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An Organized Compilation of the Summaries of Selected Decisions Released by Our New York State Appellate Courts Between January 1, 2020, and June 30, 2020, and Posted Weekly 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.

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The Fourth Department, after a reversal by the Court of Appeals, determined defendant's motion to suppress evidence seized after a street stop should have been granted and vacated defendant's guilty plea. Defendant was charged with two burglaries on different days. Defendant pled guilty to one of the burglaries in satisfaction of both. Defendant appealed the denial of the suppression motion related to the street stop. The Fourth Department did not reach the merits of the appeal because the suppression motion did not involve the offense to which defendant pled guilty. The Court of Appeals reversed, finding that the denial of the suppression motion was appealable because of its potential effect on the decision to plead guilty in satisfaction of both charges:

A majority of this Court concluded that " the judgment of conviction on appeal here did not ensue from the denial of the motion to suppress [relating solely to count two] and the latter [wa]s, therefore, not reviewable' pursuant to CPL 710.70 (2)" … . The Court of Appeals reversed, stating that "the Appellate Division may review an order denying a motion to suppress evidence where, as here, the contested evidence pertained to a count—contained in the same accusatory instrument as the count defendant pleaded guilty to—that was satisfied by the plea" … . The Court of Appeals remitted the matter to this Court to rule on defendant's suppression contention.

Upon remittitur, we now agree with defendant that Supreme Court erred in refusing to suppress physical evidence seized as a result of his unlawful detention on October 3, 2014 … . We further agree with defendant that such error was not harmless under the circumstances (see id. at 1424). We therefore reverse the judgment, vacate the plea, grant that part of the omnibus motion seeking to suppress the physical evidence seized from defendant on October 3, 2014, and remit the matter to Supreme Court, Monroe County, for further proceedings on the indictment. People v Holz, 2020 NY Slip Op 03345, Fourth Dept 6-12-20

APPEALS, SUPPRESSION MOTION.

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.

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

BEST EVIDENCE RULE.

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

BRADY.

EXCULPATORY (BRADY) EVIDENCE IN THE COMPLAINANT'S MENTAL HEALTH RECORDS WAS REDACTED BY THE JUDGE; TWO INDICTMENT COUNTS WERE MULTIPLICITOUS; NEW TRIAL ORDERED IN THIS SEXUAL ABUSE CASE (SECOND DEPT).

The Second Department, reversing defendant's sexual abuse convictions, determined the defendant was entitled to exculpatory (Brady) evidence in the complainant's mental health records which was redacted by the judge. The Second Department noted that, upon retrial, two counts of sexual abuse related to a continuous incident were multiplicitous and one of the counts must be dismissed:

The complainant and the defendant each testified and presented sharply divergent accounts of the events that were alleged to have occurred during the summer of 2009. The record shows that a determination of credibility was key to the jury's consideration of this case, as the jury acquitted the defendant of the charge of rape in the first degree but convicted him of the charges alleging sexual abuse in the first degree. Thus, the redacted portion of the complainant's mental health records which contains the statement "[s]exual abuse denied" and the portion of the checklist reflecting that "[s]exual abuse (lifetime)" was not checked off could be viewed by the jury as exculpatory and materially relevant to the matter … . Since the jury had to weigh the credibility of the complainant and the defendant, this evidence, if disclosed, may have changed the result of the proceeding. Accordingly, the judgment must be reversed and the matter remitted for a new trial. People v Butler, 2020 NY Slip Op 03374, Second Dept 6-17-20

CELL SITE LOCATION.

EVEN THOUGH THE US SUPREME COURT CASE REQUIRING WARRANTS FOR CELL SITE LOCATION DATA WAS NOT DECIDED AT THE TIME OF TRIAL, PRESERVATION OF THAT ISSUE FOR APPEAL IS STILL NECESSARY; A DEFENDANT MAY BE INDICTED FOR BOTH DEPRAVED INDIFFERENCE AND INTENTIONAL MURDER; CONSECUTIVE SENTENCES FOR THE SHOOTINGS AND POSSESSION OF A WEAPON WERE APPROPRIATE (FIRST DEPT).

The First Department, affirming defendant's murder, assault and weapon-possession convictions, and affirming the denial of defendant's motion to vacate the convictions, determined: (1) the issue re: the warrantless procurement of cell site location data was not preserved, and preservation was necessary despite the fact that the US Supreme Court case requiring warrants was not decided at the time of trial; (2) the defendant was properly indicted, by different grand juries, for both depraved indifference and intentional murder; and (3) consecutive sentences for possession of a weapon and the shootings were appropriate:

At trial, defendant did not preserve any claim relating to cell site location information obtained without a warrant, and the motion court providently exercised its discretion under CPL 440.10(2)(b) when it rejected defendant's attempt to raise this issue by way of a postconviction motion. Defendant asserts that it would have been futile for trial counsel to raise the issue because the Supreme Court of the United States had not yet decided Carpenter v United States (585 US __, 138 S Ct 2206 [2018]), a case that we assume, without deciding, applies here because defendant's direct appeal was pending at the time that case was decided. We conclude that defendant should not be permitted to avoid the consequences of the lack of preservation. Although Carpenter had not yet been decided, and trial counsel may have reasonably declined to challenge the cell site information, defendant had the same opportunity to advocate for a change in the law as did the litigant who ultimately succeeded in doing so … . In the closely related context of preservation, the Court of Appeals has expressly rejected the argument that an "appellant should not be penalized for his failure to anticipate the shape of things to come" … . * * *

A grand jury's indictment of defendant for depraved indifference murder, after a prior grand jury had indicted him for intentional murder, did not violate CPL 170.95(3). The second presentation did not require permission from the court, because the first indictment cannot be deemed a dismissal of the depraved indifference count in the absence of any indication that the first grand jury was aware of or considered that charge … . The rule that a person may not be convicted of both intentional and depraved indifference murder … applies to verdicts after trial, not indictments. These charges may be presented to a trial jury in the alternative (as occurred in this case, where defendant was acquitted of depraved murder but nevertheless claims a spillover effect). Furthermore, the People were not required to present both charges to the same grand jury … . People v Crum, 2020 NY Slip Op 03282, First Dept 6-11-20

CITIZEN'S ARREST, PEACE OFICERS.

