NEW YORK APPELLATE DIGEST, LLC

Criminal Law
September 2019

Summaries of Selected Decisions Addressing Criminal Law Released by the New York State Appellate Courts in September, 2019, Organized Alphabetically by Topic. Click on the Table of Contents Entries to Go to the Summaries, Which Link to the Decisions on the New York State Courts Website.

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The Fourth Department affirmed defendant's kidnapping conviction but reversed the weapons-related counts because the evidence she constructively possessed a weapon found in the house was legally insufficient:

… [T]he evidence is legally sufficient to support [defendant's] conviction of kidnapping in the second degree. Viewing the evidence in the light most favorable to the People … , we conclude that there is a valid line of reasoning and permissible inferences to support the conclusion that defendant had "a shared intent, or community of purpose' with the principal[s]" … . Defendant was present in a house when the police raided it and rescued two victims who were being held captive there, and the identification of one of the victims was found in a backpack that defendant was wearing when the police entered the house. It could be readily inferred from the evidence that defendant was aware that the victims were being held there and that she intentionally aided the principals by providing them and the victims with food … . …

[The weapons-related] counts were based on her possession of a rifle that was found in the house after the police entered. To establish constructive possession of the weapon, the People had to establish that defendant "exercised dominion or control over [the weapon] by a sufficient level of control over the area in which [it was] found" … . Here, the evidence established that, prior to the arrival of the police, defendant was sitting in the living room of the house, the rifle was on a table in the living room, and one of the other perpetrators in the kidnapping put on a mask, grabbed the rifle, went to the room where the victims were being held, then came back to the living room and put the rifle back on the table. Contrary to the People's contention, that evidence is insufficient to establish that defendant had constructive possession of the weapon. A defendant's mere presence in the house where the weapon is found is insufficient to establish constructive possession … , and there was no evidence establishing that defendant exercised dominion or control over the weapon … . People v Rolldan, 2019 NY Slip Op 06913, Fourth Dept 9-27-19

APPEALS.

THE PEOPLE'S APPEAL FROM THE DENIAL OF ITS MOTION FOR RECONSIDERATION OF COUNTY COURT'S DISMISSAL OF THE INDICTMENT WAS NOT AUTHORIZED BY STATUTE AND MUST THEREFORE BE DISMISSED (THIRD DEPT).

The Third Department determined the People's appeal from dismissal of the indictment and the denial of their motion for reconsideration, which was not authorized by statute, must be dismissed. County Court had determined the victim's testimony at the grand jury was unsworn and could not be considered. The People then made a motion for reconsideration with proof the victim had been properly sworn:

… [D]efendant, an inmate at Greene County Correctional Facility, was charged by indictment with aggravated harassment of an employee by an inmate, stemming from an April 2016 incident wherein defendant was transported to Columbia Memorial Hospital for medical treatment and thereafter allegedly drank his own urine and spat it in the face of a correction officer (hereinafter the victim). The parties thereafter entered into a stipulation in lieu of motions and, pursuant thereto, County Court reviewed, among other things, the grand jury minutes to determine whether there was legally sufficient evidence to support the indictment. In December 2016, County Court dismissed the indictment, determining that the evidence before the grand jury was legally insufficient inasmuch as the People's sole witness — the victim — had not been administered the correct oath and, as such, had presented unsworn testimony to the grand jury. The People thereafter moved for reconsideration, averring that the court reporter had erroneously omitted reference to the correct oath which had, in fact, been appropriately given by the jury foreperson to the victim, and the People affixed to the motion a corrected copy of the grand jury minutes reflecting same.

… [I]t is well settled that "no appeal lies from a determination made in a criminal [action] unless specifically provided for by statute" … . Here, the People's underlying motion purports to be one for "reconsideration"; however, even construing such motion as a motion to reargue and/or renew, there is no statute authorizing the People to appeal from the denial of such a motion in a criminal action … . People v Overbaugh, 2019 NY Slip Op 06546, Third Dept 9-12-19

APPEALS.

