NEW YORK APPELLATE DIGEST, LLC

Criminal Law
January 2020

An Organized Compilation of the Summaries of Selected Decisions Addressing Criminal Law Released in January 2020 and Posted Weekly on the New York Appellate Digest Website. The Issues Are Described in the Table of Contents. The Table of Contents Entries Link to the Summaries which Link to the Decisions on the Official New York Courts Website. Click on "Table of Contents" in the Header to Return There.

Contents

Table of Contents

Table of Contents

Table of Contents

APPEALS, SEX OFFENDER REGISTRATION ACT (SORA).

COUNTY COURT DID NOT ISSUE A WRITTEN ORDER RE THE DEFENDANT'S RISK ASSESSMENT PURSUANT TO THE SEX OFFENDER REGISTRATION ACT (SORA); THEREFORE THE APPEAL WAS NOT PROPERLY BEFORE THE APPELLATE DIVISION AND WAS DISMISSED (THIRD DEPT).

The Third Department determined Count Court had not issued a written order with respect to the defendant's risk assessment under the Sex Offender Registration Act (SORA) and therefor the appeal was not properly before the court:

Following a hearing at which the People advocated for an upward departure, County Court granted the request and classified defendant as a risk level three sex offender with a sexually violent offender designation. Defendant appeals.

It is a statutory requirement that County Court "render an order setting forth its determinations and findings of fact and conclusions of law on which the determinations are based" (Correction Law § 168-n [3] …). That written order then must be "entered and filed in the office of the clerk of the court where the action is triable" (CPLR 2220 [a] …).

Although the record before us contains a decision of County Court that sets forth its findings of fact and conclusions of law, the court did not issue a written order and the risk assessment instrument does not contain the "so ordered" language so as to constitute an appealable order. Absent any order by the court, this appeal is not properly before us and must be dismissed … . People v Johnson, 2020 NY Slip Op 00006, Third Dept 1-2-20

APPEALS, WEIGHT OF THE EVIDENCE.

DEFENDANT'S ROBBERY CONVICTION WAS AGAINST THE WEIGHT OF THE EVIDENCE; THE IDENTIFICATION TESTIMONY WAS TOO WEAK TO MEET THE BEYOND A REASONABLE DOUBT STANDARD (SECOND DEPT).

The Second Department, reversing defendant's conviction determined the identification evidence was too weak to support the conviction in this robbery case. The conviction was deemed to be against the weight of the evidence:

Upon the exercise of our independent factual review power (see CPL 470.15[5]), we conclude that the verdict of guilt was against the weight of the evidence. "[W]eight of the evidence review requires a court first to determine whether an acquittal would not have been unreasonable. If so, the court must weigh conflicting testimony, review any rational inferences that may be drawn from the evidence and evaluate the strength of such conclusions. Based on the weight of the credible evidence, the court then decides whether the [factfinder] was justified in finding the defendant guilty beyond a reasonable doubt" … .

At the second trial, in this one-witness identification case, the complainant consistently had difficulty remembering details of the crime. She could not remember how she described the defendant, and when asked how she recognized him, she stated, "[b]y his shirt." The description she provided of the perpetrator shortly after the incident did not match, in several ways, the defendant's actual physical characteristics and appearance. Moreover, at the time of his arrest, several minutes after the incident, the defendant possessed neither the money nor the personal items which had allegedly been taken from the complainant. People v James, 2020 NY Slip Op 00615, Second Dept 1-29-20

CONSTITUTIONAL LAW.

STATUTE CRIMINALIZING THE POSSESSION OF AN UNLICENSED FIREARM DOES NOT VIOLATE THE SECOND AMENDMENT (FOURTH DEPT).

The Fourth Department, in a full-fledged opinion by Justice Peradotto, determined that the statute prohibiting possession of an unlicensed firearm in the home does not violate the Second Amendment:

… [D]efendant contends that New York may not constitutionally impose any criminal sanction whatsoever on the unlicensed possession of a handgun in the home. * * *

… [I]t is beyond dispute that "New York has substantial, indeed compelling, governmental interests in public safety and crime prevention" … . Those concerns include the state's "substantial and legitimate interest and[,] indeed, . . . grave responsibility, in insuring the safety of the general public from individuals who, by their conduct, have shown" that they should not be entrusted with a dangerous instrument … . …

… [T]the criminal prohibition on the unlicensed possession of a handgun, including in the home, bears a substantial relationship to the state's interests. "In the context of firearm regulation, the legislature is far better equipped than the judiciary' to make sensitive public policy judgments (within constitutional limits) concerning the dangers in carrying [and possessing] firearms and the manner to combat those risks" … . People v Tucker, 2020 NY Slip Op 00739, Fourth Dept 1-31-20

EXPEDITED REVIEW, DISCOVERY/DISCLOSURE, PROTECTIVE ORDER.

IN PERHAPS THE FIRST APPELLATE-JUSTICE REVIEW OF A PROTECTIVE ORDER UNDER THE NEW PROVISIONS OF CRIMINAL PROCEDURE LAW 245.70, JUSTICE SCHEINKMAN FOUND THE PEOPLE DID NOT SUBMIT SUFFICIENT EVIDENCE TO JUSTIFY WITHHOLDING FROM THE DEFENSE THE IDENTITIES OF WITNESSES IN THIS RAPE/MURDER CASE (SECOND DEPT).

The Second Department, in one of the first decisions under the new discovery provisions of the Criminal Procedure Law, after an expedited review by Justice Scheinkman pursuant to CPL 245.70, reversing Supreme Court, determined the protective order prohibiting defense access to the names, addresses and other identifying information of witnesses in this rape/murder case must be vacated without prejudice:

CPL 245.70(1) provides that, upon a showing of good cause by either party, the court may order that disclosure and inspection be denied, restricted, conditioned, or deferred, or make such order as appropriate. The court is now specifically permitted to condition discovery on making the information available only to counsel for the defendant (see CPL 245.70[1]). Alternatively, the court is permitted to order defense counsel, or persons employed by the attorney or appointed by the court to assist in the defense, not to disclose physical copies of discoverable documents to the defendant or anyone else, subject to the defendant being able to access redacted copies at a supervised location … . Should the court restrict access to discovery by the defendant personally, the court is required to inform the defendant on the record that counsel is not permitted by law to disclose the material or information to the defendant … . * * *

This case is one of the first under this new review procedure. The threshold question is what standard is the intermediate appellate justice to apply in performing the expedited review. The statute is silent on that subject.

