQUIREMENT FOR APPEAL APPLIED (SECOND DEPT).

The Second Department, vacating defendant's guilty plea, determined: (1) the plea was not voluntary because defendant was given the wrong information about the possible maximum sentence if he went to trial; and (2) the error is an exception to the preservation requirement for appeal because defendant could not have known of the error at the time of the plea:

The Court of Appeals … has carved out an exception to the preservation doctrine "because of the actual or practical unavailability of either a motion to withdraw the plea' or a motion to vacate the judgment of conviction,'" in certain instances, reasoning that " a defendant can hardly be expected to move to withdraw his plea on a ground of which he has no knowledge'" … . Moreover, the defendant's contention that his plea of guilty was not knowing, voluntary, and intelligent survives his valid appeal waiver … . …

Here, the defendant's plea was not made knowingly, voluntarily, and intelligently. The record demonstrates that the defendant was not presented with legitimate alternatives about the maximum sentence he faced in the event he chose to reject the People's plea offer and was convicted after trial. … On this record, given the difference between the incorrect maximum aggregate sentence of 3 to 5 years that defense counsel communicated to the defendant, the actual maximum aggregate sentence of 2 to 4 years, and the bargained-for sentence of 1½ to 3 years, the threat of a higher sentence rendered the defendant's plea involuntary … . People v Keller, 2019 NY Slip Op 00620, Second Dept 1-30-19

GUILTY PLEAS, ATTORNEYS.

DEFENSE COUNSEL'S TAKING A POSITION ADVERSE TO DEFENDANT'S PRO SE MOTION TO WITHDRAW HIS GUILTY PLEA VIOLATED DEFENDANT'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL (THIRD DEPT).

The Third Department determined defense counsel violated defendant's right to effective assistance of counsel by taking a position adverse to defendant's pro se motion to vacate his guilty plea:

Defense counsel's repeated assertions that there was no basis for defendant's motion and that his plea had been entered knowingly and voluntarily created a conflict of interest between him and defendant, thereby giving rise to County Court's obligation to assign new counsel before deciding the motion … . Accordingly, we vacate the sentence and remit the matter for assignment of new counsel and reconsideration of defendant's motion. People v Faulkner, 2019 NY Slip Op 00645, Third Dept 1-31-19

GUILTY PLEAS, JUDGES, APPEALS.

THE THIRD DEPT EXERCISED ITS INTEREST OF JUSTICE JURISDICTION AND VACATED DEFENDANT'S PLEA BECAUSE HE WAS NOT ADEQUATELY INFORMED OF THE RIGHTS HE WAS GIVING UP BY PLEADING GUILTY, TWO JUSTICE DISSENT (THIRD DEPT).

The Third Department, vacating defendant's guilty plea, exercising its interest of justice jurisdiction, over a two-justice dissent, determined defendant was not adequately informed of the rights he was giving up by pleading guilty:

Defendant contends that his plea was not knowing, voluntary and intelligent because County Court failed to advise him of the constitutional rights he was waiving by pleading guilty. Although defendant failed to preserve this contention for our review through an appropriate postallocution motion … , we nonetheless exercise our interest of justice jurisdiction to take corrective action and reverse the judgment … . …

… [D]uring the abbreviated plea colloquy, County Court briefly advised defendant that, if he were to plead guilty, he would be giving up his "right to a trial, . . . the right to testify at that trial, to call witnesses and to

cross-examine the People's witnesses." Significantly, County Court did not advise defendant that he had a right to a jury trial or that he would be waiving the privilege against self-incrimination by entering a guilty plea … . Further, the court failed to obtain any assurance that defendant had discussed with counsel the trial-related rights that are automatically forfeited by pleading guilty or the constitutional implications of a guilty plea … .

From the dissent:

… .[W]e do not think that the unpreserved error cited by the majority, standing alone, necessitates this Court exercising its interest of justice jurisdiction to reverse the judgment of conviction as there is nothing compelling about this case that "cries out for fundamental justice beyond the confines of conventional considerations" … . People v Demkovich, 2019 NY Slip Op 00326, Third Dept 1-17-19

GUILTY PLEAS, JUDGES.

THIRD DEPT DECLINED TO EXERCISE ITS INTEREST OF JUSTICE JURISDICTION TO REVIEW WHETHER DEFENDANT WAS ADEQUATELY INFORMED OF THE RIGHTS SHE WAS GIVING UP BY PLEADING GUILTY, TWO JUSTICE DISSENT (THIRD DEPT).

The Second Department, over a two-justice dissent, declined to exercise its interest of justice jurisdiction to review whether defendant was adequately informed of the rights she was giving up by pleading guilty:

… [W]e find that this is not a proper matter for the exercise of our interest of justice jurisdiction. Defendant has a lengthy criminal history and admitted at the time of the plea that she was guilty of possessing heroin with the intent to sell it. Defendant was represented by counsel and entered into a plea agreement with a favorable sentence. Although defendant later filed a motion to withdraw her plea, she elected to withdraw the motion after being granted an adjournment and conferring with counsel. Significantly, defendant has since served her negotiated sentence and been released from custody; however, if this conviction is reversed, defendant once again faces prosecution for the original charge, which, if convicted, carries a greater sentencing range … . …

From the dissent:

Our review of the plea colloquy reveals that County Court engaged in an extremely limited exchange with defendant, advising her only that, by pleading guilty, she would forever relinquish her "right to go to trial, the right to testify, to call witnesses, [and to] cross-examine the People's witness[es]." Critically, there was no

discussion of the privilege against self-incrimination, the right to be tried by a jury or whether defendant had conferred with counsel and understood the constitutional rights that she was automatically waiving by pleading guilty … . People v Glover, 2019 NY Slip Op 00325, Third Dept 1-17-19

GUILTY PLEAS, JUVENILE DELINQUENCY.