WAIVER OF APPEAL INVALID; MATTER REMITTED FOR THE STATUTORILY REQUIRED FINDINGS FOR THE DENIAL OF DEFENDANT'S SUPPRESSION MOTION; APPEAL HELD IN ABEYANCE (SECOND DEPT).

The Second Department determined defendant's waiver of appeal was invalid. He therefore could challenge the denial of his suppression motion on appeal. However, Supreme Court did not make the statutorily required findings of fact and conclusions of law. The matter was remitted for findings on all the issues raised by the suppression motion, and the appeal is held in abeyance:

When the Supreme Court attempted to explain to the defendant the waiver of the right to appeal, it improperly conflated the right to appeal with rights automatically forfeited by a plea of guilty … . As such, the record does not demonstrate that the defendant understood the nature of the right he was being asked to waive or the distinction between the right to appeal and the other trial rights which are forfeited incident to a plea of guilty … . Moreover, although the record of the proceedings reflects that the defendant executed a written waiver of his right to appeal, the court did not ascertain on the record whether the defendant had read the waiver or discussed it with defense counsel … . …

"[T]he CPL article 710 suppression procedure involves an adjudication based on mixed questions of law and fact"… . "The suppression court must make findings of fact, often requiring it to assess the credibility of witnesses" … . "Regardless of whether a hearing was conducted, the court, upon determining [an article 710] motion, must set forth on the record its findings of fact, its conclusions of law and the reasons for its determination" (CPL 710.60[6] …). People v Harris, 2019 NY Slip Op 06795, Second Dept 9-25-19

CHARACTER EVIDENCE.

EVIDENCE OF THE CHILD VICTIM'S REPUTATION FOR UNTRUTHFULNESS SHOULD HAVE BEEN ADMITTED IN THIS SEXUAL OFFENSES CASE; THE RELIABILITY OF THE EVIDENCE, A QUESTION OF LAW, WAS ESTABLISHED, THE CREDIBILITY OF THE EVIDENCE IS A JURY QUESTION (THIRD DEPT).

The Third Department, reversing defendant's conviction of predatory sexual assault against a child, criminal sexual act in the first degree and endangering the welfare of a child, determined defendant should have been allowed to present evidence of the child-victim's reputation for untruthfulness. The court noted the two-pronged analysis for such character evidence: (1) the reliability of the evidence (a question of law); and (2) the credibility of the evidence (a question of fact):

"Once the party seeking admission of reputation evidence has laid the proper foundation, it is for the jury to evaluate the credibility of the character witnesses who testify, and to decide how much weight to give the views reported in their testimony. While a reasonable assurance of reliability is necessary for a proper foundation, such reasonable assurance exists where the testifying witnesses report the views of a sufficient number of people, and those views are based on sufficient experience with the person whose character is in question. Reputation evidence may be reliable . . ., but still questionable from a credibility standpoint. This possibility, however, is not a proper basis for exclusion of reputation evidence. Reliability — whether a character witness has established a proper basis for knowing a key opposing witness' general reputation for truth and veracity — is a question of law for the court. By contrast, the credibility of such character witness — whether that witness is worthy or unworthy of belief or is motivated by bias — is a factual question for the jury. We caution that a trial court should not use reliability as a ground for excluding evidence it believes is not credible" … .

… [D]efendant proffered a proposed witness who was prepared to testify that she had known the victim since birth, that they were members of the same large extended family and that many members of the extended family knew the victim. Further, the proposed witness was prepared to testify that she was aware of the victim's bad reputation for truthfulness among the extended family. …

County Court erred when it determined that the proposed testimony failed to establish a proper foundation for admission of testimony regarding the victim's bad reputation for truthfulness; in fact, the offer of proof contained

each element required by People v Fernandez (17 NY3d at 76-77). People v Youngs, 2019 NY Slip Op 06540, Third Dept 9-12-19

CONSTRUCTIVE POSSESSION.