This Justice accepts the proposition that where a pure question of law is concerned, the reviewing justice decides the question de novo … . Where, however, the issue involves balancing the defendant's interest in obtaining information for defense purposes against concerns for witness safety and protection, the question is appropriately framed as whether the determination made by the trial court was a provident exercise of discretion … .

… [T]he People's affirmation was unaccompanied by any affidavit from anyone with personal or direct knowledge of the relevant circumstances. … [W]hile alleging that a witness had been approached in person and by use of social media by "associates" of the defendant, the People did not set forth the name of any such associate, the relationship between the defendant and any associate, the date or approximate date of the alleged improper approach, or even a general description of the incident. While the use of social media is alleged, no screen shot or other depiction of the communication was provided. Further, the four corners of the affirmation do not contain the identity of the witnesses subject to the contact that caused concern. In short, the sealed affirmation submitted to justify the issuance of the protective order is vague, speculative, and conclusory. Under these circumstances, the affirmation was legally insufficient to support the granting of the relief sought. People v Beaton, 2020 NY Slip Op 00372, Second Dept 1-17-20

EXPEDITED REVIEW, DISCOVERY/DISCLOSURE, PROTECTIVE ORDER.

PROTECTIVE ORDER ISSUED PURSUANT TO THE NEW DISCOVERY/DISCLOSURE STATUTES VACATED; MATTER REMITTED TO ALLOW THE DEFENSE TO BE HEARD ON THE PEOPLE'S APPLICATION FOR A PROTECTIVE ORDER (SECOND DEPT).

The Second Department, after an expedited review pursuant to the new Criminal Procedure Law section 245.70, vacated the protective order and remitted the matter to allow the defense to oppose the application for a protective order:

I conclude that the Supreme Court should have afforded defense counsel an opportunity to be heard on the People's application for a protective order (see People v Bonifacio ___ AD3d ___, 2020 NY Slip Op 00517 [2d Dept 2020]). Accordingly, the application by the defendant Carlson Small is granted, the Supreme Court's ruling and protective order are vacated, and the matter is remitted to the Supreme Court, Kings County, to afford the defendants an opportunity to make arguments to that court with respect to the People's application for a protective order, and for a new determination of that application thereafter. People v Reyes, 2020 NY Slip Op 00620, Second Dept 1-29-20

EXPEDITED REVIEW, DISCOVERY/DISCLOSURE, PROTECTIVE ORDER.

PROTECTIVE ORDER VACATED UPON EXPEDITED REVIEW (SECOND DEPT).

The Second Department, vacating the protective order issued by Supreme Court, determined defense counsel should have been heard in opposition to the application for the protective order:

… [T]he matter is remitted to the Supreme Court, Nassau County, to afford the defendant an opportunity to make arguments to that court with respect to the People's application for a protective order.

Under the circumstances of this case, the Supreme Court should have granted defense counsel's request for an opportunity to be heard with respect to the People's application for a protective order pursuant to CPL 245.70 … . … [T]he People advised this Court that they no longer oppose the application. People v Belfon, 2020 NY Slip Op 00519, Second Dept 1-27-20

EXPEDITED REVIEW, DISCOVERY/DISCLOSURE, PROTECTIVE ORDER.

PROTECTIVE ORDER ALLOWING THE PEOPLE TO HOLD BACK INFORMATION (OTHERWISE SUBJECT TO AUTOMATIC DISCLOSURE) UNTIL AFTER JURY SELECTION VACATED; MATTER REMITTED TO ALLOW THE DEFENSE TO OPPOSE THE REQUEST FOR THE ORDER; THE PROCEDURAL REQUIREMENTS OF THE NEW DISCOVERY PROVISIONS ADDRESSED IN SOME DETAIL (SECOND DEPT).

The Second Department, in an expedited appellate review of the issuance of a protective order by Supreme Court, vacated the protective order and sent the matter back to allow the defense to make an argument in opposition. The defendant is accused of stabbing his wife multiple times. The People, pursuant to CPL 245.70, ex parte, applied for and were granted an order delaying, until after jury selection, the turning over of information

otherwise subject to automatic disclosure under CPL 245.70. The decision makes an effort to explain how these new disclosure provisions should be handled by the trial courts:

Unlike the prior discovery statute, which allowed the People to wait until the time of trial to turn over witness statements (see CPL former 240.45), the new statutory scheme provides that disclosure is to be made within days after arraignment (see CPL 245.10[1][a]). The new statute provides that there shall be a "presumption in favor of disclosure" when interpreting certain listed provisions of CPL article 245 (CPL 245.20[7]), although the provision relating to protective orders (CPL 245.70) is not among those that are listed (see CPL 245.20[7]).

CPL 245.70 provides that upon a showing of good cause by either party, the court may at any time order that discovery be denied, restricted, conditioned, or deferred, or make such other order as is appropriate (see CPL 245.70[1]). It further provides that the court "may permit a party seeking or opposing a protective order under this section, or another affected person, to submit papers or testify on the record ex parte or in camera," and that any such papers and a transcript of any such testimony may be sealed and constitute a part of the record on appeal (CPL 245.70[1]). …

The statute cannot be reasonably construed to permit a protective order to be sought entirely ex parte in every case. Since entirely ex parte proceedings should be allowed only in some cases, it necessarily follows that proceedings on applications for a protective order should be entirely ex parte only where the applicant has demonstrated the clear necessity for the entirety of the application, and the submissions in support of it, to be shielded from the opposing party. …

The necessity for appellate intervention would have been reduced had the Supreme Court, either before or after granting the subject protective order, afforded defense counsel the opportunity to be heard and thereafter determined whether to grant, adhere to, modify, or rescind the protective order. People v Bonifacio, 2020 NY Slip Op 00517, Second Dept 1-23-20

Similar issues and result in People v Reyes-Fuentes, 2020 NY Slip Op 00518, Second Dept 1-23-20

EXPEDITED REVIEW, DISCOVERY/DISCLOSURE, PROTECTIVE ORDER.