FEDERAL CUSTOMS AND BORDER PATROL MARINE INTERDICTION AGENT IS NOT A PEACE OFFICER UNDER NEW YORK LAW; THEREFORE THE AGENT MADE A VALID CITIZEN'S ARREST OF AN ERRATIC DRIVER HE OBSERVED WHILE ON THE HIGHWAY; MOTION TO SUPPRESS THE WEAPON FOUND IN DEFENDANT'S CAR SHOULD NOT HAVE BEEN GRANTED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Feinman, reversing the Appellate Division, over a dissent, determined the federal marine interdiction agent with US Customs and Border Protection (CBP) was not a peace officer under New York law and, therefore, could effect a citizen's arrest. The federal agent observed

defendant driving erratically and putting other drivers in danger so he activated his emergency lights and pulled the driver over. The agent stayed in his vehicle and called the Buffalo police. After the Buffalo police arrived, the agent left. The police found a weapon in defendant's car and he was charged with criminal possession of a weapon. Supreme Court granted defendant's motion to suppress and the Fourth Department affirmed. Both courts relied on People v Williams (4 NY3d 535 [2005]) which held that peace officers could not make a citizen's arrest. The Court of Appeals reasoned that Williams did not control because the federal agent in this case was not a peace officer under the relevant New York statutory definitions and therefore could make a citizen's arrest:

Because the agent who stopped defendant in this case is not considered a federal law enforcement officer with peace officer powers pursuant to CPL 2.10 and 2.15, he could not have improperly circumvented the jurisdictional limitations on the powers reserved for those members of law enforcement under CPL 140.25, as the peace officers in Williams did. In other words, the agent's conduct here did not violate the Legislature's prescribed limits on a peace officer's arrest powers because he is not, in fact, a peace officer. …

… [A]side from the clear limits as to the justifiable use of physical force that may be applied during an arrest by a private citizen (CPL 35.30 [4]; CPL 140.35 [3]), as well as the requirement that "[s]uch person must inform the person whom he [or she] is arresting of the reason for such arrest unless he [or she] encounters physical resistance, flight or other factors rendering such procedure impractical" (CPL 140.35 [2]), nothing in the citizen's arrest statutes themselves set forth the methods that must be employed when, as here, a crime is committed in the responding citizen's presence (see CPL 140.30, 140.40 …). We reiterate that whether this stop comported with constitutional principles or the express terms of the arrest statutes is simply not before us, as defendant failed to raise any such arguments before the suppression court. People v Page, 2020 NY Slip Op 03265, CtApp 6-11-20

CO-DEFENDANT'S STATEMENT.

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

CONSECUTIVE SENTENCES.

EVIDENCE DID NOT SUPPORT CONSECUTIVE SENTENCES FOR CRIMINAL POSSESSION OF A WEAPON AND MURDER (SECOND DEPT).

The Second Department determined the trial evidence did not support consecutive sentences for criminal possession of a weapon and murder:

We agree with the defendant that the sentencing court could not lawfully direct that the sentence imposed upon one of the convictions of criminal possession of a weapon in the second degree run consecutive to the sentence imposed upon the conviction of murder in the second degree. As the defendant correctly contends, it is impossible, based on the indictment or the trial court's charge, to determine whether the act that formed the basis of the jury's verdict on the criminal possession of a weapon in the second degree counts was not the basis for its conviction on the murder in the second degree count. Therefore, the People have failed to meet their burden of proving the validity of consecutive sentences … . People v McClinton, 2020 NY Slip Op 00879, Second Department 2-5-20

CRIMINAL NEGLIGENCE.

CRIMINALLY NEGLIGENT HOMICIDE CONVICTION ARISING FROM A TRAFFIC ACCIDENT WAS AGAINST THE WEIGHT OF THE EVIDENCE (SECOND DEPT).

The Second Department, reversing defendant's conviction, over a two-justice dissent, determined the conviction for criminally negligence homicide was against the weight of the evidence. The passenger in defendant's car was killed when defendant's car went off the road, apparently after colliding with other cars defendant was attempting to pass. The decision described all of the witness's testimony in detail and concluded the conflicting testimony was not a sufficient basis for a conviction:

"A person is guilty of criminally negligent homicide when, with criminal negligence, he [or she] causes the death of another person" (Penal Law § 125.10). A person acts with criminal negligence when "he [or she] fails to perceive a substantial and unjustifiable risk that such result will occur or that such [a] circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation" (Penal Law § 15.05[4]).

The defendant's conduct must rise to a level of carelessness where its "seriousness would be apparent to anyone who shares the community's . . . sense of right and wrong" … . Moreover, the conduct must create the risk, rather than simply not perceive the risk … .

In cases concerning charges of criminally negligent homicide arising out of automobile accidents involving excess rates of speed, "it takes some additional affirmative act by the defendant to transform speeding into dangerous speeding" … .

Here, the People failed to establish, beyond a reasonable doubt, that the defendant "fail[ed] to perceive a substantial and unjustifiable risk" (Penal Law § 15.05[4]) which caused the death of his passenger. People v Derival, 2020 NY Slip Op 02072, Second Dept 3-25-20

CROSS-EXAMINATION OF POLICE.

CROSS-EXAMINATION OF A POLICE OFFICER ABOUT MISCONDUCT IN A CIVIL SUIT SHOULD HAVE BEEN ALLOWED; CONVICTION REVERSED (FIRST DEPT).