THERE WAS SUFFICIENT EVIDENCE DEFENDANT INTENTIONALLY AIDED THE PRINCIPALS IN THE KIDNAPPING; THE EVIDENCE THAT DEFENDANT CONSTRUCTIVELY POSSESSED A WEAPON, HOWEVER, WAS LEGALLY INSUFFICIENT (FOURTH DEPT).

The Fourth Department affirmed defendant's kidnapping conviction but reversed the weapons-related counts because the evidence she constructively possessed a weapon found in the house was legally insufficient:

… [T]he evidence is legally sufficient to support [defendant's] conviction of kidnapping in the second degree. Viewing the evidence in the light most favorable to the People … , we conclude that there is a valid line of reasoning and permissible inferences to support the conclusion that defendant had "a shared intent, or community of purpose' with the principal[s]" … . Defendant was present in a house when the police raided it and rescued two victims who were being held captive there, and the identification of one of the victims was found in a backpack that defendant was wearing when the police entered the house. It could be readily inferred from the evidence that defendant was aware that the victims were being held there and that she intentionally aided the principals by providing them and the victims with food … . …

[The weapons-related] counts were based on her possession of a rifle that was found in the house after the police entered. To establish constructive possession of the weapon, the People had to establish that defendant "exercised dominion or control over [the weapon] by a sufficient level of control over the area in which [it was] found" … . Here, the evidence established that, prior to the arrival of the police, defendant was sitting in the living room of the house, the rifle was on a table in the living room, and one of the other perpetrators in the kidnapping put on a mask, grabbed the rifle, went to the room where the victims were being held, then came back to the living room and put the rifle back on the table. Contrary to the People's contention, that evidence is insufficient to establish that defendant had constructive possession of the weapon. A defendant's mere presence in the house where the weapon is found is insufficient to establish constructive possession … , and there was no evidence establishing that defendant exercised dominion or control over the weapon … . People v Rolldan, 2019 NY Slip Op 06913, Fourth Dept 9-27-19

INCLUSORY CONCURRENT COUNTS.

RAPE THIRD IS NOT AN INCLUSORY CONCURRENT COUNT OF RAPE FIRST; THE VERDICT SHEET INCLUDED AN IMPERMISSIBLE ANNOTATION, MATTER REMITTED TO DETERMINE WHETHER DEFENSE COUNSEL CONSENTED TO THE ANNOTATION (FOURTH DEPT).

The Fourth Department determined: (1) rape third is not an inclusory concurrent count of rape first; and (2) the verdict sheet included an impermissible annotation. The matter was remitted to determine whether defense counsel consented to the annotation:

… [T]he verdict sheet, which states in relevant part "Fourth Count: Rape in the Third Degree (lack of consent/totality of circumstances)," contains an impermissible annotation. Specifically, the "totality of circumstances" language is impermissible because it is not "statutory language" (CPL 310.20 [2]; see Penal Law § 130.25 [3]). Rather, it is language from the pattern jury instructions (see CJI 2d[NY] Penal Law § 130.25 [3]). Supreme Court was therefore required to obtain defense counsel's consent prior to submitting the annotated verdict sheet to the jury … . Although "consent to the submission of an annotated verdict sheet may be implied where defense counsel fail[s] to object to the verdict sheet after having an opportunity to review it' "… , here, the record does not reflect whether defense counsel had that opportunity. We therefore hold the case, reserve decision and remit the matter to Supreme Court to determine, following a hearing if necessary, whether defense counsel consented to the annotated verdict sheet … . People v Wilson, 2019 NY Slip Op 06900, Fourth Dept 9-27-19

JURY NOTES.