SUPREME COURT DID NOT ABUSE ITS DISCRETION IN GRANTING A PROTECTIVE ORDER ALLOWING THE PEOPLE TO DELAY DISCLOSURE OF EVIDENCE IN THIS MURDER CASE UNTIL ONE WEEK BEFORE TRIAL; CRITERIA EXPLAINED (SECOND DEPT).

The Second Department, in an expedited review of Supreme Court's granting a protective order in a murder case, determined Supreme Court did not abuse its discretion, in part because defense counsel was notified of the ex parte proceeding:

On January 15, 2020, the Supreme Court convened in an open session in the presence of the prosecutor, defense counsel, and the defendant. After ascertaining that defense counsel would not waive a hearing on the protective order, the court ordered the courtroom sealed. The defendant was removed from the courtroom, and defense counsel stepped out of the courtroom. Defense counsel did not voice an objection to the court's conduct of an ex parte proceeding. Nor did defense counsel seek to offer any arguments concerning any of the factors relevant to the determination as to whether, and to what extent, a protective order should be issued. The court then proceeded to conduct an ex parte proceeding regarding the People's application. Thereafter, the court resumed with a continued open session attended by both defense counsel and the defendant. After the court informed defense counsel that it had granted the People's application, the parties and the court proceeded to discuss other matters related to the case. During these proceedings, defense counsel inquired as to whether there was description of the shooting by a witness. The court responded by stating that defense counsel had been provided with a videotape that "pretty much shows you how the shooting occurred." … The defendant now seeks expedited review of the court's ruling pursuant to CPL 245.70(6).

… [T]he record reflects that the court considered the possibility of allowing defense counsel access to the information on the condition that it not be shared with the defendant personally; the court raised this possibility sua sponte.

It would have been better in my view to allow defense counsel to see the portions of the People's written application that contained legal argument or other matter that would not reveal the information sought to be covered by the protective order, pending the court's determination as to whether the sensitive portions of the People's application should be sealed. Further, it would have been better in my view, even assuming that portions

of the People's written and oral presentations should be sealed, to permit defense counsel to participate in portions of the protective order proceeding where the substance of the sealed information is not discussed. In my view, defense counsel should be excluded from participation in the protective order review process only to the extent necessary to preserve the confidentiality of sensitive information pending the court's determination as to the issuance, and scope, of the protective order. People v Nash, 2020 NY Slip Op 00520, First Dept 1-27-20

INEFFECTIVE ASSISTANCE OF COUNSEL, DEPORTAION.

DEFENDANT WAS TOLD BY DEFENSE COUNSEL WHEN HE PLED GUILTY IN 2007 THAT IF HE STAYED OUT OF TROUBLE WHILE ON PROBATION HE WOULD NOT BE DEPORTED, HOWEVER DEPORTATION WAS MANDATORY; DEFENDANT WAS ENTITLED TO A HEARING ON HIS MOTION TO VACATE HIS CONVICTION BASED UPON INEFFECTIVE ASSISTANCE OF COUNSEL; CRITERIA FOR DETERMINING WHETHER THERE WAS A REASONABLE PROBABILITY DEFENDANT WOULD HAVE GONE TO TRIAL, INCLUDING HIS UNDISPUTED STRONG DESIRE TO STAY IN THE US, EXPLAINED IN SOME DEPTH (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Renwick, reversing Supreme Court, determined defendant (Martinez) was entitled to a hearing on his CPL 440.10 motion to vacate his 2007 judgment of conviction. At the time defendant pled guilty the court warned him there could be immigration consequences, but defense counsel told him he wouldn't have to worry about deportation if he stayed out of trouble while on probation. In fact, however, deportation was mandatory. Supreme Court denied the motion based in part on defendant's motivation for it, i.e., the expansion of his taxi business in Massachusetts. The First Department noted that plaintiff's current motivation for the motion to vacate is irrelevant. The matter was sent back for a hearing in front of a different judge:

In the context of a guilty plea, the ultimate question of prejudice is whether there was a reasonable probability that a reasonable person in a defendant's circumstances would have gone to trial if given constitutionally adequate advice … . A defendant must convince the court that a decision to reject the plea bargain would have been rational … . In that regard, appropriate factors to be weighed include, among others, evidence of defendant's incentive, at the time of his plea, to remain in the United States rather than his native country; his respective family and employment ties at the time of his plea, to the United States, as compared to his country of origin; the strength of the People's case; and defendant's sentencing exposure … . In answering the prejudice question,

judges should be cognizant that a noncitizen defendant confronts a very different calculus than confronts a United States citizen … . For a noncitizen defendant, "preserving [his] right to remain in the United States may be more important to [him] than any jail sentence"… . Thus, a determination of whether it would be rational for a defendant to reject a plea offer "must take into account the particular circumstances informing the defendant's desire to remain in the United States" … .

Significantly, on the record before this Court, there is reason to believe that Martinez would have given paramount importance to avoiding deportation, if he had known that it was more than a mere possibility, but was an unavoidable consequence of his plea to an aggravated felony. Indeed, evidence regarding Martinez's background completely supports his current assertion that his main focus has been always to remain in the United States. This much is undisputed: his long history in the United States, his efforts to become a citizen, his family circumstances, and his gainful employment in Massachusetts, all signal his strong connection to, and desire to remain in, the United States … . People v Martinez, 2020 NY Slip Op 00252, First Dept 1-14-20

JURORS.

DEFENSE MOTION TO SET ASIDE THE VERDICT BASED UPON THE ALLEGED MISCONDUCT OF TWO JURORS SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING (FIRST DEPT).

The First Department, ordering a hearing, determined a juror's expression of a romantic interest in a member of the prosecution team could amount to disqualifying juror misconduct. Allegations about another juror's close relationship with a witness also warranted a hearing. The defense had moved to set aside the verdict alleging juror misconduct:

The court improvidently exercised its discretion in denying, without a hearing, that branch of defendant's motion to set aside the verdict on the ground of alleged misconduct by two jurors (see CPL 330.40[2][f]).

