NEW YORK APPELLATE DIGEST, LLC

Criminal Law
May 2020

An Organized Compilation of the Summaries of Selected Decisions Released in May 2020 and Posted on the New York Appellate Digest Website. The Entries in the Table of Contents Link to the Summaries Which Link to the Decisions on the Official New York Courts Website. Click on "Table of Contents" in the Header on Any Page to Return There.

Contents

Table of Contents

Table of Contents

Table of Contents

APPEALS, EVIDENCE.

THE CONCEPTS OF 'OVERWHELMING EVIDENCE' AND 'HARMLESS ERROR' DISCUSSED IN DEPTH; THE MAJORITY FOUND THE EVIDENCE OVERWHELMING AND THE ERROR HARMLESS; THE CONCURRENCE FOUND THE EVIDENCE WAS NOT OVERWHELMING BUT FOUND THE ERROR HARMLESS UNDER A DIFFERENT ANALYSIS; THE DISSENT FOUND THE EVIDENCE WAS NOT OVERWHELMING AND THE ERROR WAS NOT HARMLESS (THIRD DEPT).

The Third Department reached different conclusions about how the erroneous denial of defendant's motion to suppress the cell site location data should be treated on appeal under a harmless error analysis. The majority and the concurrence applied different harmless error analyses but concluded the conviction should be affirmed. The dissent argued the error was not harmless requiring a new trial. The decision includes useful, comprehensive discussions of "overwhelming evidence" and "harmless error. "The dissent summarized the three positions as follows:

From the dissent:

In essence, the majority applies the longstanding New York test of first assessing whether the evidence adduced at trial was overwhelming in favor of conviction, concludes that it was, and therefore the admission of the cell phone location data was harmless since it could not have influenced the result of the trial. The concurrence disagrees with the finding that the evidence of guilt was overwhelming, but finds the error of admitting the cell phone location data nonetheless harmless; the concurrence maintains that, since its effect was to favor, or disfavor, the contentions of each side equally, this is one of the exceedingly rare cases where, despite the absence of overwhelming evidence of guilt, the admission of tainted evidence, however misguided, was, in the words of the leading Court of Appeals case of People v Crimmins (36 NY2d 230, 242 [1975]), nothing more than the "sheerest technicality." Because I believe that the other evidence of defendant's guilt was not overwhelming, and the effect of admitting the cell phone location data not necessarily neutral, I dissent and would reverse the judgment of conviction. People v Perez, 2020 NY Slip Op 02684, Third Dept 5-7-20

APPEALS, WEIGHT OF THE EVIDENCE.

DEFENDANT, FROM THE OUTSET, CLAIMED A MAN SHE HAD JUST MET AT A BAR WAS DRIVING HER CAR WHEN IT WENT OFF THE ROAD AND THEN FLED THE SCENE; THE DWI CONVICTIONS WERE AGAINST THE WEIGHT OF THE EVIDENCE (FOURTH DEPT).

The Fourth Department, reversing the Driving While Intoxicated (DWI) convictions, determined the convictions were against the weight of the evidence. The defendant claimed from the outset that her car, which had gone off the road, was driven by a man she just met at a bar and who fled after the accident. There was no direct evidence defendant was the driver:

Defendant's assertion that the car had been operated by an individual named Paul was not inconsistent with the evidence at trial. Although defendant's request that the passing motorist not call 911 constituted evidence of consciousness of guilt, it is well settled that consciousness of guilt evidence is a "weak" form of evidence … . The failure of defendant to provide a more detailed description of Paul did little to disprove defendant's hypothesis of innocence, given the general nature of the questions posed to her and their emphasis on contact information for Paul that defendant reasonably was not in a position to provide. Finally, the testimony of the investigator that the position of the driver's seat in the car was inconsistent with the car being driven by someone who is 5 feet 10 inches tall, as opposed to defendant's height of 5 feet 7 inches, may have been persuasive if there were other such circumstantial evidence, but no other evidence existed here. Giving the evidence the weight it should be accorded, therefore, we find that the People failed to establish, beyond a reasonable doubt, that defendant operated the car that had gone off the roadway … . People v Bradbury, 2020 NY Slip Op 02577, Fourth Dept 5-1-20

APPEALS.

ALTHOUGH DEFENDANT'S SUPPRESSION MOTION RELATED TO A THEFT ON OCTOBER 3 AND DEFENDANT PLED GUILTY TO A DIFFERENT THEFT ON OCTOBER 1 IN SATISFACTION OF BOTH, DEFENDANT WAS ENTITLED TO APPELLATE REVIEW OF HIS SUPPRESSION MOTION; THE APPELLATE DIVISION'S DENIAL OF REVIEW REVERSED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Fahey, reversing the Appellate Division, determined defendant was entitled to appellate review of the denial of his suppression motion even though the suppression motion did not relate to the offense to which defendant pled guilty. The defendant was charged with two thefts from the same residence on different days, a laptop computer taken on October 1 and jewelry taken on October 3. The police stopped the defendant on the street on October 3 and seized the jewelry. The suppression hearing related to that street stop. The defendant pled guilty to the theft of the computer and the jewelry-theft was satisfied by the plea. The Fourth Department held defendant was not entitled to appellate review of the jewelry-related suppression motion because defendant pled to the computer-theft. The case was sent back for review of the denial of the suppression motion:

Defendant was charged by indictment with two counts of burglary in the second degree … . The first count related to the laptop computer, taken from a dwelling on October 1, 2014; the second count related to the jewelry, which was taken from the same dwelling on October 3, 2014, the day of the arrest.