The First Department, reversing defendant's conviction, determined cross-examination of a police officer about misconduct in a civil suit should have been allowed:

The trial court erred in denying defendant's request to cross-examine a police Sergeant regarding allegations of misconduct in a civil lawsuit in which it was claimed that this police Sergeant and a police detective arrested the plaintiff without suspicion of criminality and lodged false charges against him … . The civil complaint contained allegations of falsification specific to this officer (and another officer), which bore on his credibility at the trial.

Contrary to the People's allegations, the error was not harmless. The police sergeant's credibility was critical because he was the only eyewitness to the crime … . Although the sergeant's testimony was corroborated by other evidence, none of this corroborating evidence was sufficient, on its own, to prove defendant's guilt, as all of it relied on the sergeant's testimony for context. People v Conner, 2020 NY Slip Op 03200, First Dept 6-4-20

CROSS-EXAMINATION OF POLICE.

SECOND DEGREE MURDER COUNTS DISMISSED AS INCLUSORY CONCURRENT COUNTS RE FIRST DEGREE MURDER; CROSS EXAMINATION OF A POLICE OFFICER RE EXCESSIVE FORCE PROPERLY PRECLUDED BECAUSE THE ALLEGATIONS WERE NOT RELEVANT TO CREDIBILITY (SECOND DEPT).

The Second Department determined the second degree murder counts must be dismissed as inclusory concurrent counts of the convictions of first degree murder. The court noted that the trial court properly precluded cross examination of a police officer about allegations of the officer's use of excessive force because the allegations were not relevant to credibility:

While specific and relevant allegations of misconduct in a civil action filed against a law enforcement officer may be used for the limited purpose of impeaching that law enforcement witness at trial … , such impeachment is subject to the court's broad discretion in controlling the permissible scope of cross-examination … . Here, the defendant failed to demonstrate that specific allegations of excessive force in a federal action pending against the detective and a finding in 2010 by the Civilian Complaint Review Board that the detective used excessive force were relevant to the detective's credibility … . People v Brown, 2020 NY Slip Op 01632, Second Dept 3-11-20

CUSTODY.

AFTER THE INITIAL INVESTIGATION AT THE SCENE AND AFTER DEFENDANT WAS HANDCUFFED AND SEATED IN THE BACK OF THE POLICE CAR, THE OFFICER ASKED DEFENDANT "WHAT HAPPENED?"; DEFENDANT'S RESPONSE SHOULD HAVE BEEN SUPPRESSED; CONVICTION REVERSED (THIRD DEPT).

The Third Department, reversing defendant's conviction, determined statements made by defendant when he was handcuffed in the back of a police car should have been suppressed. The officer (Nellis) asked the defendant "What happened?" after the initial investigation was over:

After Nellis arrived at the scene and discovered defendant in the driveway, he entered the residence and found the victim being treated by defendant's mother. The victim was convulsing and making gurgling sounds, and Nellis observed bruises and dried blood on her face. Nellis radioed emergency services to respond immediately, exited the residence and informed defendant that he was being detained for questioning. The officer did not immediately ask defendant what happened, but, after defendant was handcuffed and placed in the backseat of the patrol car, Nellis asked defendant, "What happened?" In response, defendant told him that he "snapped" and he "wanted her to feel the pain he had." Defendant also admitted, "I choked her with a rope but never struck her in the face." County Court allowed the statements, reasoning that the purpose of Nellis' questioning was to clarify the nature of the volatile situation rather than to elicit evidence of a crime. We disagree.

The incident had been completed, the parties had been identified and medical assistance requested; defendant had been cooperative and responsive. "[W]here criminal events have been concluded and the situation no longer requires clarification of the crime or its suspects, custodial questioning will constitute interrogation" … . …

We cannot say beyond a reasonable doubt that these statements did not contribute to defendant's conviction and, as such, the error was not harmless. People v McCabe, 2020 NY Slip Op 02288, Third Dept 4-16-20

CUSTODY.

BECAUSE DEFENDANT INVOKED HIS RIGHT TO COUNSEL WHEN HE WAS NOT IN CUSTODY HE COULD VALIDLY WITHDRAW HIS REQUEST WITHOUT THE PRESENCE OF COUNSEL (FOURTH DEPT).

The Fourth Department determined defendant invoked his right to counsel when he was not in custody and therefore defendant could validly withdraw his request for counsel without the presence of counsel:

The Court of Appeals has stated that a defendant who asserts his or her right to counsel while out of custody may later withdraw that assertion without an attorney present and speak to law enforcement agents … . A hearing court may infer that a defendant has withdrawn a request for counsel when the defendant's conduct unambiguously establishes such a withdrawal, which requires consideration of all relevant factors, including "whether defendant was fully advised of his or her constitutional rights before invoking the right to counsel and subsequently waiving it, whether the defendant who has requested assistance earlier has initiated the further communication or conversation with the police . . . , and whether there has been a break in the interrogation after the defendant has asserted the need for counsel with a reasonable opportunity during the break for the suspect to contact an attorney" … . Here, defendant was repeatedly advised of his rights, including twice immediately before he resumed speaking with the police. Moreover, after an overnight break in questioning, defendant initiated the conversation with the police to inquire about taking a polygraph examination, and he provided his own transportation to the investigators' office. Consequently, we conclude that the court properly determined that defendant withdrew his assertion of his right to counsel … . We reject defendant's contention that a different result is required because he did not cause the break in the interrogation. The relevant consideration is not which party caused the break in the questioning, rather it is whether there was "a reasonable opportunity during the break for the suspect to contact an attorney" … , and in this case defendant had such an opportunity during the overnight break in questioning. People v Brown, 2020 NY Slip Op 01981, Fourth Dept 3-20-20

DEFENDANT'S SILENCE.

REVERSIBLE ERROR TO ADMIT INTO EVIDENCE A VIDEO OF THE INTERROGATION OF DEFENDANT SHOWING HIM REMAINING SILENT WHILE THE POLICE RECOUNTED THE CASE AGAINST HIM (THIRD DEPT).