ALLOCUTION CAST DOUBT ABOUT GUILT IN THIS JUVENILE DELINQUENCY PROCEEDING, AN EXCEPTION TO THE PRESERVATION REQUIREMENT FOR APPEAL (SECOND DEPT).

The Second Department, reversing Family Court, determined that the plea allocution was defective in this juvenile delinquency proceeding. The allocution did not support the elements of the charged offense (grand larceny fourth degree if committed by an adult) and the juvenile's foster care planner was not questioned about the offense, a defect which cannot be waived. Although no motion to withdraw was made, the allocution cast significant doubt about guilt which constitutes an exception to the the preservation requirement for appeal:

The appellant did not move to withdraw his admission on the grounds raised on appeal … . However, this is one of the " rare case[s] . . . where the [appellant's] recitation of the facts underlying the crime pleaded to clearly casts significant doubt upon the [appellant's] guilt,' [which] fall[s] into the narrow exception to the preservation requirement"… . In addition, the appellant was not required to preserve his contention that the Family Court erred in failing to obtain an allocution from the foster care case planner, since the statutory requirement of such an allocution may not be waived … . * * *

The Family Court did not elicit any additional details concerning the incident in order to clarify how the appellant came to be in possession of the $5 such that it could be concluded that he took it from the boy's person within the meaning of Penal Law § 155.30(5). Thus, the court "did not elicit a sufficient factual basis to support [the appellant's] admission'" … .

In addition, the appellant's admission was defective since his foster care case planner was present, but the Family Court failed to ascertain through allocution of the foster care case planner, as a person legally responsible for the appellant's care, "that (a) [the appellant] committed the act or acts to which he [was] entering an admission, (b) he [was] voluntarily waiving his right to a fact-finding hearing, and (c) he [was] aware of the possible specific dispositional orders" … . Matter of Richard S., 2019 NY Slip Op 00130, Second Dept 1-9-19

INDICTMENTS, TRIAL EVIDENCE.

DEFENDANT WAS CONVICTED OF 37 COUNTS OF SEXUAL OFFENSES, THE TESTIMONY AT TRIAL RENDERED 26 COUNTS DUPLICITOUS REQUIRING REVERSAL (THIRD DEPT).

The Third Department determined that 26 of the 37 sexual offense counts on which defendant was convicted must be reversed because they were rendered duplicitous by the trial testimony:

An indictment count is duplicitous when it charges more than one crime that is completed by a discrete act in the same count … . "Even if a count is valid on its face, it is nonetheless duplicitous where the evidence presented to the grand jury or at trial 'makes plain that multiple criminal acts occurred during the relevant time period, rendering it nearly impossible to determine the particular act upon which the jury reached its verdict'" … . Thus, when "the trial testimony provides evidence of repeated acts that cannot be individually related to specific counts in the indictment, the prohibition against duplicitousness has been violated" … . …

For example, counts 1 and 2 of the indictment used identical language to charge defendant with predatory sexual assault against a child on the ground that he committed the crime of criminal sexual assault in the first degree against victim 1 during the summer of 2006 … . Victim 1 testified that, during the summer of 2006 when he was 12 years old, defendant put his mouth on victim 1's penis "[a]t least two times." Likewise, counts 5 and 6 charged defendant with criminal sexual act in the second degree consisting of oral sexual conduct with victim 1 during the summer of 2007, counts 7 and 8 charged defendant with the commission of the same crime during the summer of 2008, counts 9 through 12 charged defendant with the commission of two counts of criminal sexual act in the third degree in each of the summers of 2009 and 2010, and count 13 charged defendant with the commission of sexual abuse in the second degree during the summer of 2006. Victim 1 testified that the charged conduct occurred at least twice during each of the specified time periods. He provided no further specifics about the frequency or timing of any particular act, and the prosecutor did not seek to distinguish among them by, for example, drawing victim 1's attention to the first incident in one of the specified time periods and then asking him to describe that particular event … . Likewise, the jury was given no instructions that distinguished between the counts pertaining to any of the time periods in a way that would have permitted it to relate each of the counts to a specific act … . People v Madsen, 2019 NY Slip Op 00003, Third Dept 1-3-19

JURY INSTRUCTIONS, ROBBERY.

FAILURE TO INSTRUCT THE JURY ON THE MEANING OF 'DEPRIVE' WITH RESPECT TO THE LARCENY ELEMENT OF ROBBERY REQUIRED REVERSAL OF DEFENDANT'S FELONY MURDER AND CRIMINAL POSSESSION OF A WEAPON CONVICTIONS (FIRST DEPT).

The First Department, reversing defendant's felony murder and criminal possession of a weapon convictions, determined that the jury should have been instructed on the definition of "deprive" with respect to the larceny aspect of the underlying robbery:

In connection with the larceny element of attempted robbery, the offense underlying the felony murder charge, the court, upon defense counsel's request, should have instructed the jury on the definition of "deprive" … . The failure to so charge the jury as requested constitutes reversible error, since such omission "could have misled the jury into thinking that any withholding, permanent or temporary, constituted larceny"… . Indeed, "the concepts of deprive' and appropriate' . . . are essential to a definition of larcenous intent' and they connote a purpose . . . to exert permanent or virtually permanent use thereof'" … . It is the function of the jury to determine whether defendant intended to rob the victim and permanently keep the property taken from him. By failing to give the requested charge, the court usurped that function.