Defendant moved to suppress the jewelry, contending that his detention and the seizure of the jewelry violated his right to freedom from unreasonable searches and seizures …. Following a suppression hearing, with testimony from two of the police officers present at the arrest, Supreme Court denied defendant's motion, concluding that the police had "reasonable suspicion that a crime had been committed and that the defendant was the perpetrator."

Defendant, a predicate felony offender who was facing a maximum sentence of 30 years in prison if convicted of both counts of burglary, pleaded guilty to one count of burglary in the second degree, in satisfaction of the entire indictment. … [D]efendant pleaded guilty to the October 1 burglary, as charged in the count pertaining to the theft of the laptop computer, in satisfaction of the count charging the October 3 burglary of jewelry, which was the subject of his motion to suppress. * * *

"[W]hen a conviction is based on a plea of guilty an appellate court will rarely, if ever, be able to determine whether an erroneous denial of a motion to suppress contributed to the defendant's decision, unless at the time of the plea he states or reveals his reason for pleading guilty" … . * * *

A defendant who pleads guilty to one count will invariably take into consideration that other counts are satisfied by the plea. Importantly, a count satisfied by a guilty plea bears the double jeopardy consequences of a judgment of conviction. The judgment in this case prevents the People from prosecuting defendant again for the October 3, 2014 burglary, even though defendant did not plead to that count … . People v Holz, 2020 NY Slip Op 02682, CtApp 5-7-20

APPEALS.

COUNTY COURT'S POST-JUDGMENT DENIAL OF DEFENDANT'S SUPPRESSION MOTION, AFTER A HEARING HELD PURSUANT TO THE SECOND CIRCUIT'S ORDER RE: DEFENDANT'S PETITION FOR A WRIT OF HABEAS CORPUS, WAS AN INTERMEDIATE ORDER WHICH IS NOT APPEALABLE; MATTER REMITTED TO ALLOW COUNTY COURT TO AMEND THE JUDGMENT OF CONVICTION TO REFLECT THE RECENT DENIAL OF THE SUPPRESSION MOTION; THE AMENDED JUDGMENT OF CONVICTION WOULD THEN BE APPEALABLE (THIRD DEPT).

The Third Department determined the post-judgment order denying defendant's motion to suppress his statements was an intermediate order which was not appealable. The Second Circuit, pursuant to defendant's petition for a writ of habeas corpus, ordered defendant's release unless a state court adjudicated the voluntariness of his confession (made in 1986 when defendant was 16). County Court held a new suppression hearing and issued the order denying suppression. The Third Department sent the matter back to allow the amendment of the judgment of conviction to reflect the recent denial of the suppression motion, which would then be appealable:

Although not raised by the parties, we must first address the threshold issue of the appealability of County Court's order. Indeed, an order denying a defendant's suppression motion is an unreviewable intermediate order (see CPL 450.10). Ordinarily, in the course of a criminal proceeding, suppression hearings occur prior to a judgment of conviction and are reviewed incident to the direct appeal from that judgment. Nevertheless, there are cases, including the instant appeal, where a suppression hearing occurred after entry of a judgment of

conviction … . In each of these cases, the trial court was specifically instructed that, if the defendant did not prevail in the suppression hearing, the judgment of conviction should be amended to reflect that fact … . Here, however, the Second Circuit did not advise County Court to take this step … , and there is no evidence in the record that an amended judgement of conviction was entered after the People prevailed at the suppression hearing.

Accordingly, because an amended judgment of conviction has not been entered, we must dismiss this appeal. This harsh outcome appears at odds with the federal habeas corpus remand, which, in our view, was intended to permit review of the suppression hearing until finally decided by the court of last resort. However, this dismissal provides County Court the opportunity to amend the judgment of conviction to reflect the denial of the suppression motion, and defendant could then appeal as of right from the amended judgment of conviction (see CPL 450.10 [1]). People v Dearstyne, 2020 NY Slip Op 02951, Third Dept 5-21-20

APPEALS, WAIVER. DEFENDANT WAS GIVEN THE ERRONEOUS IMPRESSION THE WAIVER OF APPEAL FORECLOSED ALL APPELLATE RIGHTS; THE WAIVER WAS THEREFORE INVALID (FOURTH DEPT).

The Fourth Department determined defendant's waiver of appeal was not valid because the court gave the erroneous impression all appellate rights were given up by the waiver:

County Court's oral explanation of the waiver suggested that defendant was entirely ceding any ability to challenge his guilty plea on appeal, but such an "improper description of the scope of the appellate rights relinquished by the waiver is refuted by . . . precedent, whereby a defendant retains the right to appellate review of very selective fundamental issues, including the voluntariness of the plea" … . In addition, by further explaining that the cost of the plea bargain was that defendant would no longer have the right ordinarily afforded to other defendants to appeal to a higher court any decision the court had made, the court "mischaracterized the waiver of the right to appeal, portraying it in effect as an absolute bar' to the taking of an appeal" … . The written waiver executed by defendant did not contain clarifying language; instead, it perpetuated the mischaracterization that the appeal waiver constituted an absolute bar to the taking of a first-tier direct appeal and even stated that the rights defendant was waiving included the "right to have an attorney appointed" if he could not afford one and the "right to submit a brief and argue before an appellate court issues relating to [his] sentence and conviction" … . Where, as here, the "trial court has utterly mischaracterized the nature of the right a defendant

was being asked to cede,' [this] [C]ourt cannot be certain that the defendant comprehended the nature of the waiver of appellate rights' " … . People v Youngs, 2020 NY Slip Op 02558, Fourth Dept 5-1-20

ATTORNEYS.