The Third Department reversed defendant's conviction because a video of his interrogation, which showed him remaining silent while the police recounted the case against him, was admitted into evidence:

"It is a well-established principle of state evidentiary law that evidence of a defendant's pretrial silence is generally inadmissible" … . There are many reasons why an individual may choose not to speak to the police; however, there is a substantial risk that jurors might construe such silence as an admission and draw an unwarranted inference of guilt … . Here, the admitted video consists of the police recounting their case against defendant, including reading his texts aloud and being met largely, if not completely, with silence. Defendant is shown slouching, with an ankle shackle securing him to the chair, and he is dressed in a hooded sweatshirt with oversized sweatpants worn in a manner so as to expose his underwear. His attitude appears to be dismissive and, at one point, he laughs in response to police questioning. Throughout the video, defendant makes no inculpatory statements. Both detectives who appear in the video were presumably available to testify and, in fact, one of them did testify.

Allowing evidence of defendant's selective silence was highly prejudicial because there was a significant risk that the jurors deemed defendant's failure to answer the police officer's questions to be an admission of guilt … . Given its highly prejudicial nature and that it contained little to no probative value, we agree with defendant that County Court erred in allowing the redacted video to be shown to the jury … . This error was compounded by the People's use of the video during summation, wherein the prosecutor highlighted and commented upon defendant's silence during the police interrogation. In doing this, the People improperly shifted the burden to defendant … . People v Chapman, 2020 NY Slip Op 02330, Third Dept 4-23-20

DEPRAVED INDIFFERENCE.

THE DEPRAVED-INDIFFERENCE ELEMENT OF THE CHARGED OFFENSES WAS NOT SUPPORTED BY THE WEIGHT OF THE EVIDENCE; ALTHOUGH DEFENDANT'S ATTEMPTS TO CARE FOR BURNS ON THE CHILD'S LEGS WERE GROSSLY INADEQUATE, THOSE MEASURES DID NOT SUPPORT A FINDING DEFENDANT DID NOT CARE AT ALL ABOUT THE CONDITION OF THE CHILD (SECOND DEPT).

The Second Department, reducing defendant's assault and reckless endangerment convictions, over a dissent, determined the depraved-indifference element of the charges was not supported by the weight of the evidence. The defendant's 20-month-old foster child had second and third degree burns on his legs. Mother consistently explained she heard screaming coming from the bathroom where she saw the child trying to get out of the tub and the child's three-year-old sister standing outside the tub as the tub was filling up with hot water. The People tried to prove, through an expert (Yurt), that the child had been held in hot water. But there were inconsistencies in the expert's testimony. Defendant explained that she was afraid to take the child to the hospital and instead tried to treat the burns after talking to a pharmacist and going on line:

The inconsistencies in Yurt's [the People's expert's] testimony undermined the People's already tenuous theory that the defendant affirmatively caused the burns. …

Accordingly, to establish the "depraved indifference" element of the subject offenses, we are left with the defendant's failure to obtain proper medical care for the child. This case is thus squarely controlled by Lewie and Matos. As in those cases, while the evidence in this case shows that the defendant "cared much too little about [the] child's safety, it cannot support a finding that she did not care at all" (People v Lewie, 17 NY3d at 359; see People v Matos, 19 NY3d at 476). Like the defendant in Matos, the defendant in the present case took measures, "albeit woefully inadequate" ones, to care for the child, by inquiring about proper burn care at a pharmacy, purchasing ointments and bandages, and keeping the burns covered. Those measures are commensurate with the measures taken by the defendant in Matos who reacted to a beating that caused her child severe internal bleeding and multiple broken bones by making a homemade splint for her son's leg and giving him ibuprofen (see id. at 476). People v Verneus, 2020 NY Slip Op 03256, Second Dept 6-10-2o

DEPRAVED INDIFFERENCE.

THE EVIDENCE SUBMITTED TO THE GRAND JURY IN THIS DRUNK-DRIVING-ACCIDENT CASE SUPPORTED THE TWO COUNTS OF DEPRAVED INDIFFERENCE ASSAULT STEMMING FROM INJURIES SUFFERED BY THE TWO PASSENGERS; SUPREME COURT SHOULD NOT HAVE DISMISSED THOSE COUNTS (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the evidence submitted to the Grand Jury supported the depraved indifference assault counts stemming from injuries suffered by the two passenger in a drunk driving accident after a police pursuit:

The … accident reconstruction revealed that defendant was driving 119 miles an hour five seconds before the accident, then slammed on his brakes and steered hard to the right, hurtling into the parking lot and striking a concrete barrier at approximately 60 miles per hour. * * *

Drunk driving cases do not ordinarily lend themselves to a finding of depraved indifference, nor does "every vehicular police chase resulting in death [or serious injury] . . . take place under circumstances evincing" it … . Unlike in cases where a defendant attempted to avoid harming others in the course of a chase … , however, the intoxicated defendant here was warned by one of his passengers that he should slow down and "was well aware that [he] was endangering [their] lives" by flouting traffic laws and fleeing a police officer at ludicrous speeds on local roads … . Moreover, the same passenger testified that defendant knew that the parking lot was a shortcut to another street and that he suddenly "turned into" it when she mentioned seeing a police cruiser. The grand jury could infer from this proof that defendant did not care about the welfare of his passengers and that he lost control of the vehicle not in an unsuccessful effort to navigate a bend in the road, but rather in a near-suicidal gambit to escape police by making an abrupt turn at high speed and trying to traverse the parking lot. It follows from those inferences that defendant "appreciated that he . . . was engaging in conduct that presented a grave risk of death and totally disregarded that risk, with catastrophic consequences" … . Although innocent inferences could also be drawn from the evidence presented, legally sufficient proof nevertheless existed for the grand jury's finding that defendant exhibited depraved indifference toward his passengers and, thus, Supreme Court erred in dismissing the two counts of assault in the first degree … . People v Edwards, 2020 NY Slip Op 02503, Third Dept 4-30-20

DEPRAVED INDIFFERENCE.