THE JURY NOTES SHOULD HAVE BEEN READ VERBATIM TO COUNSEL, NOT PARAPHRASED BY THE JUDGE; THIS MODE OF PROCEEDINGS ERROR REQUIRES REVERSAL (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the jury notes should have been read verbatim to counsel, not paraphrased:

.. [T]he jury submitted a note stating, "We would like to see the difference between first and second degree murder. (Powerpoint)." The Supreme Court informed counsel, the defendant, and the codefendant that the jurors "want to be recharged on first degree and second degree." …

The jury submitted another note which read, "Phone Records Between Jimmy & Ragene — When Did Communication Start?" During a discussion on the record, the Supreme Court mentioned that the jurors "want to know when did the communications start. And the communications started on June 11. And the stipulation covers it. So we'll read back the stipulation."

The record reveals that the Supreme Court did not read the entire contents of these two jury notes into the record, and there was no indication that the entire contents of the notes otherwise were shared with counsel … . Rather, the court improperly paraphrased the notes … .

Counsel's awareness of the existence of a note does not effectuate the court's proper discharge of its statutory duty … . Although defense counsel may have been made aware of the existence and gist of the second note during an off-the-record discussion, this is insufficient to establish that counsel had been made aware of the precise contents of the note … . Where a trial transcript does not show compliance with O'Rama's procedure, it cannot be assumed that the omission was remedied at an off-the-record conference to which the transcript does not refer … .

As such, the Supreme Court committed a mode of proceedings error when it failed to provide counsel with meaningful notice of the precise contents of substantive juror inquiries, and therefore, reversal is required … . People v Copeland, 2019 NY Slip Op 06507, Second Dept 9-11-19

JURY SELECTION.

DEFENSE COUNSEL'S PEREMPTORY CHALLENGE TO A JUROR WAS SLIGHTLY LATE; TO DENY THE REQUEST IN THE ABSENCE OF DISCERNABLE INTERFERENCE OR UNDUE DELAY WAS AN ABUSE OF DISCRETION; NEW TRIAL ORDERED (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined the denial of defense counsel's slightly late peremptory challenge to an unsworn juror was an abuse of discretion:

The court named prospective juror number one to be assigned a seat and said, "We now have ten, need two. Looking at Chavez – -," when defense counsel interrupted, stating that he had made an error and had intended to exercise a peremptory challenge to prospective juror number one. Defense counsel acknowledged that the challenge was "a couple of seconds" late, and requested permission to excuse prospective juror number one. The court summarily denied the request.

The defendant contends that the Supreme Court improvidently exercised its discretion in denying his belated peremptory challenge. We agree. Under CPL 270.15, "the decision to entertain a belated peremptory challenge is left to the discretion of the trial court" … . Where a belated peremptory challenge to as-yet unsworn prospective jurors "would interfere with or delay the process of jury selection," it is a proper exercise of the court's discretion to refuse to permit the challenge … . However, where there is "no discernable interference or undue delay caused by defense counsel's momentary oversight that would justify [the court's] hasty refusal to entertain [the] defendant's challenge," it is an improvident exercise of discretion to deny it … . Here, the delay in challenging prospective juror number one was de minimis …. There was no discernable interference or undue delay caused by defense counsel's momentary oversight, and the voir dire of the next subgroup of jurors was still to be conducted … . People v Price, 2019 NY Slip Op 06629, Second Dept 9-18-19

JUVENILE DELINQUENCY.

FAMILY COURT FAILED TO COMPLY WITH THE FAMILY COURT ACT AND PENAL LAW REQUIREMENTS IN THIS JUVENILE DELINQUENCY PROCEEDING, PETITION DISMISSED (SECOND DEPT).