DEFENDANT SUFFICIENTLY DEMONSTRATED A PLEA WHICH WOULD NOT RESULT IN MANDATORY DEPORTATION COULD HAVE BEEN WORKED OUT; THE MOTION TO VACATE HIS CONVICTION ON INEFFECTIVE ASSISTANCE OF COUNSEL GROUNDS SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant's motion to set aside his conviction based upon ineffective assistance of counsel should not have been denied without a hearing. The defendant presented sufficient evidence that defense counsel could have negotiated a plea which would not result in mandatory deportation:

Where the basis of a claim for ineffective counsel is counsel's failure to attempt to negotiate an immigration friendly plea, defendant has to show that there is a reasonable probability that the People would have made such an offer … . If the likelihood that the People would have made such an offer is speculative, then the motion may be denied without a hearing … . Here, however, defendant's motion shows that there was a reasonable possibility that his plea counsel could have secured a plea deal with less severe immigration consequences. …

Defendant has adequately alleged that there was a reasonable possibility that the People would have offered defendant such a plea, despite the fact that the drug possession charge is a lesser-included offense to the drug sale charge. First, the People agreed to a sentence of one year in prison and one year of post-release supervision in order to cover defendant's drug offenses. This suggests that there was a reasonable possibility that the People would have agreed to a different, immigration-favorable disposition resulting in the same aggregate prison time … . …

Second, both offenses subject defendant to equally enhanced sentences if he were to be convicted of another felony within 10 years … . …

Third, if the People had only been willing to offer the lesser-included offense together with a longer sentence, defendant might well have been willing to agree to that. …

Finally, there is no evidence that the People specifically sought a conviction on the drug sales offense in order to secure a harsher immigration consequence for defendant … . …

'… [D]efendant demonstrated a reasonable possibility that he would have rejected his plea had he known that he could have obtained a sentence that had less harsh immigration consequences … . People v George, 2020 NY Slip Op 02852, First Dept 5-14-20

ATTORNEYS.

DEFENDANT WAS DEPRIVED OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN DEFENSE COUNSEL ARGUED DEFENDANT'S PRO SE MOTION TO SET ASIDE THE VERDICT WAS NOT VIABLE (SECOND DEPT).

The Second Department, remitting the matter for a determination of defendant's CPL 330.30 motion to set aside the verdict, determined defendant's attorney took a position adverse to defendant by arguing defendant's pro se motion was not viable:

Prior to sentencing, the defendant moved, pro se, to set aside the verdict pursuant to CPL 330.30. At the sentencing hearing, defense counsel stated that the defendant asked him to adopt the motion but that defense counsel did not believe that it was "viable." He added that, in his opinion, the motion argued matters that were not "for the purview of the [c]ourt." The Supreme Court declined to review the motion.

As the People concede, defense counsel, by taking a position adverse to that of his client on the motion to set aside the verdict pursuant to CPL 330.30, deprived the defendant of the effective assistance of counsel … . People v Sonds, 2020 NY Slip Op 03036, Second Dept 5-27-20

ATTORNEYS.

DEFENSE COUNSEL'S REMARKS ABOUT DEFENDANT'S PRO SE MOTION TO WITHDRAW HER GUILTY PLEA CREATED A CONFLICT OF INTEREST REQUIRING THE ASSIGNMENT OF NEW COUNSEL; TWO-JUSTICE DISSENT (THIRD DEPT).

The Third Department, reversing Supreme Court, over a two-justice dissent, determined the sentencing court should have assigned new counsel to defendant based upon defense counsel's remarks about defendant's pro se motion to withdraw her guilty plea, which created a conflict of interest. The dissenters argued that, before defense made the remarks evincing a conflict of interest, the sentencing judge had denied defendant's pro se motion to withdraw her plea without prejudice to retain counsel and make a new motion:

After Supreme Court agreed to adjourn sentencing, without having decided defendant's pro se motion, defense counsel requested that he be permitted to put "a couple [of] things on the record." Upon receiving the court's permission, defense counsel proceeded to make several detrimental statements that were adverse and prejudicial to defendant. At this point, a conflict of interest arose between defendant and defense counsel, and Supreme Court was obligated to relieve defense counsel of his representation of defendant … . Supreme Court, however, did not acknowledge that a conflict of interest had arisen or inform defendant that she was entitled to the assignment of new counsel, should she opt to avail herself of that option.