THE OPINION CHANGING THE CRITERIA FOR THE DEPRAVED-INDIFFERENCE MENS REA CAME DOWN BEFORE DEFENDANT'S CONVICTION BECAME FINAL; DESPITE THE AFFIRMANCE OF DEFENDANT'S MURDER CONVICTION ON APPEAL, THE DENIAL OF A MOTION TO REARGUE THE APPEAL, THE DENIAL OF THE MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS, AND THE DENIAL OF DEFENDANT'S PETITION FOR A WRIT OF HABEAS CORPUS IN FEDERAL COURT, SUPREME COURT SHOULD HAVE GRANTED DEFENDANT'S MOTION TO VACATE HIS CONVICTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion to vacate his depraved-indifference murder conviction should have been granted. The Court of Appeals opinion which changed the proof requirements for the depraved indifference mens rea was issued before defendant's conviction became final. The proof at defendant's trial demonstrated defendant acted intentionally as opposed acting with "depraved indifference:"

… [T]he defendant moved pursuant to CPL 440.10(1)(h) to vacate so much of the judgment as convicted him of depraved indifference murder, arguing that, in light of People v Payne (3 NY3d 266), which was decided 15 days after this Court affirmed the judgment of conviction on his direct appeal but before his conviction became final (see Policano v Herbert, 7 NY3d at 593), the evidence at trial was legally insufficient to establish that he acted with the requisite mens rea for depraved indifference murder. The Supreme Court denied the motion without a hearing, as both procedurally barred by CPL 440.10(2)(a) and meritless. The court reasoned that the defendant's legal sufficiency argument based on the change of law set forth in People v Payne had been addressed and rejected by this Court in denying the defendant's motion for leave to reargue his direct appeal, by the Court of Appeals in denying the defendant's motion for leave to appeal, and by the federal court in denying the defendant's petition for a writ of habeas corpus. With respect to the merits of the defendant's motion, the Supreme Court determined that, viewing the evidence in the light most favorable to the prosecution, the evidence was legally sufficient to support the jury's verdict. * * *

… [T]he trial evidence was not legally sufficient to support a verdict of guilt of depraved indifference murder (see People v Payne, 3 NY3d at 272; People v Hernandez, 167 AD3d at 940). People v Illis, 2020 NY Slip Op 03535, Second Dept 6-24-20

DISCOVERY.

DISCLOSURE OF WITNESS CONTACT INFORMATION SHOULD HAVE BEEN DELAYED UNTIL 15 DAYS BEFORE TRIAL (SECOND DEPT).

The Second Department, reversing Supreme Court, determined disclosure of contact information re: the complainant's mother and two 911 callers must be delayed until 15 days before trial:

Where, as here, "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" … .

Applying the factors set forth in CPL 245.70(4), including concerns for witness safety and protection, I conclude that the Supreme Court improvidently exercised its discretion in directing immediate disclosure of the subject materials to counsel for the defendant, counsel's investigator, and the defendant. Under the particular facts and circumstances of this case, the Supreme Court should have delayed disclosure of the address and contact information of the complainant, and of the name, address, and contact information of the complainant's mother and the individuals identified as the first and second 911 callers … . People v Harper. 2020 NY Slip Op 02193, Second Dept 4-2-20

DISCOVERY.

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

DISCOVERY.

PROTECTIVE ORDER DELAYING DISCOVERY UNTIL 45 DAYS BEFORE TRIAL GRANTED BY THE APPELLATE COURT (SECOND DEPT).

The Second Department, reversing Supreme Court, granted the People's application for a protective order delaying release of discovery until 45 days before trial:

Pursuant to CPL 245.70(6), a party who has unsuccessfully sought, or opposed the granting of, a protective order relating to the name, address, contact information, or statements of a person may obtain expedited review by an individual justice of the intermediate appellate court to which an appeal from a judgment of conviction would be taken. Where, as here, "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" … .

Applying the factors set forth in CPL 245.70(4), including concerns for witness safety and protection, I conclude that the Supreme Court improvidently exercised its discretion in directing immediate disclosure of the subject materials to counsel for the defendant and his investigator. Under the particular facts and circumstances of this case, the Supreme Court should have delayed disclosure of the subject materials to counsel for the defendant and his investigator until 45 days before trial. People v Brown, 2020 NY Slip Op 01439, Second Dept 2-28-20

DISCOVERY.

PROTECTIVE ORDER PRECLUDING DISCLOSURE OF EVIDENCE TO THE DEFENSE REVERSED (SECOND DEPT).

The Second Department, in a decision by Justice Scheinkman, reversing Supreme Court, vacated a protective order concerning the disclosure of certain evidence to the defense:

I agree with the defendant that the People should have been required to disclose to defense counsel the general nature of the information that the People sought to be protected (see CPL 245.10[1][a] ["Portions of materials claimed to be non-discoverable may be withheld pending a determination and ruling of the court under 245.70 of this article; but the defendant shall be notified in writing that information has not been disclosed under a particular subdivision of (CPL 245.20)"]).

The defendant and his counsel were not informed as to whether what was sought to be protected were only witness names and personal information as opposed to witness statements, police reports, grand jury testimony, video or audio recordings, or other evidence.

I also agree with the defendant that, under the circumstances of this case, the People should have been required to disclose information about the reasons for the application that would not reveal the existence of the information sought to be protected. As I stated in People v Bonifacio (179 AD3d 977, 979), "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" and that it may be that "even where some aspects of the application should be considered by the court ex parte, other portions of the application may be appropriately disclosable." Here, much of the written application could have been disclosed to defense counsel in redacted form without any danger of revealing the information sought to be protected … . People v Belfon, 2020 NY Slip Op 01630, Second Dept 3-11-20

DISFIGUREMENT.

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

DNA.