While there are some cases in which the court's omission of the definition of a term or terms may constitute harmless error, under the facts of this case, the error was not harmless … . People v Ataroua, 2019 NY Slip Op 00197, First Dept 1-10-19

JURY SELECTION, BATSON.

COURT NEVER RULED ON WHETHER THE PROSECUTOR'S INITIAL REASON FOR EXCLUDING AN AFRICAN-AMERICAN POTENTIAL JUROR WAS A CREDIBLE RACE-NEUTRAL REASON, THE REASONS OFFERED AFTER THE JUROR WAS QUESTIONED FURTHER SHOULD NOT HAVE BEEN CONSIDERED, NEW TRIAL ORDERED (SECOND DEPT

The Second Department, reversing defendant's conviction, determined the trial court did not handle the Batson challenge to the prosecutor's striking an African American juror correctly. When asked about her reasons, the prosecutor said the potential juror was too young to sit on a murder trial. Upon further questioning the potential juror had difficulty understanding and answering questions. But the court never ruled whether the prosecutor's initial reason for excluding the potential juror, his youth, was a credible race-neutral explanation:

New York courts apply the three-step test of Batson v Kentucky (476 US 79) to determine whether a party has used peremptory challenges to exclude potential jurors for an impermissible discriminatory reason… . "The first step requires that the moving party make a prima facie showing of discrimination in the exercise of peremptory challenges; the second step shifts the burden to the nonmoving party to provide race-neutral reasons for each juror being challenged; and the third step requires the court to make a factual determination as to whether the race-neutral reasons are merely a pretext for discrimination" … .

… [T]he Supreme Court failed in its duty to determine whether the prosecutor's race-neutral explanations were credible (see … United States v Taylor, 636 F3d 901, 905 [7th Cir] ["when ruling on a Batson challenge, the trial court should consider only the reasons initially given to support the challenged strike, not additional reasons offered after the fact"]). People v Alexander, 2019 NY Slip Op 00135, Second Dept 1-9-19

JURY SELECTION, BATSON.

THE BATSON RECONSTRUCTION HEARING, HELD AFTER THE MATTER WAS SENT BACK BECAUSE OF THE LACK OF AN ADEQUATE RECORD FOR APPEAL, WAS ITSELF DEFICIENT, THE ORIGINAL PROSECUTOR DID NOT TESTIFY AND THE NOTES OF THE ORIGINAL PROSECUTOR WERE NOT PROVIDED TO THE COURT, CONVICTIONS REVERSED AND INDICTMENT DISMISSED (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Manzanet-Daniels, over two separate dissenting opinions, reversing the defendant's convictions and dismissing the indictment, determined the Batson reconstruction hearing, held after the matter was sent back to the trial court because the record on appeal was not sufficient, did not demonstrate that the prosecution's peremptory challenges to African-American-male venire persons were justified by nondiscriminatory reasons. The Batson reconstruction hearing was itself deficient because it was held with a different prosecutor and the original prosecutor's notes were not provided, nor did the orignal prosecutor testify:

The purpose of a Batson reconstruction hearing is to attempt to recreate, after the fact, a record of the prosecutor's proffered justifications for striking certain venire persons. At such a hearing, it is typical to rely on the contemporaneous notes of the prosecutor and to elicit testimony from him or her. The prosecutor testifies as a sworn witness, and is subject to cross-examination concerning the strike or strikes … .

"[T]here is no better evidence of a prosecutor's intent than her notes from jury selection"… ; indeed, seminal opinions on Batson have referred to jury selection notes as evidence of prosecutorial bias (see e.g. Foster v Chatman, ___ US ___, 136 S Ct 1737, 1755 [2016]). In Foster, the prosecutor's notes were not disclosed until post-conviction proceedings years later. The notes showed the letter "B" next to the names of the African American jurors and their names highlighted in green pen. Three decades after trial, the contents of the notes led the Supreme Court to reverse the defendant's conviction.

No testimony or notes were offered at this Batson reconstruction hearing. The ADA who conducted the voir dire did not appear and his notes were never disclosed. The ADA at the reconstruction hearing could only speculate as to the motives of his colleague. This procedure was insufficient to satisfy the requirements of Batson. People v Watson, 2019 NY Slip Op 00217, First Dept 1-10-19

MIRANDA, ATTORNEYS, APPEALS.

UNWARNED STATEMENTS MADE DURING CUSTODIAL INTERROGATION AND STATEMENTS MADE IN THE ABSENCE OF COUNSEL SHOULD HAVE BEEN SUPPRESSED, DEFENSE COUNSEL'S FAILURE TO OBJECT CONSTITUTED INEFFECTIVE ASSISTANCE, SOME UNPRESERVED APPELLATE ISSUES CONSIDERED IN THE INTEREST OF JUSTICE (SECOND DEPT).