The Second Department, reversing Family Court in this juvenile delinquency proceeding, determined the court failed to comply with the notice provisions and the plea allocution requirements of the Family Court Act, as well as the proof requirements of the Penal Law. It was alleged the appellant either recklessly or intentionally broke a window:

Although the Family Court, Ulster County, advised the appellant of her rights prior to accepting an admission, the court failed to obtain an allocution from a parent or a person legally responsible for the appellant with regard to their understanding of any rights the appellant may be waiving as a result of her admission (see Family Ct Act § 321.3[1] …). The appellant appeared telephonically even though there is no provision under article 3 of the Family Court Act authorizing the appearance by telephone of a minor in a juvenile delinquency proceeding, and the only persons in court that day were the appellant's attorney and the attorney representing the Ulster County Attorney's Office. …

Since the provisions of Family Court Act § 321.3 may not be waived, and the record does not support the determination of the court that a "reasonable and substantial effort" was made to notify the appellant's mother or guardian about the … proceeding … .

… [T]he plea allocution also failed to comport with the sufficiency requirements of Family Court Act § 321.3(1), which mandates that the court ascertain through allocution of the appellant that she "committed the act or acts to which [s]he is entering an admission" … . The appellant's allocution to breaking a window failed to establish the elements of criminal mischief in the fourth degree under subdivision 3 of Penal Law § 145.00, which requires evidence that the appellant "[r]ecklessly damage[d] property of another person in an amount exceeding two hundred and fifty dollars" … The petition did not allege any monetary amount as to the cost of the damage to the window, and no evidence as to the value of the window was adduced at the proceeding … . In fact, the invoice attached to the petition indicates that the cost of replacing the window, including labor, totaled $225, an amount less than the requisite jurisdictional predicate.

Even if the petition was liberally construed to have charged the appellant with the intentional conduct subdivision of criminal mischief, Penal Law § 145.00(1), rather than the subdivision that was charged, which pertains to reckless conduct … , dismissal of the petition is warranted … . The appellant's allocution to breaking the window failed to show that she intentionally broke the window … . Matter of P., 2019 NY Slip Op 06497, Second Dept 9-11-19

SEARCHES.

A SMALL AMOUNT OF COCAINE IN PLAIN VIEW IN DEFENDANT DRIVER'S POCKET DID NOT PROVIDE PROBABLE CAUSE TO SEARCH THE TRUNK OF DEFENDANT'S CAR AFTER A TRAFFIC STOP (SECOND DEPT).

he Second Department, on an appeal by the People, determined finding a small amount of cocaine on defendant driver's person did not provide probable cause to believe drugs would be in the trunk. Therefore the weapon and drugs found in the trunk, as well as defendant's statements about searching the trunk, were properly suppressed:

… County Court concluded that the recovery of a small quantity of what appeared to be cocaine, along with a cut straw, in plain view on the defendant's person, was insufficient to give the police probable cause to believe that additional contraband would be found in the vehicle's trunk, particularly after a search of the passenger compartment revealed nothing. This Court has, in a factually similar case, reached the same conclusion … . Under the facts of this case, we decline to disturb the court's finding as to lack of probable cause.

Contrary to the People's contention, cases in which there is circumstantial evidence of recent drug use within the passenger compartment, such as when the police, during a routine traffic stop, detect the odor of burning marijuana … are distinguishable, since such evidence provides good reason to believe that the unseen drugs may be located somewhere within the vehicle. By contrast, the fact that a small quantity of drugs is found on the defendant's person, with no other drugs being found in the passenger compartment of the vehicle, does not, without more, provide probable cause to believe that additional drugs may be found in the trunk of the vehicle … . People v Garcia, 2019 NY Slip Op 06509, Second Dept 9-11-19

SEARCHES.

THE WARRANTLESS SEARCH OF DEFENDANT'S VEHICLE WAS NOT JUSTIFIED UNDER THE AUTOMOBILE EXCEPTION OR AS A LIMITED SAFETY SEARCH, MOTION TO SUPPRESS PROPERLY GRANTED (FOURTH DEPT).