The People's trial preparation assistant, who assisted the trial prosecutors, disclosed that some time after the trial and before sentencing, he received a handwritten note in the mail from the jury foreperson, stating: "Now that the trial is over . . ." (ellipsis in original), followed by the juror's first and last name, her juror number, the court part in which the trial had occurred, her phone number, and her address. The note also included a crossed-out phrase from which it could be inferred that the original version of the note had been written during the trial.

Under the circumstances, the note itself was sufficient evidence to raise an issue of fact about whether the foreperson's apparent romantic interest in the trial preparation assistant prevented her from deliberating fairly … . The assistant's affidavit stating that he did not respond to the juror's note or otherwise communicate with her at any time is not dispositive, as the issue is the juror's misconduct or bias during the trial.

The court also erred with regard to a second juror. That juror had a sufficiently close relationship with a witness to warrant a hearing as to whether that juror engaged in misconduct by failing to disclose the relationship to the court. People v Guillen, 2020 NY Slip Op 00387, First Dept 1-21-20

JURORS.

JUROR SHOULD NOT HAVE BEEN REPLACED WITH AN ALTERNATE; NO SHOWING JUROR WAS 'UNAVAILABLE' WITHIN THE MEANING OF CPL 270.35; CONVICTION REVERSED (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined the trial judge should not have discharged a juror and replaced her with an alternate after the proof had closed and before summations. The juror was not "unavailable" within the meaning of Criminal Procedure Law (CPL) 270.35:

… [A]fter both sides had rested but before summations, the Supreme Court, over the defendant's objection, excused juror No. 10 and replaced her with an alternate on the basis that juror No. 10 had to travel to Maryland for an evening work obligation the next day, which was a Friday. The day after the alternate was substituted, the jury found the defendant guilty of assault in the first degree and criminal possession of a weapon in the fourth degree. …

… [T]he defendant's statutory and constitutional rights were violated when, over the defendant's objection, the court excused Juror No. 10 and substituted an alternate juror. The record does not demonstrate that Juror No. 10 was unavailable as that term is used in CPL 270.35 … . Juror No. 10's work obligation did not render her unavailable for jury service, as her own convenience or potential financial hardship are insufficient to render her unavailable under CPL 270.35 … . People v Alleyne, 2020 NY Slip Op 00154, Second Dept 1-8-20

MISTRIAL, SUA SPONTE.

TRIAL JUDGE SHOULD NOT HAVE, SUA SPONTE, DECLARED A MISTRIAL TO ACCOMMODATE A JUROR'S WEEKEND PLANS; WRIT OF PROHIBITION GRANTED; RETRIAL BARRED; INDICTMENT DISMISSED (FIRST DEPT).

The First Department, granting petitioner's application for a writ of prohibition and dismissing the indictment, determined the trial court should not have, sua sponte, declared a mistrial to accommodate a juror's weekend travel plans. Retrial was barred:

The trial court was not compelled by manifest necessity to declare a mistrial and terminate the proceedings …, and accordingly, retrial is barred under the Double Jeopardy Clauses of the Federal and New York State Constitutions … . It was an abuse of discretion to declare a mistrial in order to accommodate a juror's weekend travel plans, including a Friday, which she belatedly informed the court about during deliberations, where the court, as requested by defendant, reasonably could have directed the juror to report for deliberations the following day, and the court also failed to confirm that the jury was hopelessly deadlocked at the time … . Matter of Bannister v Wiley, 2020 NY Slip Op 00522, First Dept 1-28-20

PROMOTING PRISON CONTRABAND.

THE INDICTMENT CHARGING PROMOTING PRISON CONTRABAND WAS JURISDICTIONALLY DEFECTIVE BECAUSE IT ALLEGED DEFENDANT POSSESSED LESS THAN 25 GRAMS OF MARIJUANA WHICH DOES NOT MEET THE DEFINITION OF 'DANGEROUS CONTRABAND," AN ELEMENT OF THE OFFENSE (THIRD DEPT).

The Third Department, reversing defendant's conviction and dismissing the indictment, determined the indictment, charging defendant with promoting prison contraband in the first degree was jurisdictionally defective because it alleged possession of less that 25 grams of marijuana:

Defendant asserts that the indictment is jurisdictionally defective based on the Court of Appeals' decision in People v Finley (10 NY3d 647 [2003]). In that case, the Court held that the possession of a small amount of marihuana, specifically less than 25 grams, did not, absent aggravating circumstances, constitute dangerous contraband within the meaning of Penal Law §§ 205.00 (4) and 205.25 as is necessary to support the charge of promoting prison contraband in the first degree … . Defendant contends that there is no valid basis in the indictment for this charge because he possessed less than 25 grams of marihuana. The People concede that this is a jurisdictional defect warranting reversal of the judgment of conviction. In addition, defendant requests that the indictment be dismissed in its entirety, and the People consent to such relief given that defendant's guilty plea satisfied both charges contained therein. Accordingly, based upon our review of the record, the case law and the parties' submissions, we conclude that the judgment of conviction must be reversed, thereby vacating the plea and sentence, and that the indictment must be dismissed in its entirety. People v Lawrence, 2020 NY Slip Op 00004, Third Dept 1-2-20

SEARCH AND SEIZURE.

THE WARRANTLESS SEIZURE AND SEARCH OF A BAG IN DEFENDANT'S CAR WAS NOT JUSTIFIED UNDER THE INEVITABLE DISCOVERY DOCTRINE; ERROR HARMLESS HOWEVER (FOURTH DEPT).

The Fourth Department determined the inevitable discovery doctrine did not apply to a "diabetes bag" seized by the police. The bag should have been suppressed, but error was deemed harmless:

On the day of his arrest, a police officer pulled defendant's vehicle over for failing to signal. Defendant had a passenger with him. After approaching the vehicle, the officer observed that defendant appeared to be under the influence of drugs and placed him under arrest. The passenger was also arrested. At a suppression hearing, the officer testified that, after she arrested defendant and seated him in her patrol vehicle, defendant indicated that he had diabetes medication in his vehicle. Defendant did not give the officer permission to retrieve the bag of medication from his vehicle or say that he needed it at that time, nor did he give her permission to open the bag. The officer testified that she retrieved the bag for defendant because defendant would be allowed access to certain medication in lockup; she did not intend to give the bag to defendant while he was in the patrol vehicle. The officer looked in the bag and found needles, "narcotics," and "some residue"—not diabetes medication. Defendant's vehicle was subsequently impounded pursuant to Buffalo Police Department (BPD) written policy. During the inventory search of the vehicle, the officers recovered, inter alia, methamphetamine. * * *

We agree with defendant, however, that the court erred in refusing to suppress the evidence obtained from the diabetes bag pursuant to the inevitable discovery doctrine. The contents of the diabetes bag that defendant sought to suppress was the "very evidence" that was obtained as the "immediate consequence of the challenged police conduct" … . People v Hayden-larson, 2020 NY Slip Op 00791, Fourth Dept 1-31-20

SENTENCING.