The Second Department, over a partial dissent, reversed defendant's bribery and falsely reporting an incident convictions, in the interest of justice, and ordered a new trial. The facts are too complex to fairly summarize here. Defendant was accused of assault by her husband. The police called her to the station where she was interviewed. After she was told she would be placed under arrest she allegedly offered sex and money to the interviewing officer (Officer Persaud) to make the charges go away. The officer wore a wire to record further conversations about the bribery. After defendant was arraigned and represented by counsel, defendant was again interviewed in the back of a police car (by Sargeant Klein and her partner) concerning the alleged bribery. That conversation was also recorded. Statements made during custodial interrogation that were not preceded by Miranda warnings and statements made to police officers in the absence of counsel should not have been admitted. Defense counsel was ineffective for failing to object:

Officer Persaud should have known that in telling the defendant that she needed to come to the precinct station house in connection with his investigation into the allegations her husband had made against her, allegations about which she had already been told she would be arrested, placing her in an interview room, and then confronting her with the allegations and the evidence against her, including the existence of the order of protection, he was reasonably likely to elicit from the defendant an incriminating response … . * * *

… [T]the defendant's alleged bribery of Officer Persaud and her allegedly false reporting of his sexual misconduct during that same encounter were "so inextricably interwoven in terms of both their temporal proximity and factual interrelationship" as to render unavoidable the conclusion that any interrogation concerning the allegedly false report would inevitably elicit incriminating responses regarding the matter in which there had been an entry of counsel… . Furthermore, the police were aware that the defendant was actually represented by an attorney and the interrogation actually entailed an infringement of her constitutional right to counsel by impermissible questioning on the represented crimes … . * * *

… [T]he defendant demonstrated the absence of "a reasonable and legitimate strategy under the circumstances and evidence presented" … for defense counsel's stipulation to admission of a recording of the entire interview between the defendant and Sergeant Klein and her partner, and his failure to object to Sergeant Klein's testimony recounting the same interview, or Officer Persaud's testimony in which he recounted numerous statements made by the defendant, of which the People failed to provide notice as required by CPL 710.30(1)(a). People v Stephans, 2019 NY Slip Op 00473, Second Dept 1-23-19

PRESCRIPTION DRUGS, LARCENY, WIRETAP RECORDINGS.

PROVIDING ILLEGAL HIV MEDICATIONS TO A PHARMACY FOR RESALE: (1) DID NOT CONSTITUTE GRAND LARCENY BECAUSE THE AGENT OF THE PHARMACY TO WHOM THE DRUGS WERE PROVIDED KNEW THE DRUGS WERE ILLEGAL AND THAT KNOWLEDGE IS IMPUTED TO THE CORPORATION; AND (2) DID NOT CONSTITUTE CRIMINAL DIVERSION OF PRESCRIPTION DRUGS BECAUSE THE DRUGS WERE PROVIDED TO A CORPORATION, NOT TO A PERSON WHO HAD NO MEDICAL NEED FOR THEM; AN UNSEALED COMPILATION OF WIRETAP RECORDINGS CONSTRUCTED FROM SEALED ORIGINALS WAS ADMISSIBLE (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Sgroi, reversing defendant's grand larceny and criminal diversion of prescription medications convictions, determined that: (1) the knowledge of the agent of the pharmacy to whom the illegal HIV drugs were provided must be imputed to the corporation, therefore the corporation was deemed to know it was receiving and selling illegal drugs; (2) the statute prohibiting criminal diversion of prescription drugs is aimed at street sales of prescription drugs to those who have no medical need for them, therefore the statute does not apply to supplying illegal drugs to a pharmacy for resale; (3) the money-laundering convictions and related sentences should be affirmed; and (4) a compilation of wiretap recordings, although not sealed, was made from properly sealed recordings and was properly authenticated, therefore the compilation was admissible:

… [T]here is no statutory requirement that a properly authenticated composite recording be compared against the sealed original recording. Three simultaneous original recordings of the intercepted communications were created in this case. The composite recording was compared against an original version of the recordings, and [a witness] testified that the composite recording was a true and accurate reflection of the content of the original.

,,, [A] sealed version of the original recording existed to deter alteration of, and permit challenge to, the composite, thus satisfying the statute. * * *

[Re; Grand Larceny:] The People's theory in this case was that the defendant … wrongfully took money from [the pharmacy] by falsely representing that the medications they were selling were lawful to sell, transfer, and dispense. The defendant argues … that the People failed to prove that such a false representation of past or existing fact was made to [the pharmacy] because [the agent] , a high managerial employee of [the pharmacy], knew that the medications were not lawful to sell, transfer, and dispense, and thus, [the pharmacy], by imputation, also knew this fact. We agree. * * *

[Re: Criminal Diversion of Prescription Medications Penal Law § 178.25:] The defendant does not challenge the People's premises that (1) the medications had left the legitimate stream of commerce rendered them "adulterated," and (2) one cannot have a "medical need" for adulterated medications, as the term "medical need" is used in the statute. Thus, we do not address the validity of these premises. However, the defendant challenges the applicability of this statute to his alleged conduct on the basis that, by its terms, the statute cannot apply to a transfer of prescription medications to a corporation, as opposed to a person capable of having medical needs. Again, we agree. People v Gross, 2019 NY Slip Op 00461, Second Dept 1-23-19

ROBBERY.

NO EVIDENCE THE VICTIM, AS OPPOSED TO AN EYEWITNESS, SAW A FIREARM, ROBBERY FIRST CONVICTION REVERSED (FIRST DEPT).