28-YEAR PRE-INDICTMENT DELAY IN THIS MURDER CASE DID NOT VIOLATE DEFENDANT'S RIGHT TO DUE PROCESS; DNA PROFILE STEMMING FROM DEFENDANT'S 2008 ARREST MATCHED BLOOD EVIDENCE FROM THE 1984 MURDER (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Chambers, determined the 28 year pre-indictment delay in this murder case did not violate defendant's due process rights. Defendant was arrested in 2008 and his DNA profile was obtained. He had been a suspect in the 1984 murder and the blood evidence from the murder was linked to the defendant:

… [T]he preindictment delay of more than 28 years was undoubtedly extraordinary, a fact that weighs in favor of the defendant … . However, under the circumstances presented, the People met their burden of demonstrating good cause for the delay … . The record of the Singer hearing supports the hearing court's determination that the People acted in good faith in deferring commencement of the prosecution until after they were able to match the defendant's DNA profile with the one found on some of the blood-stained items recovered from the crime scene.

While the defendant correctly points out that DNA testing of the crime scene evidence could have been performed years earlier, there is nothing to suggest that such tests would have yielded any meaningful information, as the defendant's own DNA profile was not available to investigators for comparative purposes until it was entered into CODIS in March of 2008. Nor are we persuaded by the defendant's contention that the People could have sought a court order compelling the defendant to produce a DNA sample for analysis before 2008 … . Considering that the outcome of such a proceeding, under the particular facts of this case, would be very difficult to predict … , we are loath to saddle the People with an affirmative duty to embark upon a course that could ultimately prove unsuccessful, and possibly jeopardize an ongoing investigation. People v Innab, 2020 NY Slip Op 01363, Second Dept 2-26-20

DNA.

FRYE HEARING SHOULD HAVE BEEN HELD TO DETERMINE THE ADMISSIBILITY OF DNA EVIDENCE DERIVED USING THE FORENSIC STATISTICAL TOOL (FST); NEW TRIAL ORDERED (SECOND DEPT).

The Second Department, reversing defendant's conviction and ordering a new trial, determined either the DNA evidence should have been precluded, or a Frye hearing should have been held for DNA evidence derived using the Forensic Statistical Tool (FST):

Prior to trial, the defendant moved to preclude evidence sought to be introduced by the People regarding DNA testing derived from the use of the Forensic Statistical Tool (hereinafter FST), or alternatively, to conduct a hearing pursuant to Frye v United States (293 F 1013 [DC Cir]) to determine the admissibility of such evidence. The Supreme Court denied the defendant's motion, finding that FST was generally accepted in the scientific community.

Based upon the recent determinations by the Court of Appeals in People v Foster-Bey (_____ NY3d _____, 2020 NY Slip Op 02124) and People v Williams (_____ NY3d _____, 2020 NY Slip Op 02123), we find that it was an abuse of discretion as a matter of law for the Supreme Court to admit the FST evidence without first holding a Frye hearing "given [the] defendant's showing that there was uncertainty regarding whether such proof was generally accepted in the relevant scientific community at the time of [the defendant's] motion" … . Additionally, we find that the error was not harmless … . Without this forensic evidence, proof of the defendant's guilt was not overwhelming as the only additional evidence linking the defendant to the weapon was the testimony of a lay witness which was circumstantial in nature. People v Pelt, 2020 NY Slip Op 03250, Second Dept 6-10-20

DNA.

RECORD DOES NOT DEMONSTRATE DEFENSE COUNSEL WAS MADE AWARE OF A JUROR'S COMPLAINTS ABOUT THE DELIBERATIONS AND THE CONTENTS OF A NOTE FROM THE JURY; THE FOR CAUSE CHALLENGES TO TWO JURORS SHOULD HAVE BEEN GRANTED; DNA TESTING OF GUM DISCARDED BY THE DEFENDANT WHILE IN CUSTODY WAS PROPER (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined the for cause challenges to two jurors should have been granted and the record does not indicate defense counsel was made aware of a juror's complaint to the judge about the deliberations and the contents of a note from the jury. The decision dealt with several suppression issues, including the finding that DNA testing of a piece of gum discarded by the defendant when he was in custody was proper:

At the commencement of the second day of deliberations, the court met with counsel and deliberating juror C.H., who had left the court a telephone message expressing concerns about deliberations. This conversation took place outside the defendant's presence. Although the court properly attempted to keep its communication with C.H. ministerial by simply directing her to put her concerns in writing, C.H. refused to accept the court's directions, expressing concerns about the course of deliberations, including a concern that someone was "stirring the jury" and that other jurors had been "influenced." The court eventually directed a court officer to return C.H. to the jury room and provide her with writing materials. * * *

After the colloquy with C.H. and following an off-the-record discussion, the defendant was returned to the courtroom, and the court stated that it had received a note from the jury which had been marked as Court Exhibit X and "sealed with the consent of all parties." No further discussion of Court Exhibit X appears on the record. * * *

We cannot assume, from the County Court's statement that the parties agreed to seal the note, that counsel was made aware of the exact contents of the note since "an insufficient record cannot be overcome with speculation about what might have occurred. The presumption of regularity cannot salvage an O'Rama error of this nature" … . Moreover, since the failure to disclose a jury note to counsel is a mode of proceedings error, it cannot be overlooked as harmless even where the evidence is otherwise overwhelming … . People v Kluge, 2020 NY Slip Op 00878, Second Dept 2-5-20

DNA.

TESTIMONY SUPPORTING THE ADMISSION OF DNA PROFILES WAS HEARSAY WHICH VIOLATED THE CONFRONTATION CLAUSE (CT APP).