DEFENDANT NEED NOT BE INFORMED AT THE TIME OF THE PLEA TO A SEX OFFENSE THAT HE OR SHE MAY BE SUBJECT TO A MENTAL HYGIENE LAW ARTICLE 10 CIVIL ACTION AS THE RELEASE DATE APPROACHES (THIRD DEPT).

The Third Department determined defendant, a sex offender who was found to suffer from a mental abnormality after Mental Hygiene Law Article 10 trial, was not entitled specific performance of his plea agreement, which made no mention of the of potential Mental Hygiene Law proceedings:

Respondent next challenges Supreme Court's denial of his pretrial motion to dismiss the petition inasmuch as his 1997 plea agreement is a legal and binding contract — one that entitled him to specific performance. Proceedings pursuant to the Sex Offender Management and Treatment Act "are expansive civil proceedings, which are entirely separate from and independent of the original criminal action" … . Moreover, "[i]t is well settled that trial courts are required to advise defendants who plead guilty regarding the direct consequences of such plea, but they have no obligation to iterate every collateral consequence of the conviction" … . As relevant here, "the potential for either civil confinement or supervision pursuant to [the Sex Offender Management and Treatment Act] is a collateral consequence of a guilty plea and, therefore, the current state of the law does not require that defendants be informed of it prior to entering a plea of guilty" … . As such, we discern no error in Supreme Court's denial of respondent's request for specific performance. Nor are we persuaded by respondent's assertion that specific performance is appropriate because the Mental Hygiene Law article 10 litigation ensued following the expiration of his sentence, as the article 10 proceeding commenced upon the date that the petition was filed, prior to respondent's release date … . Matter of State of New York v Robert G., 2020 NY Slip Op 00009, Third Dept 1-2-20

SENTENCING.

DEFENDANT'S SENTENCE DEEMED TOO HARSH BASED UPON DEFENDANT'S CRIMINAL HISTORY, THE PLEA DEAL DEFENDANT WAS OFFERED BEFORE TRIAL, AND THE ABSENCE OF ANY NEW EVIDENCE REVEALED BY THE TRIAL (FOURTH DEPT).

The Fourth Department determined defendant's sentence was unduly harsh based upon his criminal history and the plea deal defendant was offered before trial:

… [T]he 10-year determinate sentence is unduly harsh and severe considering that defendant has no violent crimes on his record and was offered the opportunity to plead guilty to the charges in the indictment in exchange for a prison sentence of five years. It does not appear that any facts were revealed at trial that were unknown to the People or the court at the time the sentence promise was made. Under the circumstances, we modify the judgment as a matter of discretion in the interest of justice by reducing the sentence on each count to a determinate term of imprisonment of seven years plus three years of postrelease supervision … . People v Green, 2020 NY Slip Op 00765, Fourth Dept 1-31-20

SENTENCING.

SENTENCE DEEMED HARSH AND EXCESSIVE; REDUCED IN THE INTEREST OF JUSTICE (SECOND DEPT).

The Second Department reduced the defendant's sentence, noting it was defendant's first conviction, her strong family and community ties, her long employment history and her mental health history. "The defendant was convicted of two counts each of rape in the third degree, criminal sexual act in the third degree, and endangering the welfare of a child arising out of two separate incidents wherein the defendant, who was a paraprofessional at a school which the 16½-year-old victim attended, took the victim to a hotel and had sexual intercourse and oral sex with him:"

Appeal by the defendant from a judgment … convicting her of rape in the third degree (two counts), criminal sexual act in the third degree (two counts), and endangering the welfare of a child (two counts), after a nonjury

trial, and sentencing her to determinate terms of imprisonment of 3 years on each of the counts of rape in the third degree (counts 1 and 4) and criminal sexual act in the third degree (counts 2 and 5), to be followed by a period of postrelease supervision of 10 years, and a determinate term of imprisonment of 1 year on each of the counts of endangering the welfare of a child (counts 3 and 6), with the sentences imposed on counts 1, 2, and 3 to run concurrently with each other, and the sentences imposed on counts 4, 5, and 6 to run concurrently with each other and consecutively to the sentences imposed on counts 1, 2, and 3. * * *

The sentence imposed, which is at the upper end of the legal sentencing range, is harsh and excessive … . Accordingly, exercising our interest of justice jurisdiction, we modify the sentence to the extent indicated herein … . People v Thompson, 2020 NY Slip Op 00164, Second Dept 1-8-20

SENTENCING.

THE RECORD DOES NOT DEMONSTRATE DEFENDANT WAS WARNED THE USE OF DRUGS WHILE ON FURLOUGH WOULD RESULT IN AN ENHANCED SENTENCE; MATTER REMITTED FOR RESENTENCING OR WITHDRAWAL OF THE PLEA (THIRD DEPT).

The Third Department determined the sentencing court should not have imposed an enhanced sentence because the record did not demonstrate defendant was warned the use of drugs while on furlough would result in a stiffer sentence:

… "[A] court may not impose an enhanced sentence unless, as is relevant here, it has informed the defendant of specific conditions that the defendant must abide by or risk such enhancement" … . A review of the transcript of all of the proceedings, including those at which defendant entered his guilty pleas, reflects that, although he received warnings that certain conduct could result in an enhanced sentence of up to nine years on the first indictment, he was never advised that a positive drug test could result in an enhanced sentence. Given that the furlough was granted off-the-record, the record before us does not disclose what, if any, warnings were provided to defendant prior to his release on furlough … . Moreover, when defendant objected to the enhanced sentence, the court did not advise him of the right to a hearing to contest the alleged violation … , and the record does not contain the positive drug test results, the testing date or any evidence as to when defendant consumed these drugs so as to establish that it occurred during the six-hour furlough … . Accordingly, the sentences imposed upon the first indictment must be vacated and the matter remitted to County Court to either impose the original agreed-

upon sentences or to give defendant an opportunity to withdraw his guilty plea to that indictment … . People v Blanford, 2020 NY Slip Op 00646, Third Dept 1-30-20

SEX OFFENDER REGISTRATION ACT (SORA).