The First Department, reversing defendant's robbery first conviction, determined that, although a witness saw a firearm, the victim did not:

… [T]he evidence did not establish the element of display of what appeared to be a firearm … . The robbery was accomplished by assaulting the victim and taking his wallet. Although an eyewitness saw the display of what appeared to be a firearm, there was no evidence that the victim ever saw it … . People v Allende, 2019 NY Slip Op 00195, First Dept 1-10-19

SEARCHES, STREET STOPS, STANDING, JUDGES.

OFFICER DID NOT HAVE PROBABLE CAUSE TO SEARCH THE VAN AFTER HE LEARNED THAT DEFENDANT, WHO WAS SITTING IN THE PASSENGER SEAT, WAS SMOKING A CIGAR, NOT MARIJUANA, SUPREME COURT'S SUA SPONTE FINDING THAT DEFENDANT DID NOT HAVE STANDING TO CONTEST THE SEARCH WAS ERROR, THERE WAS UNCONTRADICTED EVIDENCE THE VAN WAS DEFENDANT'S WORK VEHICLE (SECOND DEPT).

The Second Department, reversing defendant's possession of a weapon conviction and dismissing the indictment, determined that the police officer did not have probable cause to search the van where the weapon was found. The defendant was sitting in the passenger seat smoking a cigar when the officer approached and removed him from the van, apparently because the officer thought defendant was smoking marijuana. At the time the officer searched the van, he know defendant was smoking a cigar. Although defendant was sitting in the passenger seat, there was no evidence to contradict his claim that the van was his work vehicle. Contrary to Supreme Court's contrary finding (made sua sponte), the defendant had standing to contest the search:

The officer testified that he removed the defendant from the minivan and frisked him out of a fear for the officer's own safety; no weapon was recovered. The officer further testified that, at that time, he realized that the two men were smoking cigars, not marijuana. Nevertheless, the officer went around the minivan to the driver's side and opened the sliding door on that side, whereupon he observed a firearm sticking out of a bag behind the driver's seat.

We disagree with the hearing court's determination, sua sponte, that the defendant lacked standing to challenge the search of the minivan. The defendant, who had told the police at the police station that the minivan was his work van, had standing to challenge the search. Although the defendant had been sitting in the front passenger seat of the minivan, no evidence was presented to contradict his statements that it was his work van. The defendant's statements were sufficient to establish that he exercised sufficient dominion and control over the minivan to demonstrate his own legitimate expectation of privacy therein… .

"[A]bsent probable cause, it is unlawful for a police officer to invade the interior of a stopped vehicle once the suspects have been removed and patted down without incident, as any immediate threat to the officers' safety has consequently been eliminated" … . Contrary to the People's contention, under the circumstances here, where the defendant already had been removed from the minivan and no one else was in the minivan, the police lacked probable cause to conduct a warrantless search by opening the sliding door of the minivan, and the weapon found

as a result of the unlawful search should have been suppressed … . People v Dessasau, 2019 NY Slip Op 00456, Second Dept 1-23-19

SENTENCING, ENHANCEMENT, APPEALS.

BECAUSE THE COURT DID NOT IMPOSE CONDITIONS ON THE PLEAS AND SENTENCING COMMITMENTS, THE SENTENCE SHOULD NOT HAVE BEEN ENHANCED BASED ON THE PURPORTED VIOLATIONS OF CERTAIN CONDITIONS, INCLUDING THE DEFENDANT'S FAILURE TO APPEAR AT SENTENCING, ALTHOUGH THE ISSUE WAS NOT PRESERVED, THE APPELLATE COURT CONSIDERED IT IN THE INTEREST OF JUSTICE (SECOND DEPT).

The Second Department determined the sentencing court should not have imposed an enhanced sentence (consecutive instead of concurrent) because defendant did not appear at sentencing because the court had not imposed his appearance as a condition for the pleas and sentencing commitments. Although the issue was not preserved, the court considered the appeal in the interest of justice:

The defendant entered pleas of guilty under three separate indictments. He was promised that the sentences imposed would run concurrently. The defendant did not appear in court on the scheduled sentencing date. Subsequently, in rendering the judgments of conviction, the Supreme Court directed, inter alia, the sentence imposed on the second judgment to run consecutively to the sentence imposed on the first judgment. …

… [W]e exercise our interest of justice jurisdiction to vacate the sentences. Since the record does not establish that the Supreme Court imposed as a condition on the pleas and sentencing commitments that the defendant return on the scheduled sentencing date, the court should not have imposed enhanced sentences based on the defendant's violation of this purported condition … . To the extent that the court also based its imposition of enhanced sentences on the defendant having violated certain other purported conditions, it likewise erred, since it had not imposed these conditions on the pleas and sentencing commitments. People v Andre, 2019 NY Slip Op 00136, Second Dept 1-9-19

SENTENCING, ORDERS OF PROTECTION, APPEALS.

THE WAIVER OF APPEAL WAS INVALID, THE STATUTORY REQUIREMENTS FOR THE ORDER OF PROTECTION ISSUED AT SENTENCING WERE NOT MET (SECOND DEPT).

The Second Department, vacating an order of protection issued at sentencing and affirming the conviction, determined defendant's waiver of his right to appeal was invalid:

… [T]he record does not demonstrate that the defendant understood the nature of the right to appeal and the consequences of waiving it … . The Supreme Court did not provide the defendant with an adequate explanation of the nature of the right to appeal or the consequences of waiving that right … . The court's explanation was little more than a tautology: "[Y]ou have given up your right to appeal. Which means there will be no appeal with regards to anything in your case, and the only exception to that would be an illegal sentence or some constitutional issue. But basically you have given up your right to appeal. Do you understand?" … . Furthermore, the court's statements at the plea allocution suggested that waiving the right to appeal was mandatory rather than a right which the defendant was being asked to voluntarily relinquish, and the court never elicited an acknowledgment that the defendant was voluntarily waiving his right to appeal… .