When defendant subsequently appeared in Supreme Court for sentencing, she was accompanied by her original assigned counsel.Once again, Supreme Court did not raise or address the conflict of interest that had previously arisen between defendant and defense counsel, assign new counsel or advise defendant that she was entitled to the assignment of new counsel. Defense counsel requested that defendant be granted an additional adjournment, … stating that defendant had retained a certain named attorney, but that "[t]he funds just [had not] reached him yet." Without having afforded defendant an opportunity to confer with new counsel regarding her motion to withdraw her plea or having ruled on that motion, Supreme Court denied the adjournment request and proceeded to sentencing. By failing to relieve defense counsel of his representation of defendant once the conflict of interest arose and to either assign new counsel or permit defendant a sufficient opportunity to retain alternate counsel to represent her, Supreme Court deprived defendant of her right to the effective assistance of counsel in connection with her motion to withdraw her plea … . People v Maldonado, 2020 NY Slip Op 02953, Third Dept 5-21-20

ATTORNEYS.

THE RECORD DID NOT SUPPORT DEFENDANT'S ARGUMENT THAT DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE AN ALLEGEDLY BIASED JUROR; THE RECORD DID NOT SUPPORT A CONSTITUTIONAL INEFFECTIVE ASSISTANCE CLAIM; THEREFORE DIRECT APPEAL, AS OPPOSED TO A MOTION TO VACATE THE CONVICTION, WAS NOT AVAILABLE (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a comprehensive, extended dissenting opinion, determined defendant's constitutional ineffective assistance argument based upon defense counsel's failure to challenge an allegedly biased juror was properly rejected. The record was deemed insufficient to support the constitutional challenge. A motion to vacate the conviction, pursuant to Criminal Procedure Law section 440, based upon matters not in the record, may be the only avenue available to the defendant here. The defendant was charged with depraved indifference murder stemming from a drive-by shooting:

We reject defendant's argument here that prospective juror number 10's statements during voir dire reflect actual bias against defendant predicated on any evidence precluding the juror from rendering an impartial verdict, as opposed to general discomfort with the case based on media coverage. Contrary to defendant's assertion, the juror's verbatim statements did not reveal what about the case gave rise to his uneasiness — whether it be the seemingly random nature of the shooting, the defendant's or victim's identity, or the manner in which the police investigated … . Nor did this juror convey that his uneasiness was connected to any particular personal experience or relationship, … or whether his impressions risked predisposition toward the prosecution or defense. Moreover, as both the prosecutor and trial court indicated in questioning the juror, this case turned not on a dispute about the nature of the crime but on the prosecutor's ability to prove that this defendant committed it — an issue not impacted by the juror's apprehension. * * *

A defendant's views at trial about a prospective juror as conveyed to counsel are relevant to an ineffectiveness claim based on the joint decision to accept that juror. Here, where we do not know what was said between defendant and his counsel or how that conversation may have affected counsel's impression of prospective juror number 10, the ineffective assistance claim cannot be resolved on direct appeal. People v Maffei, 2020 NY Slip Op 02680, CtApp 5-7-20

BAIL.

APPELLANT, WHO HAD PUT UP HER OWN MONEY FOR DEFENDANT'S BAIL, WAS ENTITLED TO REMISSION OF THE BAIL FORFEITED WHEN DEFENDANT MISSED HIS COURT DATE; SUPREME COURT SHOULD HAVE CONSIDERED THE AFFIDAVITS AND PSYCHIATRIST'S LETTER EXPLAINING THE MENTAL-HEALTH-RELATED REASONS FOR DEFENDANT'S FAILURE TO APPEAR (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Gesmer, reversing Supreme Court, determined the appellant's pro se application for remission of the forfeited bail should have been granted. Appellant put up her own money for the bail. In support of her application for remission of the bail she submitted her own affidavit, defendant's affidavit and a letter from a psychiatrist who had treated the defendant. Supreme Court refused to consider the affidavits and letter which explained defendant had become depressed upon the death of his younger brother, began abusing drugs and went off his mental health medication, resulting in his missing his court date. Instead Supreme Court relied on the court's form application for remission of bail which was submitted by the appellant. The form application did not have any space for an explanation of the reasons for defendant's missing his court date:

A court may forfeit a bail bond "[i]f, without sufficient excuse, a principal does not appear when required or does not render himself amenable to the orders and processes of the criminal court wherein bail has been posted" (CPL 540.10[1]). When this occurs, the surety may make an application for remission of the forfeited bail, which the court may grant "upon such terms as are just" (CPL 540.30[2]). "[S]uch an application should be granted only under exceptional circumstances and to promote the ends of justice. In making the application, a defendant or surety has the burden of proving that the defendant's failure to appear was not deliberate and willful, and that the failure did not prejudice the People or deprive them of any rights" … . We find that appellant met all of these requirements. People v Nichols, 2020 NY Slip Op 02741, First Dept 5-7-20

EVIDENCE, DNA.

THE PEOPLE DID NOT DEMONSTRATE THAT THE ANALYST WHO TESTIFIED ABOUT THE GENERATION OF THE DNA PROFILE HAD FIRST-HAND KNOWLEDGE OF THE PROCEDURE USED OR INDEPENDENTLY ANALYZED THE RAW DATA; NEW TRIAL ORDERED (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined the defendant was deprived of the opportunity to cross-examine a witness who had first-hand knowledge of the generation of the DNA profile:

When confronted with testimonial DNA evidence at trial, a defendant is entitled to cross-examine "an analyst who witnessed, performed or supervised the generation of defendant's DNA profile, or who used his or her independent analysis on the raw data" … . As the defendant contends, the People failed to establish that the analyst who testified in this case performed such a role in the testing or analysis of the testimonial DNA evidence introduced against him at trial … . Since the error was not harmless, the defendant is entitled to a new trial … . People v Butler, 2020 NY Slip Op 02676, Second Dept 5-6-20

EVIDENCE, POSSESSION OF FORGED INSTRUMENT, FLIGHT.