PEOPLE'S APPLICATION FOR AN UPWARD DEPARTURE NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE; EVIDENCE DEFENDANT WAS CHARGED BUT NEVER INDICTED OR CONVICTED DOES NOT MEET THE CLEAR AND CONVINCING STANDARD (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the People's application for an upward department was not supported by clear and convincing evidence. Evidence defendant was charged but not indicted or convicted does not meet the clear and convincing standard:

A departure from the presumptive risk level is generally the exception, not the rule (see Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 4 [2006] [hereinafter Guidelines]). Where the People seek an upward departure, they must identify an aggravating factor that tends to establish a higher likelihood of reoffense or danger to the community not adequately taken into account by the Guidelines, and prove the facts in support of the aggravating factor by clear and convincing evidence … .

Here, contrary to the Supreme Court's conclusion, the People failed to prove the existence of an aggravating factor by clear and convincing evidence. In granting an upward departure, the court relied upon the defendant's criminal history. However, the Guidelines account for an offender's criminal history by assessing points under risk factor 9, and the defendant's history here was not so extraordinary, extensive, or serious as to demonstrate that the assessment of those points was inadequate to capture his actual risk of reoffense and danger to the community . Further, an upward departure could not properly be based upon certain prior conduct of which the defendant was charged but either never indicted or never convicted, as the People's evidence regarding that alleged conduct did not meet the clear and convincing evidence standard … . People v Pittman, 2020 NY Slip Op 00443, Second Dept 1-22-20

SEX OFFENDER REGISTRATION ACT (SORA).

THERE SHOULD ONLY BE ONE SORA RISK ASSESSMENT PROCEEDING BASED UPON THE SAME RISK ASSESSMENT INSTRUMENT (RAI); HERE THERE WERE TWO ASSESSMENTS IN TWO COUNTIES, ONE AT LEVEL TWO AND ONE AT LEVEL THREE; THE LEVEL THREE RISK ASSESSMENT WAS VACATED (FOURTH DEPT).

The Fourth Department determined there should not be more than one SORA risk assessment for convictions stemming from the same course of conduct and based upon the same Risk Assessment Instrument (RAI). The first risk assessment was in Allegany County and designated defendant a level two risk. The second risk assessment was in Cattaraugus County and designated defendant a level three risk based upon the evidence. The Cattaraugus County assessment was vacated:

… [D]efendant was convicted in Cattaraugus County Court upon his plea of guilty of attempted sodomy in the second degree and, that same year, he was convicted in Allegany County Court upon his plea of guilty of sexual abuse in the first degree. The convictions stemmed from a course of conduct against one victim that occurred in both jurisdictions. Defendant was sentenced in both cases and, prior to his release from prison, Allegany County Court held a proceeding to determine his risk level designation under the Sex Offender Registration Act (SORA) (Correction Law § 168 et seq.) and designated him a level two risk. Cattaraugus County Court subsequently held a SORA proceeding utilizing a risk assessment instrument (RAI) and case summary that were substantively identical to those used in the Allegany County SORA proceeding, but designated defendant a level three risk. On a prior appeal … , we affirmed the order of Cattaraugus County Court designating him a level three risk.

"Where, as here, a single RAI addressing all relevant conduct is prepared, the goal of assessing the risk posed by the offender is fulfilled by a single SORA adjudication. To hold otherwise—that is, to permit multiple risk level determinations based on conduct included in a single RAI—would result in redundant proceedings and constitute a waste of judicial resources" … . In order to prevent multiple courts from reaching conflicting conclusions based on the same RAI, "one—and only one—sentencing court should render a risk level determination based on all conduct contained in the RAI" … . Inasmuch as the Cattaraugus County SORA proceeding was duplicative, we reverse the order and vacate defendant's risk level determination by Cattaraugus County Court … . People v Miller, 2020 NY Slip Op 00766, Fourth Dept 1-31-20

SON OF SAM LAW.

PENSION OF POLICE OFFICER CONVICTED OF MURDER AND ATTEMPTED MURDER CAN, UNDER THE SON OF SAM LAW, BE REACHED TO SATISFY A $1 MILLION JUDGMENT OBTAINED BY THE CRIME VICTIM (THIRD DEPT).

The Third Department determined the Son of Sam Law trumped the CPLR, the Retirement and Social Security Law, and the Administrative Code of the City of New York with respect to the pension of a former NYC police officer who was convicted of murder and attempted murder and against whom plaintiff obtained a personal injury judgment of more than $1 million:

"Executive Law § 632-a sets forth a statutory scheme intended to improve the ability of crime victims to obtain full and just compensation from the person(s) convicted of the crime by allowing crime victims or their representatives to sue the convicted criminals who harmed them when the criminals receive substantial sums of money from virtually any source and protecting those funds while litigation is pending" … . … [I]n 2001, the Legislature amended the [Son of Sam] law to allow a crime victim to seek recovery from "funds of a convicted person," which includes "all funds and property received from any source by a person convicted of a specified crime," but specifically excludes child support and earned income (Education Law § 632-a [1] [c]). * * *

This Court has found … that CPLR 5205 (c) is superseded by the Son of Sam Law … . Defendant's assertions that Retirement and Social Security Law § 110 and Administrative Code of the City of New York § 13-264 protect his pension from assignment to satisfy plaintiff's money judgment are similarly without merit due to the broad reach of the Son of Sam Law … . Prindle v Guzy, 2020 NY Slip Op 00011, Third Dept 1-2-20

STATEMENTS.