Although the record on appeal reflects that the defendant signed a written appeal waiver form, a written waiver "is not a complete substitute for an on-the-record explanation of the nature of the right to appeal" … . * * *

… [T]the Supreme Court failed to state on the record the reasons for issuing the order of protection at the time of sentencing … Furthermore, … the court failed to fix the duration of the order of protection … . Under these circumstances, we vacate the order of protection issued at the time of sentencing … . People v Moncrieft, 2019 NY Slip Op 00466, Second Dept 1-23-19

SENTENCING, PROBATION, SCRAM BRACELET.

DEFENDANT WAS REQUIRED TO WEAR AN ALCOHOL MONITORING DEVICE AS A CONDITION OF PROBATION BUT WAS UNABLE TO PAY FOR IT, THE PEOPLE DID NOT DEMONSTRATE DEFENDANT'S FAILURE TO PAY WAS WILLFUL, THEREFORE COUNTY COURT WAS OBLIGATED TO CONSIDER PUNISHMENT OTHER THAN INCARCERATION (THIRD DEPT).

The Third Department, reversing County Court, determined the People did not make a sufficient showing that defendant willfully failed to pay for the alcohol monitoring device (SCRAM bracelet). Wearing the bracelet, which cost $11 per day, was a requirement of defendant's probation. County Court was obligated to consider punishment other than imprisonment because the evidence supported defendant's inability to pay:

We agree with defendant that County Court erred in finding that the People established by a preponderance of the evidence that defendant violated the terms and conditions of his probation by willfully refusing to pay or failing to make sufficient good faith efforts to pay the cost of the SCRAM monitoring. …

… .[T]he record lacks a basis to substantiate a finding that defendant willfully refused to make the required payments. Moreover, the hearing testimony establishes that defendant made sufficient bona fide efforts to acquire the fiscal resources to pay the costs associated with SCRAM monitoring and that he could not do so as a result of his indigence, which resulted, at least in part, from the serious injuries that he sustained in August 2013. In our view, County Court was therefore required to "consider alternate measures of punishment other than imprisonment" and erred in failing to do so … . People v Hakes, 2019 NY Slip Op 00324, Third Dept 1-17-19

SENTENCING, SECOND FELONY OFFENDER.

BECAUSE THE INSTANT CONVICTION WAS FOR A CLASS A FELONY, SUPREME COURT WAS NOT AUTHORIZED TO SENTENCE DEFENDANT AS A SECOND FELONY OFFENDER (SECOND DEPT).

The Second Department, in affirming defendant's conviction and sentence, noted that defendant should not have been sentenced as a second felony offender because the instant conviction was for a class A felony:

… [T]he Supreme Court was not authorized to adjudicate the defendant a second violent felony offender since the instant conviction was for a class A felony rather than a class B, C, D, or E felony (see Penal Law §§ 70.02[1]; 70.04[1][a]). Therefore, we vacate the defendant's adjudication as a second violent felony offender. However, since the statutory sentencing parameters for a second violent felony offender do not include any specifications as to proper sentences for a class A felony because that crime is more serious than the crimes specified in those parameters, the error could not have affected the sentence imposed to the defendant's detriment (see Penal Law § 70.04[1][a]…). Therefore, the term of imprisonment imposed upon the defendant's conviction of a class A felony should not be disturbed. People v Young, 2019 NY Slip Op 00152, Second Dept 1-9-19

SENTENCING, SECOND FELONY OFFENDER.

PRIOR FLORIDA CONVICTION WAS NOT THE EQUIVALENT OF A NEW YORK FELONY, DEFENDANT SHOULD NOT HAVE BEEN SENTENCED AS A SECOND FELONY OFFENDER (FIRST DEPT).

The First Department determined defendant should not have been sentenced as a second felony offender because the prior Florida conviction was not the equivalent of a New York felony. The defendant was convicted of attempted murder and attempted robbery:

The knowledge element of the Florida statute at the time of defendant's Florida offense was that a defendant "knew of the illicit nature of the items in his possession" … . This was broader than the knowledge requirement under Penal Law § 220.16, which demands proof of "knowledge that the item at issue was, in fact, the controlled substance the defendant is charged with selling or possessing" … . Contrary to the trial court's analysis, the dispositive difference between the knowledge requirements of the Florida and New York statutes was in place at the time of defendant's 1998 Florida conviction. Florida's alteration of its knowledge requirement in 2002

(see Fla Stat Ann § 893.101) has no bearing on our analysis. People v Muhammad, 2019 NY Slip Op 00386, First Dept 1-22-19

SENTENCING, UNDULY HARSH OR SEVERE.

APPELLATE DIVISION REDUCED DEFENDANT'S SENTENCE USING ITS PLENARY POWER, DESPITE THE FACTS THAT (1) THE SENTENCE WAS WITHIN PERMISSIBLE LIMITS, (2) THE SENTENCING COURT DID NOT ABUSE ITS DISCRETION, AND (3) DEFENDANT HAD AN EXTENSIVE CRIMINAL HISTORY (FIRST DEPT).