ALTHOUGH THERE WAS EVIDENCE DEFENDANT WAS SELLING TICKETS TO A SPORTING EVENT OUTSIDE THE ARENA, THE EVIDENCE DEFENDANT KNEW THE TICKETS WERE FORGED WAS LEGALLY INSUFFICIENT; DEFENDANT'S FLIGHT WHEN HE SAW THE POLICE WAS EQUIVOCAL (FIRST DEPT).

The First Department, reversing defendant's convictions of criminal possession of a forged instrument, determined the evidence that defendant knew the Rangers tickets were forged was legally insufficient. The defendant briefly held an envelope containing the tickets and fled when he say the police:

Defendant approached Rangers fans outside of Madison Square Garden before a game, and at one point said "tickets, tickets." He was on a cell phone call for a few seconds with an unspecified caller, the substance of which was not overheard. Defendant then met an unapprehended man, who gave defendant an envelope, which he immediately passed to a codefendant. The envelope, which the police recovered from the codefendant, contained a birthday card and the four forged Rangers tickets.

The evidence suggested that defendant sought to buy or sell tickets, but it did not show that he knew the tickets in question were forged. Even if the evidence established that defendant knowingly acted in concert with one or more other persons to sell tickets, in the circumstances presented this failed to support an inference that he knew he was selling forged tickets. His momentary possession of the envelope as he took it from one man and handed it to another, without looking inside or otherwise seeing the tickets, and the lack of any evidence of the codefendant's conduct, besides his walking with defendant and receiving the tickets, does not suffice to establish that defendant knew the tickets were forged, either personally or while acting in concert with the codefendant.

Defendant's flight from a plainclothes officer, whom defendant may have recognized, was too equivocal to prove that he knew the tickets inside the envelope were forged. There are other reasonable explanations for defendant's flight, such as his potential awareness that it is unlawful to sell tickets, even if genuine, in the vicinity of the Garden … . People v Johnson, 2020 NY Slip Op 02708, First Dept 5-7-20

EVIDENCE.

BEST EVIDENCE RULE APPLIES TO VIDEO EVIDENCE AS WELL AS WRITINGS; ERROR IN FAILING TO EXCLUDE THE VIDEO EVIDENCE WAS HARMLESS HOWEVER (THIRD DEPT).

The Third Department, disagreeing with County Court, determined the best evidence rule applies to video evidence. The error was deemed harmless however:

Defendant asserts that, under the best evidence rule, the cell phone video recording of surveillance video that depicted the exterior of the bar … , as well as the observations of the detective who viewed and recorded this cell phone video, should have been precluded. Defendant further asserts that the detective should not have been allowed to testify about what he saw on a surveillance video showing the inside of the bar. In overruling defendant's objection, County Court noted that the best evidence rule applied only to writings. Contrary to the court's reasoning, however, the best evidence rule can apply to videos (see e.g. People v Cyrus, 48 AD3d 150, 159 [2007] …). Furthermore, the People did not call the bar manager or a person who installed the video equipment to authenticate the surveillance video … . Accordingly, the court erred in overruling defendant's objection to this evidence. People v Watson, 2020 NY Slip Op 03050, Third Dept 5-28-20

EXTREME EMOTIONAL DISTURBANCE.

WHETHER TO INSTRUCT THE JURY ON THE EXTREME EMOTIONAL DISTURBANCE (EED) AFFIRMATIVE DEFENSE MUST BE DETERMINED BASED SOLELY UPON THE PEOPLE'S PROOF AT TRIAL; IT WAS (HARMLESS) ERROR FOR THE COURT TO MAKE THAT DETERMINATION PRIOR TO TRIAL (FOURTH DEPT).

The Fourth Department noted that the court committed (harmless) error when it ruled, prior to the trial, that the jury would not be instructed on the extreme emotional disturbance (EED) affirmative defense:

… [T]he court erred in determining prior to trial that it would not charge the jury on the affirmative defense of EED. A defendant may be entitled to a jury charge on the affirmative defense of EED based solely on the People's proof … , and thus it was error for the court to make that ruling without any consideration of the People's evidence. People v Taglianetti, 2020 NY Slip Op 02561, Fourth Dept 5-1-20

GRAND JURY, EVIDENCE.

THE GRAND JURY EVIDENCE OF TWO LACERATIONS ON THE VICTIM'S NECK, 3-4 AND 5-6 CENTIMETERS LONG, SUPPORTED THE TWO COUNTS OF FIRST DEGREE ASSAULT BASED UPON DISFIGUREMENT (FOURTH DEPT).