THE CO-DEFENDANT'S REDACTED STATEMENT SHOULD NOT HAVE BEEN ADMITTED IN EVIDENCE BECAUSE IT WAS CLEAR THE REDACTED PORTIONS REFERRED TO DEFENDANT AND WERE INCULPATORY, NEW TRIAL ORDERED (THIRD DEPT).

The Third Department, reversing defendant's conviction, determined the redacted statement of the co-defendant (Quaile) should not have been admitted in evidence because it was clear the redacted portions referred to the defendant and were inculpatory. Defendant's right to confront the witnesses against him was violated:

… [A]lthough Quaile's statement was redacted, the jury was allowed to see where portions were blacked out and, given that the statement focused upon defendant's arrest and the items found in the trailer, there were "obvious indications that it was altered to protect the identity of a specific person," namely, defendant … . The redacted statement further advised the jury that defendant was Quaile's live-in boyfriend, that she did not know what the plastic bottle and tissues found in their bedroom were used for, that she did not know how to make methamphetamine and that she "did not know the answers" to some of [a sheriff's] questions at the trailer. When those comments are considered in tandem with the location of the blacked-out text in the statement, they can "only be read by the jury as inculpating defendant" by suggesting that he had the information and know-how that Quaile lacked and was involved in the charged crimes … . The admission of the statement therefore violated defendant's right to confront the witnesses against him. In view of County Court's failure "to give the critical limiting instruction that the jury should not consider the statement itself against anyone but" Quaile, as well as the lack of methamphetamine in the trailer or test results tying the items found in the trailer to methamphetamine production, we cannot say that the evidence against defendant is overwhelming or " that 'there is no reasonable possibility that the erroneously admitted [statement] contributed to the conviction'" … . People v Stone, 2020 NY Slip Op 00323, Third Dept 1-16-20

STREET STOPS.

THE IDENTIFICATION EVIDENCE WAS TOO WEAK TO PROVIDE PROBABLE CAUSE FOR ARREST, DEFENDANT'S STATEMENTS SHOULD HAVE BEEN SUPPRESSED; THE APPELLATE COURT CAN NOT CONSIDER THE PEOPLE'S ARGUMENT THAT DEFENDANT WAS NOT IN CUSTODY WHEN HE MADE THE STATEMENTS BECAUSE THE ISSUE WAS NOT RULED ON BELOW (SECOND DEPT).

The Second Department, reversing defendant's murder conviction and ordering a new trial, determined the identification evidence was too weak to constitute probable cause for defendant's arrest. Therefore defendant's motion to suppress his statements should have been granted. The court noted that the People's argument that defendant was not in custody when the statements were made could not be considered because the issue was not ruled upon by the trial court:

Contrary to the Supreme Court's finding, no evidence was presented at the hearing that the defendant was identified "from a photographic image taken from one of the videos." Detective John Kenney testified that a witness provided a description of the person she had seen holding a gun after shots were fired, including that the person was riding a bicycle. Kenney indicated that the witness was shown a photograph taken from a video recorded outside a restaurant near the scene of the crime, and that the witness identified the person depicted in the photograph as the individual she had seen holding a gun. Kenney also testified that another witness identified the person depicted in that photograph as the individual he had seen riding a bicycle after hearing the gunshots. However, no testimony was elicited that the person depicted in the photograph was identified as the defendant. Further, Detective Patrick Henn testified that another video was recorded across the street from the defendant's home "just before the crime," showing a person who "appeared to be the defendant" leaving his home several blocks away from the scene of the crime on a bicycle. However, no testimony was elicited that the witnesses were shown a photograph taken from the video of the defendant's home, let alone that the witnesses identified the person depicted in that video as the person they saw holding a gun or riding a bicycle after the shots were fired. The mere fact that a person believed to be the defendant was observed riding a bicycle several blocks away from the scene of the crime, shortly before the shooting, is too innocuous, standing alone, to support a finding of probable cause … . Further, Henn's conclusory testimony that the defendant "became the prime suspect" based on "[v]ideos and canvasses conducted," without further details, was insufficient to demonstrate the existence of probable cause … . Consequently, the People failed to establish that the police had probable cause to arrest the defendant, and thus, the court should have suppressed, as fruits of the unlawful arrest, the lineup

identification testimony and the defendant's statements made to law enforcement officials on October 24, 2011 … . People v Kamenev, 2020 NY Slip Op 00301, Second Dept 1-15-20

SUPERIOR COURT INFORMATION, WAIVER OF INDICTMENT.

ANNOUNCING A SIGNIFICANT CHANGE IN ITS APPELLATE-REVIEW CRITERIA, THE 3RD DEPARTMENT NOW HOLDS THE FAILURE TO INCLUDE THE DATE, APPROXIMATE TIME OR PLACE OF A CHARGED OFFENSE IN A SUPERIOR COURT INFORMATION (SCI) OR A WAIVER OF INDICTMENT IS NOT A JURISDICTIONAL DEFECT AND THEREFORE MUST BE PRESERVED FOR APPEAL (THIRD DEPT).

The Third Department, departing from its precedent based upon a recent (November 2019) ruling by the Court of Appeals, determined the failure to include the date, approximate time or place of the charged offense in a superior court information (SCI) and/or a waiver of appeal is not a jurisdictional defect:

Defendant's sole contention on this appeal, which the People have conceded based on this Court's decision in People v Busch-Scardino (166 AD3d 1314 [2018]), is that the waiver of indictment is invalid and the superior court information (hereinafter SCI) is jurisdictionally defective for failing to set forth the approximate time of the charged offense in accordance with CPL 195.20. Indeed, that has been the standard we have applied since Busch-Scardino, and we further recognize that this is not a case where the time of the offense "is unknown or, perhaps, unknowable" … . …

The Court of Appeals recently addressed the validity of appeal waivers in three consolidated appeals, and, in one of the appeals, the Court also addressed the validity of that defendant's waiver of indictment with respect to charges involving child sexual abuse (People v Lang, ___ NY3d ___, ___, 2019 NY Slip Op 08545, *7-9 [2019]).
* * *