The First Department, over a dissent, exercised its power to modify an unduly harsh or severe sentence that is within the permissible range. Defendant, who was homeless, attempted to buy toothpaste with a counterfeit $20 bill. The sentence was reduced from 4 to 8 years to 3 to 6 years:

The Appellate Division has "broad plenary power to modify a sentence that is unduly harsh or severe under the circumstances, even though the sentence may be within the permissible statutory range" … . A trial court need not abuse its discretion for the Appellate Division to substitute its own discretion … . We may "reduce a sentence in the interests of justice, taking into account factors such as defendant's age, physical and mental health, and remorse" … .

The immediate object of defendant's crime was to purchase basic human necessities, including food and toothpaste. In consideration of the fact that he was a 53 year-old, unemployed homeless man, with longstanding medical and substance abuse issues, a reduction of his sentence to 3 to 6 years is appropriate.

Defendant's extensive criminal history does not preclude a determination that his sentence is excessive … . People v Mitchell, 2019 NY Slip Op 00371, First Dept 1-22-19

SEX OFFENDER REGISTRATION ACT (SORA), APPEALS.

INSUFFICIENT EVIDENCE DEFENDANT SEX OFFENDER WAIVED HIS PRESENCE AT THE SORA RISK ASSESSMENT HEARING, ISSUE CONSIDERED IN THE INTEREST OF JUSTICE, NEW HEARING ORDERED (SECOND DEPT).

The Second Department, exercising its interest of justice appellate jurisdiction, determined the evidence that defendant waived his presence at the SORA risk assessment hearing was insufficient. A new hearing was ordered:

A sex offender facing risk level classification under SORA has a due process right to be present at the SORA hearing… . "To establish whether a defendant, by failing to appear at a SORA hearing, has waived the right to be present, evidence must be shown that the defendant was advised of the hearing date, of the right to be present at the hearing, and that the hearing would be conducted in his or her absence" … . Reliable hearsay evidence, such as an affidavit, is admissible to establish waiver … . Here, the sole "evidence" that the defendant waived the right to be present was the statement by the court that it was informed off-the-record by the New York City Police Department Sex Offender Monitoring Unit that the defendant resided at an address in Manhattan and that notice of the hearing was sent to that address and not returned as undeliverable. There was no evidence, hearsay or otherwise, that the defendant expressed a desire to forgo his presence at the hearing … . The fact that defense counsel had "no evidence to indicate" that the defendant did not receive notice of the hearing was not sufficient to indicate a waiver. People v Barney, 2019 NY Slip Op 00153, Second Dept 1-9-19

SPECIAL INFORMATION.

DEFENDANT SHOULD NOT HAVE BEEN ARRAIGNED ON A SPECIAL INFORMATION CONCERNING A PRIOR CONVICTION PRIOR TO JURY SELECTION, THE STATUTE REQUIRES ARRAIGNMENT AFTER JURY SELECTION, THE ERROR WAS DEEMED HARMLESS HOWEVER (FIRST DEPT).

The First Department, over a dissent, determined defendant should not have been arraigned on a special information pursuant to Criminal Procedure Law 200,60 before jury selection. The procedure avoids the presentation of proof of a prior conviction at trial. The error was deemed harmless by the majority. The dissent argued the error was not harmless and would have ordered a new trial:

A court cannot disregard plain statutory language simply because it concludes that an alternate procedure would be consonant with the policy underlying the statute. Courts do not possess the power to ignore the legislature … . It may well be that the legislature's general purpose in enacting CPL 200.60 was to avoid the prejudicial effect of having the prior offense proven before the jury. However, such a purpose does not support reading the timing requirement out of the statute. Allowing a defendant to wait until after the commencement of the trial ensures that he will have as much information as possible when forced to make the choice of admitting his prior conviction and relieving the People of its burden to prove it beyond a reasonable doubt; or denying the conviction and allowing the jury to learn about it. …

Despite the court's error, however, we are obliged to affirm because defendant has not shown any prejudice arising from the fact that he was required to decide whether to contest the prior conviction earlier than necessary. Defendant does not assert that he would have contested the conviction if he had been asked after jury selection. Thus, defendant's claims of prejudice are speculative. People v Alston, 2019 NY Slip Op 00410, First Dept 1-22-19

TERRORISM.

TERRORISM CONVICTION NOT SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE, THERE WAS NO EVIDENCE DEFENDANT INTENDED TO INFLUENCE THE POLICY OR ACTIONS OF THE SHERIFF'S OFFICE WHEN HE SAID HE WAS GOING TO 'COME BACK AND SHOOT THE PLACE DOWN' (THIRD DEPT).

The Third Department, reversing defendant's "terrorism" conviction after trial, determined there was legally insufficient evidence defendant intended to influence the policy or actions of a governmental body, here the Warren County Sheriff's Office (WCSO). When defendant was told at the sheriff's office that his certificate of disposition was insufficient and defendant's property could not be returned to him, he allegedly said he would "come back and shoot the place down." He was convicted of making a terroristic threat and sentenced to five years in prison:

… [T]he record contains no evidence of a necessary element of the crime of making a terroristic threat — that defendant intended to influence a policy of a governmental unit by intimidation or coercion, or that he intended to affect the conduct of a unit of government by murder, assassination or kidnapping. [The sheriff's evidence custodian] testified that as defendant exited the lobby of the WCSO building, he was mumbling to himself and

she "heard the word shoot." She then asked defendant what he had said, and he replied by stating "come back and shoot the place down." Defendant made no statement relating his threat to any policy of the WCSO or demanding that it take any specific action. People v Kaplan, 2019 NY Slip Op 00329, Third Dept 1-17-19

THIRD PARTY CULPABILITY, MOTION TO VACATE JUDGMENT.