The Fourth Department, reversing County Court, over a two-justice dissent, determined the evidence presented to the Grand Jury was sufficient to support the assault first degree counts based upon disfigurement, i.e., two lacerations, 3-4 and 5-6 centimeters long, on the victim anterior neck:

… [T]he evidence before the grand jury included the testimony of the victim, the victim's medical records, and photographs of the victim taken on the day of the incident. The evidence established that, as a result of the assault, the victim sustained "two significant lacerations to her anterior neck," which were 3-4 and 5-6 centimeters long, respectively, with soft tissue defects and exposure of underlying subcutaneous fat. The lacerations required at least 10 sutures to close. We conclude that the grand jury could reasonably infer from the evidence that the sutured wounds resulted in permanent scars … . We further conclude that, when "viewed in context, considering [their] location on the body"… , the grand jury could reasonably infer that the scars would

"make the victim's appearance distressing or objectionable to a reasonable person observing her" … . People v Harwood, 2020 NY Slip Op 02594, Fourth Dept 5-1-20

GUILTY PLEAS.

DEFENDANT WAS NOT INFORMED OF THE DEPORTATION CONSEQUENCES OF HIS GUILTY PLEA, MATTER REMANDED; DEFENDANT WAS NOT INFORMED THAT BY PLEADING GUILTY TO A PROBATION VIOLATION HE WAS GIVING UP HIS RIGHT TO A HEARING; APPEAL CONSIDERED IN THE INTEREST OF JUSTICE (FIRST DEPT).

The First Department, remanding the matter, determined defendant was not advised he could be deported based on his guilty plea, and further determined defendant's plea to a probation violation was defective because he was not informed he was giving up his right to a hearing. Although the issue was not preserved by a motion to withdraw the plea, the appeal was heard in the interest of justice:

When defendant, a noncitizen, pleaded guilty to criminal possession of a firearm, the court did not advise him that if he was not a citizen, he could be deported as a consequence of his plea. Even though he did not move to withdraw his guilty plea, there is no evidence that defendant knew about the possibility of deportation during the plea and sentencing proceedings. As such, the claim falls within the "narrow exception" to the preservation doctrine (People v Peque, 22 NY3d 168, 183 [2013], cert denied 574 US 850 [2014]). Therefore, defendant should be afforded the opportunity to move to vacate his plea upon a showing that there is a "reasonable probability" that he would not have pleaded guilty had the court advised him of the possibility of deportation (id. at 198). Accordingly, we remit for the remedy set forth in Peque (id. at 200-201), and we hold the appeal in abeyance for that purpose.

Furthermore, defendant's guilty plea to violation of probation was defective because there was no allocution about whether defendant understood that he was giving up his right to a hearing on the violation. While there is no mandatory catechism, Supreme Court failed to "advise defendant of his rights or the consequences regarding an admission to violating probation, including that he understood that he was entitled to a hearing on the issue and that he was waiving that right" … . Although defendant never moved to withdraw this plea and his claim is unpreserved, we review it in the interest of justice. People v Pinnock, 2020 NY Slip Op 02731, First Dept 5-7-20

INDICTMENTS.

ALTHOUGH THE INDICTMENT CHARGED THE DEFENDANT WITH THE INTENTIONAL KILLING OF SCOTT WRIGHT, THE JURY WAS TOLD IN ANSWER TO ITS QUESTION THAT IT COULD CONVICT THE DEFENDANT IF THEY FOUND DEFENDANT INTENDED TO KILL THE NEXT PERSON WHO CAME THROUGH THE DOOR, IRRESPECTIVE OF THE IDENTITY OF THAT PERSON; THE JURY INSTRUCTION WAS DEEMED PROPER (THIRD DEPT).

The Third Department, affirming defendant's murder conviction, determined the People were not required to prove defendant intended to kill the victim named in the indictment (Wright). Although the indictment charged defendant with the intentional murder of Wright, the jury wanted to know if they could convict if they concluded defendant simply intended to kill the next person who came through the door (who happened to be Wright). The judge answered the jury's question in the affirmative and the Third Department held the jury was properly instructed:

As defendant argues, "a jury charge may not constructively amend an indictment by varying the theory of the prosecution" … . "However, not every fact mentioned in an indictment is essential to establish the defendant's guilt of the crime charged, and thus it is not necessary in every case that the People prove all acts alleged in the indictment when the remaining acts alleged are sufficient to sustain a conviction" … . Significantly, the identity of the victim is not one of the elements of the crime of murder in the second degree … . Here, the People chose to go beyond the elements that they were required to prove to obtain a conviction both by asserting in the indictment that defendant specifically intended to shoot Wright and by making that argument at trial. Nonetheless, the jury was not required to accept this part of the People's theory to convict defendant of murder in the second degree, so long as it found that the People had proven the elements of that crime beyond a reasonable doubt. Accordingly, we find that the instruction did not alter the prosecution's theory … . …

… [W]e reject defendant's contention that County Court's supplemental instruction prejudiced defendant by introducing the new legal principle of mistake of fact. As defendant argues, the People made no arguments based on that principle during the trial. However, defendant's theory of defense throughout the trial was that the gun went off accidentally and that defendant did not intend to shoot Wright or anyone else. This defense of accident would not have been altered or affected if the question whether defendant mistook Wright for someone else had

been raised earlier; as previously noted, the identity of the victim is not an element of the crime of murder in the second degree. People v Lee, 2020 NY Slip Op 03049, Third Dept 5-28-20

RAPE SHIELD LAW.