The Fourth Department determined defendant's motion to suppress a handgun found in his vehicle and a post-seizure statement was properly granted:

… [O]fficers responded to the complainant's home after receiving a call that he had been threatened by defendant. The complainant told an officer that defendant threatened to shoot him and that he believed the threat was serious because defendant had been in possession of a black handgun prior to the instant incident. Defendant, who was seated in his truck, which was parked in front of the complainant's home, acknowledged that he had previously said he would shoot the complainant if the complainant entered defendant's property. Based on that information and defendant's admissions that he owned a rifle, which was at his home, and that he had a Virginia pistol permit but no New York pistol permit, the officers searched defendant's person but recovered no weapons. The officers then searched the area near the driver's seat of defendant's truck, from which they recovered a loaded handgun. …

The automobile exception to the warrant requirement permits a police officer to " search a vehicle without a warrant when [the officer has] probable cause to believe that evidence or contraband will be found there' " … . [T]he police did not have probable cause to search defendant's vehicle after they searched him and determined that there was no immediate threat to their safety … , inasmuch as defendant was not alleged to have brandished a gun at the scene, there was inconclusive evidence that he actually threatened the complainant at the scene, defendant did not engage in any suspicious or furtive movements, and the officers did not observe any weapons or related contraband in the vehicle or on defendant's person … . …

… [T]he officers' search of defendant's vehicle was not justifiable as a limited safety search. Probable cause is not required for a limited search of a vehicle " where, following a lawful stop, facts revealed during a proper inquiry or other information gathered during the course of the encounter lead to the conclusion that a weapon located within the vehicle presents an actual and specific danger to the officers' safety sufficient to justify a further intrusion' " … . However, the Court of Appeals has "emphasized . . . that a reasonable suspicion alone will not suffice" and that "the likelihood of a weapon in the [vehicle] must be substantial and the danger to the officer's safety actual and specific" … . People v Pastore, 2019 NY Slip Op 06930, Fourth Dept 9-27-19

SEX OFFENDER REGISTRATION ACT (SORA).

DOWNWARD DEPARTURE FROM LEVEL TWO TO LEVEL ONE WAS APPROPRIATE; DEFENDANT PARTICIPATED IN THE SEX TRAFFICKING CONSPIRACY WHILE SHE HERSELF WAS A VICTIM OF SEX TRAFFICKING (SECOND DEPT).

The Second Department, lowering defendant's risk assessment from a lever two to level one, determined that defendant was herself a victim of sex trafficking and her participation in the conspiracy occurred at the same time that she was being exploited:

… [T]he circumstances identified and proven by the defendant … are not accounted for by the SORA Guidelines and tend to demonstrate a lower likelihood of reoffense and danger to the community. The defendant's evidence showed that she was exploited by the commercial sex industry when she was a minor, and that, while she later took on some "management" responsibilities by "training" other girls, answering phones, and making appointments, at the same time, she continued to be exploited by that industry as she simultaneously served as a sex worker. There was no evidence or indication that the defendant recruited the identified victim, or any victims, or that she engaged in any acts or conduct to coerce the victim, or any victims, to engage in prostitution … . Indeed, the defendant's level of responsibility in the sex trafficking conspiracy can be gauged by the federal sentencing court's decision to sentence the defendant to time served.

Finally, under these circumstances, we find that a departure to a level one risk designation is warranted as a matter of discretion "to avoid an [overassessment] of the defendant's dangerousness and risk of sexual recidivism" … . People v Snyder, 2019 NY Slip Op 06521, Second Dept 9-11-19

SPREEDY TRIAL.

THE PEOPLE DID NOT SUBMIT SUFFICIENT PROOF THAT A PERIOD OF TIME SHOULD BE EXCLUDED FROM THE STATUTORY SPEEDY TRIAL CALCULATION, APPEAL HELD IN ABEYANCE AND MATTER SENT BACK FOR A HEARING AND REPORT (SECOND DEPT).