BASED ON THE SUBMITTED EVIDENCE OF THIRD PARTY CULPABILITY IN THIS RAPE AND MURDER CASE, DEFENDANT WAS ENTITLED TO A HEARING ON HIS MOTION TO VACATE THE JUDGMENT OF CONVICTION (SECOND DEPT).

The Second Department determined defendant was entitled to a hearing on his motion to vacate his murder conviction. The defendant and his codefendant, DiPippo, were convicted of the 1995 rape and murder of a 12-year-old girl. At DiPippo's third trial DiPippo was allowed to present evidence of third culpability. The third party, Gombert, had allegedly confessed to a fellow inmate. After DiPippo's acquittal, defendant moved to vacate his conviction based upon the newly discovered evidence of third party culpability. The motion was denied without a hearing. The matter was remitted for a hearing:

The court which entered a judgment of conviction may, on motion of the defendant, vacate the judgment on the ground that "[n]ew evidence has been discovered since the entry of a judgment based upon a verdict of guilty after trial, which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant; provided that a motion based upon such ground must be made with due diligence after the discovery of such alleged new evidence"… .

"Once the parties have filed papers and all documentary evidence or information has been submitted, the court is obligated to consider the submitted material for the purpose of ascertaining whether the motion is determinable without a hearing to resolve questions of fact'"… . "[W]hether a defendant is entitled to a hearing on a CPL 440.10 motion is a discretionary determination" … .

Under the circumstances of this case, the County Court improvidently exercised its discretion in denying, without conducting an evidentiary hearing, the defendant's motion pursuant to CPL 440.10 to vacate his judgment of conviction. In view of the parties' submissions, particularly the third-party culpability evidence relating to Gombert, a hearing is necessary to promote justice … . Following a full evidentiary hearing, the court will be in

a position to "make its final decision based upon the likely cumulative effect of the new evidence had it been presented at trial" … . People v Krivak, 2019 NY Slip Op 00464, Second Dept 1-23-19

VICTIM SERVICES, ATTORNEY'S FEES.

REGULATIONS PROMULGATED BY THE OFFICE OF VICTIM SERVICES WHICH LIMITED THE AVAILABILITY OF ATTORNEY'S FEES IN THE EARLY STAGES OF A CLAIM CONFLICT WITH THE CONTROLLING STATUTE (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Garry, determined that certain changes made by the Office of Victim Services (OVS) to regulations affecting the availability of attorney's fees in early stages of a claim conflicted with the controlling statute:

Executive Law § 626 (1) requires OVS to reimburse crime victims for out-of-pocket loss, which "shall . . . include . . . the cost of reasonable attorneys' fees for representation before [OVS] and/or before the [A]ppellate [D]ivision upon judicial review" … . Our primary purpose in interpreting this provision "is to discern the will of the Legislature and, as the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof" … . Applying these principles, we find no authorization in the statute's plain language for OVS to conclude that counsel fees are never"reasonable" during the early stages of a claim and, thus, to categorically exclude awards of counsel fees for such representation in every instance. Neither this statutory language nor the similar language of Executive Law § 623 (3) — that authorizes OVS to promulgate regulations for the approval of counsel fees "for representation before [OVS] and/or before the [A]ppellate [D]ivision" — distinguishes among the stages of a victim's representation before OVS, nor does the statutory text suggest that OVS may do so. Matter of Juarez v New York State Off. of Victim Servs., 2019 NY Slip Op 00653, Third Dept 1-31-19

WITNESS INTIMIDATION, HEARSAY ADMISSIBLE.

EVIDENCE THAT DEFENDANT USED HIS FAMILIAL RELATIONSHIP WITH THE WITNESS (DEFENDANT'S COUSIN) TO INDUCE THE WITNESS'S REFUSAL TO TESTIFY WAS SUFFICIENT TO WARRANT INTRODUCTION OF THE WITNESS'S PRIOR STATEMENTS AT TRIAL (SECOND DEPT).

The Second Department determined the evidence presented at the Sirois hearing was sufficient to warrant the conclusion that a witness, defendant's cousin, refused to testify because of the actions of the defendant. Therefore statements made by the defendant's cousin were properly admitted at trial:

The People presented phone records evidencing the dates and the content of certain calls made by the cousin to other individuals while the cousin was incarcerated at Riker's Island, and calls by the defendant to other individuals believed to be family members. The People contended these calls demonstrated that the defendant and other family members secured the cousin's agreement not to testify against the defendant. The People also represented to the Supreme Court that they planned to offer the testimony of an inmate who knew the defendant and his family, who claimed, among other things, that the defendant had told him that the defendant had "put the wolves out" on the cousin to keep him from testifying, and that the defendant was confident that he would beat the charges as a result. According to the People, the inmate subsequently refused to testify at the hearing out of fear. An Assistant District Attorney testified at the hearing as to the substance of her interview of the inmate, which had taken place the day before. …

… [T]the People "demonstrate[d] by clear and convincing evidence that the defendant, by violence, threats or chicanery, caused [the] witness's unavailability" … . Misconduct is not limited to threats or intimidation; it can also include situations where, as here, the People established by clear and convincing evidence that the defendant used his close personal relationship with his cousin and/or threats to pressure him not to testify … . People v Walton, 2019 NY Slip Op 00623, Second Dept 1-30-19