ALTHOUGH IT IS NOT SETTLED WHETHER THE RAPE SHIELD LAW APPLIES TO A CIVIL PROCEEDING, SUPREME COURT HAD THE AUTHORITY TO PROHIBIT THE QUESTIONING OF PLAINTIFF'S DAUGHTER ABOUT HER SEXUAL HISTORY TO PREVENT EMBARRASSMENT AND HARASSMENT IN THIS NEGLIGENT SUPERVISION CASE (THIRD DEPT).

The Third Department upheld Supreme Court's protective order prohibiting plaintiff's child from being questioned about her sexual history. The complaint alleged the child was raped during a sleep over at defendants' home. The complaint alleged several theories of liability, including negligent supervision. Supreme Court held that the Rape Shield Law applied to this civil case. The Third Department determined it did not need to reach that issue, holding that the court had the authority to prohibit the testimony to protect the child from embarrassment:

… Supreme Court was required to balance plaintiff's concern that the child's sexual history is irrelevant, and that questions of this nature are nothing more than a form of intimidation and embarrassment, against defendants' argument that the child had a motive to fabricate the allegations of the assault because of a purported pregnancy. The record reveals that Supreme Court undertook a balancing of these concerns.

We find that plaintiff met her burden of showing annoyance and embarrassment. The child's sexual history, sexual conduct and pregnancies are not relevant or material to the elements of the causes of action for negligence, battery, intentional infliction of emotional distress or loss of services … . Moreover, it has been determined that there is limited value to testimony concerning the sexual past of a victim of a sexual assault; instead, it often serves only to harass the victim and confuse the jurors … . Lisa I. v Manikas, 2020 NY Slip Op 02846, Third Dept 5-14-20

SEARCH WARRANTS.

ALTHOUGH THE SEARCH WARRANT WAS IMPROPERLY ADDRESSED TO THE SPECIAL OPERATIONS GROUP, WHICH INCLUDED PEACE OFFICERS AS OPPOSED TO POLICE OFFICERS, THE WARRANT WAS PROPERLY ADDRESSED TO POLICE OFFICERS AS WELL; THE PARTICIPATION OF PEACE OFFICERS IN THE SEARCH WAS LIMITED AND DID NOT INVALIDATE THE SEARCH (SECOND DEPT).

The Second Department determined the fact that corrections officers (i.e., peace officers) participated in a search, along with police officers, did not invalidate the search:

There is no dispute that the search warrant was properly addressed to police officers of the City of Middletown Police Department and police officers of the New York State Police (see CPL 1.20[34][a], [d]). Accordingly, the search warrant complied with the statutory requirement that it "be addressed to a police officer whose geographical area of employment embraces or is embraced or partially embraced by the county of issuance" (CPL 690.25[1]).

The defendant is correct that the search warrant was improperly addressed to the Special Operations Group, since it includes members who are not police officers within the meaning of the statute (see CPL 690.25[1]; see also CPL 2.10[25]). However, "[s]earch warrants should be tested in a commonsense and realistic manner with minor omissions and inaccuracies not affecting an otherwise valid warrant" … . * * *

Here, the record of the suppression hearing demonstrates that the Special Operations Group played a limited role in the execution of the warrant. Members of that group merely secured entry to the residence for the benefit of the police officers who actually conducted the search and recovered the physical evidence at issue. People v Ward, 2020 NY Slip Op 02943, Second Dept 5-20-20

SEARCH WARRANTS.

POSSESSION OF SYNTHETIC CANNABINOIDS IS PUNISHABLE BY A FINE AND JAIL TIME UNDER THE SANITARY CODE; THEREFORE A SEARCH WARRANT AUTHORIZING A SEARCH FOR SYNTHETIC CANNABINOIDS IS VALID; THE WAIVER OF APPEAL HERE WAS INVALID (THIRD DEPT).

The Third Department determined defendant's waiver of appeal was invalid, but went on to find that the search warrant and search were valid and proper. The defendant argued that the search for synthetic cannabinoids not authorized because that substance is not encompassed by the Penal Law. However, the Sanitary Code makes possession of the substance a violation which can result in a fine and a jail sentence:

… [T]he appeal waiver was invalid because County Court failed to advise defendant that the right to appeal is separate and distinct from the rights automatically forfeited by pleading guilty … , and also because the court increased the sentence, but failed to inquire into whether defendant wished to withdraw his consent to the appeal waiver … . …

A search warrant application must include "[a] statement that there is reasonable cause to believe that property of a kind or character described in [CPL] 690.10 may be found in or upon a designated or described place" (CPL 690.35 [3] [b]). Personal property that "[c]onstitutes evidence or tends to demonstrate that an offense was committed in this state" is subject to seizure (CPL 690.10 [4]). "Offense" is defined as "conduct for which a sentence to a term of imprisonment or to a fine is provided by any law of this state" (Penal Law § 10.00 [1]). Further, a "[v]iolation" is defined as "an offense . . . for which a sentence to a term of imprisonment in excess of [15] days cannot be imposed" (Penal Law § 10.00 [3]).