The Second Department, sending the matter back for a hearing on defendant's statutory speedy-trial motion to dismiss, determined defendant had met his burden to show a delay greater that six months but the People did not present sufficient evidence that a period of time should be excluded from the speedy trial calculation:

… [T]he defendant sustained his initial burden on the motion by alleging that a period of unexcused delay in excess of six months had elapsed since the date that he was arraigned on the felony complaint (see CPL 30.30[1][a]). In opposition, the People failed to conclusively demonstrate with "unquestionable documentary proof" that any periods within that time should be excluded (CPL 210.45[5][c] …). Moreover, the "court action sheet" provided to this Court on appeal, of which we may take judicial notice … , contained only an ambiguous notation purportedly regarding the defendant's alleged waiver of his CPL 30.30 rights from May 5, 2014, to July 8, 2014 … . Accordingly, the matter must be remitted to the Supreme Court, Queens County, for a hearing and thereafter a report on the defendant's motion … . People v Perkins, 2019 NY Slip Op 06516, Second Dept 9-11-19

STATEMENTS.

DEFENDANT REQUESTED AN ATTORNEY IN NEVADA AND DID NOT WAIVE HIS RIGHT TO COUNSEL BEFORE HE WAS QUESTIONED IN NEW YORK, HIS STATEMENTS SHOULD HAVE BEEN SUPPRESSED (FIRST DEPT).

The First Department, reversing defendant's conviction and ordering a new trial, determined defendant had requested an attorney in Nevada and, upon being returned to New York, was questioned without waiving his right to counsel in the presence of counsel. Therefore the statements should have been suppressed:

Defendant's motion to suppress his incriminating written and videotaped statements should have been granted. Several days before defendant made the contested statements, he was taken into custody by the Las Vegas Police

Department. While in custody, defendant requested to speak with the detective from the Regional Fugitive Task Force who had located defendant in Las Vegas and was about to bring him back to New York. The detective met defendant in a conference room and asked him if he wanted to talk. Defendant responded, "I would like to tell you what happened, but I think I want to talk to an attorney." The detective, who responded by saying "okay," and did not ask defendant any questions about the homicide, testified that he understood that defendant "wanted an attorney."

Upon returning to New York, defendant met with the investigating detective and made incriminating written and video statements. Defendant moved to suppress his statements, which was denied, and the statements were admitted at trial.

"When a defendant in custody unequivocally requests the assistance of counsel, any purported waiver of that right obtained in the absence of counsel is ineffective … . People v Roman, 2019 NY Slip Op 06719, First Dept 9-24-19

STREET STOPS.

POLICE PURSUIT OF DEFENDANT WAS NOT JUSTIFIED, WEAPON FOUND NEARBY PROPERLY SUPPRESSED (SECOND DEPT).

The Second Department determined the police did not have reasonable suspicion of criminal activity at the time defendant fled and the police pursued him. The police responded to reports of gunshots heard in the vicinity. A witness reported hearing a gunshot and seeing two men walking, one wearing dark clothes and the other wearing a white jacket. The defendant and another man matched that description. When the police approached the defendant he ran. The defendant was arrested after a pursuit and a gun was found nearby. Defendant was charged with criminal possession of a weapon. The motion court suppressed the gun:

"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" … . A suspect's flight alone, even in conjunction with equivocal circumstances that might justify a common law inquiry, is insufficient to justify pursuit … . However, a defendant's flight plus "other specific circumstances indicating that the suspect may be engaged in criminal activity, may give rise to reasonable suspicion, the necessary predicate for police pursuit" … .

Here, the police lacked reasonable suspicion that the defendant had committed, was committing, or was about to commit a crime, the necessary predicate for pursuit. Although clothing worn by the defendant and his companion matched the clothing described by the unidentified witness, the witness never saw either of the two men fire or possess a gun. There is no evidence in the record that the police saw any weapons or a bulge or outline of a weapon on the defendant which could indicate that he was involved in a crime … . Furthermore, contrary to the People's contention, the manner in which the defendant held his hands while he ran did not give the police reasonable suspicion to pursue. A stop must be "justified in its inception"… , and at the time that the police began to chase the defendant, he had both his hands in his jacket pocket, an "innocuous" placement that is "susceptible of an innocent as well as a culpable interpretation" … . People v Ravenell, 2019 NY Slip Op 06630, Second Dept 9-18-19

SUPERIOR COURT INFORMATION.