The reasoning of Lang requires this Court to reassess and abandon the standard enunciated in Busch-Scardino. There is no question here that the waiver of indictment was signed in open court with counsel present in accordance with the procedural requirements set forth in NY Constitution, article I, § 6, which "establishes the prima facie validity of the waiver of the right to prosecution by indictment" … . The "approximate time" of the arson charge under review constitutes nonelemental factual information. Lang instructs that we should look not only at the waiver of indictment and the SCI, but also at the local accusatory instruments to ascertain whether

adequate notice was provided. Here, the felony complaint mirrors both the waiver and the SCI by providing the date and specific address, but without specifying the approximate time. Nonetheless, defendant raised no objection before County Court, made no demand for a bill of particulars and "lodges no claim that he lacked notice of the precise crime[] for which he waived prosecution by indictment" … . In context, we conclude that the defect here was not jurisdictional and that defendant forfeited his challenge upon his plea of guilty … . People v Elric YY., 2020 NY Slip Op 00326, Third Dept 1-16-20

SUPERIOR COURT INFORMATION, WAIVER OF INDICTMENT. IN A SIGNIFICANT DEPARTURE FROM PRECEDENT BASED UPON A NOVEMBER 2019 COURT OF APPEALS DECISION, THE FAILURE TO INCLUDE THE DATE, APPROXIMATE TIME OR PLACE OF A CHARGED OFFENSE IN A SUPERIOR COURT INFORMATION (SCI) OR A WAIVER OF INDICTMENT IS NOT A JURISDICTIONAL DEFECT AND THEREFORE MUST BE PRESERVED FOR APPEAL (THIRD DEPT).

The Third Department, departing from its precedent based upon a recent (November 2019) ruling by the Court of Appeals, determined the failure to include the date, approximate time or place of the charged offense in a superior court information (SCI) and/or a waiver of appeal is not a jurisdictional defect. Any challenge to the SCI or waiver of appeal on this ground must be preserved and, if it is not, the challenge is forfeited by a guilty plea:

… [W]e note that this Court, relying on People v Boston (75 NY2d 585, 589 [1990]), has previously held that the failure to strictly comply with the statutory requirements for waiving indictment pursuant to CPL 195.20 — including the failure to include the approximate time of each offense charged in the waiver of indictment or SCI — constitutes a jurisdictional defect that may be raised at any time, is not subject to the preservation requirement and is not precluded by a defendant's guilty plea or waiver of the right to appeal … . However, the Court of Appeals recently decided People v Lang (___ NY3d ___, 2019 NY Slip Op 08545 [2019]) wherein it rejected the argument that omission of the approximate time of the charged offense in the waiver of indictment and/or SCI constitutes a jurisdictional defect — the same argument presently raised by defendant — specifically holding that the omission of such a fact presents a mere "technical challenge" as it constitutes "non-elemental factual information that is not necessary for a jurisdictionally-sound indictment" … . Accordingly, insofar as the subject waiver of indictment and SCI provided defendant with adequate notice of the date and location of the charged offenses, and as omission of the approximate time of the charged offense from the waiver of indictment and/or

SCI constituted a nonjurisdictional defect … to which defendant did not object at a time when Supreme Court could have addressed the alleged deficiency, defendant's present challenge was forfeited by his guilty plea … . People v Shindler, 2020 NY Slip Op 00327, Third Dept 1-16-20

TAMPERING WITH EVIDENCE.

DEFENDANT'S DISCARDING A BAG OF MARIJUANA AS HE WAS BEING PURSUED BY POLICE FOR AN OPEN-CONTAINER VIOLATION CONSTITUTED ATTEMPTED TAMPERING WITH PHYSICAL EVIDENCE (SECOND DEPT).

The Second Department determined that defendant's discarding a bag of marijuana as he was being pursued by a police officer for violating the city's open-container law constituted attempted tampering with physical evidence, not tampering with physical evidence:

Here, the charge of tampering with physical evidence was based on the defendant's act of discarding the plastic bag containing marijuana as he was being pursued by Officer Scuadroni for violating the City's open-container law. Contrary to the People's contention, the defendant's act of discarding the bag did not constitute an act of concealment within the meaning of Penal Law § 215.40(2). Nevertheless, since the defendant "engage[d] in conduct that tends to effect, and comes dangerously near to accomplishing, an act of concealment intended to suppress the physical evidence" … , there is legally sufficient evidence to sustain a conviction of attempted tampering with physical evidence (see Penal Law §§ 110.00, 215.40[2 …). Accordingly, we reduce the defendant's conviction of tampering with physical evidence to attempted tampering with physical evidence … . People v Zachary, 2020 NY Slip Op 00165, Second Dept 1-8-20

VACATE CONVICTION, MOTION TO.

MOTION TO VACATE DEFENDANT'S JUDGMENT OF CONVICTION SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING; SUPREME COURT MAY HAVE IMPROPERLY RELIED ON CPL 440.30 (d) WHICH ONLY APPLIES IF THE MOTION IS BASED SOLELY ON AN ALLEGATION BY THE DEFENDANT (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant's motion to vacate his judgment of conviction should not have been denied without a hearing. There was a question of fact whether defense counsel was aware he could call an expert to testify defendant, who had ingested drugs, did not have the required mental state (depraved indifference). The First Department noted Supreme Court may have improperly relied on Criminal Procedure Law (CPL) 440.30 (d) which applies only if the motion is based solely on an allegation by the defendant (not the case here):

While the motion court had a sound basis for its conclusion that there was "no reasonable possibility" that defendant's trial counsel "was unaware that he could call an expert to testify about the defendant's state of mind," we find that this was not an adequate basis for denying the motion without a hearing in these circumstances. First, to the extent the court may have been relying on CPL 440.30(d), that section permits summary denial when "there is no reasonable possibility that such an allegation is true," but it applies only when the allegation "is made solely by the defendant." That is not the case here, where the allegation at issue regarding trial counsel's statements was made by defendant's motion counsel based on his own knowledge.

Nor do we believe that this is a case such as People v Samandarov (13 NY3d 433 [2009]), where the lack of merit of a CPL 440.10 motion could be determined on the parties' submissions, despite it being "theoretically possible that a hearing could show otherwise" (id. at 440). Here, while the court's perception may well be borne out, there are issues of fact sufficient to warrant a hearing … . People v Martin, 2020 NY Slip Op 00067, First Dept 1-7-20