Defendant is correct in asserting that the Penal Law prohibitions against the possession of controlled substances and marihuana do not specifically include synthetic cannabinoid. However, the Sanitary Code makes it "unlawful for any individual . . . to possess, manufacture, distribute, sell or offer to sell any synthetic phenethylamine or synthetic cannabinoid," with exceptions not applicable here (10 NYCRR 9-1.2). Significantly, "[t]he provisions of the [S]anitary [C]ode shall have the force and effect of law and the non-compliance or non-conformance with any provision thereof shall constitute a violation punishable on conviction for a first offense by a fine not exceeding [$250] or by imprisonment . . . not exceeding [15] days, or both" (Public Health Law § 229 …). It follows that, by definition, a search warrant may be issued for the alleged possession of synthetic cannabinoids … . People v Morehouse, 2020 NY Slip Op 03048, Thrid Dept 5-28-20

SEARCHES.

AFTER A TRAFFIC STOP AND A FOOT CHASE DEFENDANT WAS TAKEN INTO CUSTODY; NOTHING THE DEPUTY HAD SEEN AT THAT POINT PROVIDED PROBABLE CAUSE TO SEARCH THE DEFENDANT'S CAR; AFTER OPENING THE CAR DOOR AND SMELLING MARIJUANA THE DEPUTY CONDUCTED A WARRANTLESS SEARCH; THE DRUGS AND WEAPON SHOULD HAVE BEEN SUPPRESSED (FOURTH DEPT)

The Fourth Department, reversing defendant's conviction and dismissing the indictment, determined the deputy did not have probable cause for a warrantless search of defendant's car and the drugs and weapon found in the car should have been suppressed. The deputy initiated a traffic stop because defendant allegedly made a turn without signaling. The defendant told the deputy he could not roll down his window or open the driver side door. After making "furtive" movements inside the car, the defendant opened the passenger side door and fled. The deputy chased defendant and took him into custody. When asked why he ran, defendant said there was a warrant for his address. The deputy returned to defendant's car, opened the door, smelled marijuana and searched the car. The Fourth Department found that nothing the deputy had seen prior to his opening the car door provided probable cause for the search:

Under the Fourth Amendment of the United States Constitution, "a search conducted without a warrant issued by an impartial Magistrate is per se unreasonable unless one of the established exceptions applies" … . "One such exception is the so-called automobile exception', under which State actors may search a vehicle without a warrant when they have probable cause to believe that evidence or contraband will be found there" … . Applying our State Constitution, the Court of Appeals has held that when police want to search a vehicle at the time they arrest its occupant, "the police must… not only have probable cause to search the vehicle but . . . there must also be a nexus between the arrest and the probable cause to search" … . "[T]he requirement of a connection" between "the probable cause to search and the crime for which the arrest is being made" is "flexible" inasmuch as a court need not focus "solely on the crimes for which a defendant was formally arrested" … . "[T]he proper inquiry is simply whether *the circumstances* gave the officer probable cause to search the vehicle" … . When police officers stop a vehicle, they may have probable cause to search the vehicle under the automobile exception based "on grounds other than those that initially prompted [the officers] to stop the vehicle," i.e., the probable cause may come to light after the stop… . …

Although defendant engaged in "furtive and suspicious activity" and his "pattern of behavior, viewed as a whole" was suspicious … , there was no direct nexus between the initial traffic stop for a traffic violation and the search

of defendant's vehicle. Furthermore, there was no direct nexus between the arrest of defendant and the search of his vehicle. Defendant made no statements to suggest that the vehicle contained contraband or evidence of a crime … , the deputy did not observe any contraband in plain view , the deputy did not find any contraband on defendant's person when he took defendant into custody … , and it cannot be said that defendant's "furtive movements" toward the center console lacked any innocent explanation or occurred under circumstances suggesting that criminal activity was afoot … . People v Johnson, 2020 NY Slip Op 02589, Fourth Dept 5-1-20

SENTENCING.

REFERENCES TO DEVIATE BEHAVIOR AND USE OF FORCE IN PETITIONER-INMATE'S CRIME AND SENTENCE INFORMATION FORM AND HIS COMPAS RISK AND NEEDS ASSESSMENT INSTRUMENT NOT SUPPORTED BY THE SEXUAL OFFENSES COMMITTED; THE PETITION SEEKING CORRECTION OF THE DOCUMENTS SHOULD NOT HAVE BEEN DISMISSED (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court, determined petitioner-inmate had raised legitimate issues about the contents of his Crime and Sentence Information (CSI) form and his COMPAS Risk and Needs Assessment Instrument requiring further proceedings in this Article 78 action. Specifically petitioner argued that references to "deviate" behavior and use of force in connection with sexual offenses were inaccurate:

… [W]ith respect to the CSI form, petitioner was not convicted of any crimes involving an element of "deviate" behavior … . Additionally, with regard to the challenged characterization in the COMPAS instrument indicating that petitioner committed a "[s]ex [o]ffense with [f]orce," we note that petitioner was not convicted of a crime involving "force" or "forcible" contact … . Accordingly, to the extent that the inclusion of such references in the CSI form and COMPAS instrument could be perceived as misleading and be potentially prejudicial to "future deliberations concerning the petitioner's status" … , we find that, at this stage of the proceeding, in the absence of a more developed record, petitioner has stated a potentially valid cause of action. Because respondent has yet to serve an answer in this matter, this matter must be remitted to Supreme Court for this purpose … . Matter of Staropoli v Botsford, 2020 NY Slip Op 02840, Third Dept 5-14-20