DEFENDANT CHARGED WITH AN A FELONY AND FACING A POTENTIAL LIFE SENTENCE CANNOT WAIVE INDICTMENT AND PLEAD TO A SUPERIOR COURT INFORMATION; JURISDICTIONAL ISSUE PROPERLY CONSIDERED ON APPEAL DESPITE GUILTY PLEA AND FAILURE TO RAISE THE ISSUE BELOW (CT APP).

The Court of Appeals, reversing defendant's conviction by guilty plea, determined that the NYS Constitution and Criminal Procedure Law 195.10[1] prohibited defendant's waiver of indictment because defendant was charged with an A felony with a potential life sentence. The defendant was charged with second degree murder, waived indictment and pled to a superior court information charging first degree manslaughter. The court noted that this jurisdictional issue could be considered on appeal despite the guilty plea and the failure to raise the issue below:

The New York State Constitution provides that "[n]o person shall be held to answer for a capital or otherwise infamous crime . . . unless on indictment of a grand jury" (NY Const, art. 1 § 6). The Constitution contains a limited exception to this jurisdictional requirement: "a person held for the action of a grand jury upon a charge for such an offense, other than one punishable by death or life imprisonment, with the consent of the district attorney, may waive indictment by a grand jury and consent to be prosecuted on an information filed by the district attorney" (id.).

In addition, Criminal Procedure Law § 195.10 provides that a defendant may waive indictment by grand jury when, among other conditions, "the defendant is not charged with a class A felony punishable by death or life imprisonment" (CPL 195.10 [1]). Accordingly, under both the Constitution and Criminal Procedure Law, a defendant who is held for the action of the grand jury on a class A felony punishable by life imprisonment may not waive indictment by the grand jury and agree to be prosecuted for a lesser included offense in order to facilitate a plea bargain on the homicide offense … . People v Monforte, 2019 NY Slip Op 06451, CtApp 9-5-19

VERDICT SHEET.

RAPE THIRD IS NOT AN INCLUSORY CONCURRENT COUNT OF RAPE FIRST; THE VERDICT SHEET INCLUDED AN IMPERMISSIBLE ANNOTATION, MATTER REMITTED TO DETERMINE WHETHER DEFENSE COUNSEL CONSENTED TO THE ANNOTATION (FOURTH DEPT).

The Fourth Department determined: (1) rape third is not an inclusory concurrent count of rape first; and (2) the verdict sheet included an impermissible annotation. The matter was remitted to determine whether defense counsel consented to the annotation:

… [T]he verdict sheet, which states in relevant part "Fourth Count: Rape in the Third Degree (lack of consent/totality of circumstances)," contains an impermissible annotation. Specifically, the "totality of circumstances" language is impermissible because it is not "statutory language" (CPL 310.20 [2]; see Penal Law § 130.25 [3]). Rather, it is language from the pattern jury instructions (see CJI 2d[NY] Penal Law § 130.25 [3]). Supreme Court was therefore required to obtain defense counsel's consent prior to submitting the annotated verdict sheet to the jury … . Although "consent to the submission of an annotated verdict sheet may be implied where defense counsel fail[s] to object to the verdict sheet after having an opportunity to review it' "… , here, the record does not reflect whether defense counsel had that opportunity. We therefore hold the case, reserve decision and remit the matter to Supreme Court to determine, following a hearing if necessary, whether defense counsel consented to the annotated verdict sheet … . People v Wilson, 2019 NY Slip Op 06900, Fourth Dept 9-27-19