The Court of Appeals, reversing defendant's conviction, over a concurrence, determined the testimony which formed the basis for the admission in evidence of DNA profiles was hearsay which violated the Confrontation Clause:

In People v John, we held that, 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" (27 NY3d 294, 315 [2016]). In People v Austin, we reiterated that a testifying analyst who did not participate in the generation of a testimonial DNA profile satisfies the Confrontation Clause's requirements only if the analyst "used his or her independent analysis on the raw data to arrive at his or her own conclusions" (30 NY3d 98, 105 [2017] …). The records before us do not establish that the testifying analyst had such a role in either case. Accordingly, because the analyst's hearsay testimony as to the DNA profiles developed from the post-arrest buccal swabs "easily satisfies the primary purpose test" for determining whether evidence is testimonial … , we conclude that her testimony and the admission of those DNA profiles into evidence, over defendants' objections, violated defendants' confrontation rights. People v Tsintzelis, 2020 NY Slip Op 02026, CtApp 3-24-20

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

DWI.

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

DWI.

WAIVER OF APPEAL INVALID; THERE WAS PROBABLE CAUSE FOR THE DWI ARREST EVEN THOUGH NO FIELD SOBRIETY TESTS WERE CONDUCTED; BETTER PRACTICE WOULD BE FOR THE PROSECUTOR TO PLACE THE EVIDENCE OF DEFENDANT'S GUILT ON THE RECORD AT THE TIME OF AN ALFORD PLEA (THIRD DEPT).

The Third Department, affirming defendant's DWI conviction by guilty plea, determined the waiver of appeal was insufficient. The Third Department noted that the better practice would have been to place the evidence of defendant's guilt on the record at the time of the Alford plea, and found the arresting officer had probable cause without conducting field sobriety tests. With regard to the waiver of appeal, the court wrote:

During the brief colloquy with defendant, County Court did not sufficiently distinguish the waiver of the right to appeal from the trial-related rights that defendant was forfeiting by virtue of his guilty plea, and the record does not reflect that defendant executed a written waiver. Additionally, in response to County Court's inquiry regarding defendant's willingness to waive his right to appeal, defendant replied, "Yes, if that's what I gotta do, yes. If that's what you're making me do, I'll do it." Under these circumstances, we are unable to conclude that defendant knowingly, intelligently and voluntarily waived his right to appeal. People v Crandall, 2020 NY Slip Op 01857, Third Dept 3-16-20

EXTREME EMOTIONAL DISTURBANCE (EED).

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

FALSE CONFESSIONS.

DEFENSE 'FALSE CONFESSION' EXPERT SHOULD HAVE BEEN ALLOWED TO TESTIFY, CONVICTION REVERSED; RIGHT TO CONFRONT WITNESSES NOT VIOLATED BY STATEMENTS IN THE VIDEO INTERROGATION THAT NONTESTIFYING WITNESSES HAD IMPLICATED THE DEFENDANT (SECOND DEPT).

The Second Department, reversing defendant's murder conviction, determined the defense "false confession" expert should have been allowed to testify. The defendant was 15 when arrested. He maintained his innocence for two hours and 45 minutes of interrogation before confessing. The Second Department rejected defendant's argument that he was denied his right to confront witnesses by statements in the video interrogation that nontestifying witnesses had implicated the defendant:

Contrary to the defendant's contention, his right to confrontation was not violated when the Supreme Court allowed into evidence portions of his videotaped statement to law enforcement officials that contained statements that nontestifying witnesses had implicated him in the crime. The statements were not received for their truth, but to explain the defendant's reaction to hearing them … . Further, the court properly instructed the jury that it was not to consider any of the statements as evidence against the defendant, and the jury is presumed to have followed this admonition … . * * *

… Supreme Court improvidently exercised its discretion in denying the defendant's application to permit testimony from his expert witness on the issue of false confessions. We have previously determined that "it cannot be said that psychological studies bearing on the reliability of a confession are, as a general matter, within the ken of the typical juror'" … . Thus, here, the court should not have precluded the testimony of the defendant's expert witness on this ground.

Further, "[w]ith regard to expert testimony on the phenomenon of false confessions, in order to be admissible, the expert's proffer must be relevant to the [particular] defendant and interrogation before the court'" … . Here,

the report of the defendant's expert was sufficiently detailed so that it was relevant to this particular defendant, including discussing characteristics that heightened his vulnerability to manipulation, and the interrogation conducted by the detectives, such as the techniques that were utilized and the improper participation of the defendant's mother during the interview. People v Churaman, 2020 NY Slip Op 03526, Second Dept 6-24-20

FIREARM NOT CONNECTED TO SHOOTING.

A REVOLVER WHICH COULD NOT BE CONNECTED TO THE SHOOTING SHOULD NOT HAVE BEEN ADMITTED IN EVIDENCE; ERROR HARMLESS HOWEVER (THIRD DEPT).

The Third Department determined the admission into evidence of a revolver which could not be connected to the shooting at issue was (harmless) error:

Defendant next argues that County Court erred in admitting into evidence an operable .38-caliber revolver, containing five spent rounds, that was recovered from a nearby rooftop a few days after the shooting. Testing could not conclusively show that the revolver was used in the shooting or that it had been handled by defendant, but it remained relevant given the circumstances of its recovery and the fact that it could not be ruled out as the one used by the shooter … . The revolver was accordingly admissible unless its probative value was "substantially outweighed by the danger that it [would] unfairly prejudice the other side or mislead the jury," and County Court attempted to reduce that danger by telling the jury why the revolver was being admitted into evidence and urging it to give the revolver whatever weight it deemed appropriate … . County Court's ameliorative efforts arguably fell short but, in our view, any resulting error was harmless "in light of the overwhelming testimony identifying defendant as [the] assailant" … . People v Banks, 2020 NY Slip Op 01525, Third Dept 3-5-20

FIREARM NOT CONNECTED TO THE SHOOTING.

REVOLVER FOUND BY A PASSERBY SEVEN BLOCKS FROM THE CRIME SCENE SHOULD NOT HAVE BEEN ADMITTED IN EVIDENCE; ERROR DEEMED HARMLESS HOWEVER (SECOND DEPT).

The Second Department determined a revolver found by a passerby seven blocks from the scene of the crime should not have been admitted in evidence. The error was harmless however:

Supreme Court should not have admitted into evidence a revolver that was recovered by the police from underneath a vehicle five to seven blocks away from the scene of the crime and approximately seven hours after the shooting. The revolver was discovered by a passerby, who notified the police. "When real evidence is purported to be the actual object associated with a crime, the proof of accuracy has two elements. The offering party must establish, first, that the evidence is identical to that involved in the crime; and, second, that it has not been tampered with" … . At trial, the only eyewitness at the scene of the shooting who observed the defendant armed with a firearm testified that the defendant was armed with a "[s]ilver, long barrel" revolver. Contrary to the court's determination, although that testimony was somewhat consistent with the defendant's description of his revolver, it was insufficient to provide reasonable assurances that the revolver that was admitted into evidence was the same revolver used by the defendant during the shooting … . No forensic evidence was recovered from the subject revolver linking it to the defendant, and more significantly, the eyewitness was never asked, either by the police after the revolver was recovered or by the prosecution at trial, to identify the revolver as the "actual object" used by the defendant during the shooting … . Further, there was no evidence in the record to support the court's independent observation that the revolver that was admitted into evidence was "very uncommon" and a "very, very unique gun." People v Deverow, 2020 NY Slip Op 01359, Second Dept 2-26-20

FIREARM, PROOF OF USE.

RECKLESS ENDANGERMENT AND MENACING A POLICE OFFICER CONVICTIONS WERE AGAINST THE WEIGHT OF THE EVIDENCE (FOURTH DEPT).

The Fourth Department reversed two of defendant's convictions as against the weight of the evidence. Defendant was charged with reckless endangerment first degree and menacing a police officer. It was alleged defendant fired a weapon during a foot chase. The two officers heard a gunshot but no bullet or casing was found:

… [T]he jury would have had to resort to sheer speculation to find that defendant displayed or fired a weapon, much less that he fired a weapon intentionally. The officers' testimony that they "heard" a gunshot from some distance away does not prove beyond a reasonable doubt, for purposes of the menacing charge, that defendant visually displayed the weapon that discharged the shot. Nor does such testimony prove beyond a reasonable doubt, for purposes of the reckless endangerment charge, that the shot was fired toward the officers and thereby created a grave risk of death to them. Indeed, the second officer's testimony that he "believed" that defendant had shot at the officers is speculative and is contradicted by his contemporaneous statement that the gun might have discharged accidentally. People v Thomas, 2020 NY Slip Op 03318, Fourth Dept 6-12-20

GRAND LARCENY, PROOF OF VALUE.

PROOF OF THE VALUE OF THE STOLEN ITEMS WAS INSUFFICIENT; GRAND LARCENY 3RD DEGREE CONVICTION NOT SUPPORTED BY THE WEIGHT OF THE EVIDENCE (SECOND DEPT).

The Second Department determined the grand larceny third degree charged was against the weight of the evidence because the value of the stolen items was not proven:

The People were required to establish that the market value of the stolen items at the time of the crime exceeded $3,000 (see Penal Law § 155.20[1]). Here, the stolen property consisted of two handguns, several items of jewelry, and a computer tablet. The complainant testified that (1) the purchase price of the .40 caliber Smith & Wesson automatic handgun was $800 and that he purchased it "[a]pproximately four years" before the burglary; (2) the purchase price of the .380 Ruger automatic handgun was $600 and that he purchased it "[t]wo years"

before the burglary; and (3) he cleaned both guns regularly, and they were both operable. The People's ballistics expert testified that the retail value of each firearm was "anywhere from $500 to $1,000."

However, the only evidence of the value of the remaining stolen items was the complainant's testimony regarding the purchase price of some of those items, and he did not testify as to when he purchased those items, their market value, or the cost to replace them. Although a "victim is competent to supply evidence of original cost" … , "evidence of the original purchase price, without more, will not satisfy the People's burden" … . On this record, we cannot conclude that the fact-finder could "reasonably infer, rather than merely speculate" that the value of all of the stolen goods exceeded the statutory threshold of $3,000 … . Accordingly, we find that the evidence was insufficient to establish that the value of the property taken exceeded $3,000 … . People v Rivera, 2020 NY Slip Op 01192, Second Dept 2-19-20

GRAND LARCENY, PROOF OF VALUE.

RECKLESS ENDANGERMENT CONVICTION NOT SUPPORTED BY THE WEIGHT OF THE EVIDENCE; BECAUSE THE LEGAL SUFFICIENCY OF THE CONVICTION WAS NOT CHALLENGED IT MUST BE REVERSED NOT REDUCED BY THE APPELLATE COURT; GRAND LARCENY AND POSSESSION OF STOLEN PROPERTY CONVICTIONS NOT SUPPORTED BY THE WEIGHT OF THE EVIDENCE; INADEQUATE PROOF OF VALUE (FOURTH DEPT).

The Fourth Department reversed the reckless endangerment, grand larceny, possession of stolen property, and arson third degree convictions, and affirmed the murder, assault and arson second degree convictions. With respect to reckless endangerment first degree, the conviction was against the weight of the evidence and the appellate court could not reduce the conviction to a lesser included because defendant did not argue the evidence was legally insufficient. So the reckless endangerment conviction was reversed. The grand larceny/possession of stolen property convictions were not supported by adequate proof that the value of the stolen vehicle was more than $100. Arson third degree was dismissed as an inclusory concurrent count of arson in the second degree:

We agree with defendant … that the verdict finding him guilty of reckless endangerment in the first degree is against the weight of the evidence. "A person is guilty of reckless endangerment in the first degree when, under circumstances evincing a depraved indifference to human life, he [or she] recklessly engages in conduct which

creates a grave risk of death to another person" … . Count five of the indictment alleged that defendant recklessly engaged in conduct creating a grave risk of death to emergency responders when he intentionally started the fire. We agree with defendant that the verdict on that count is against the weight of the evidence because the People did not prove beyond a reasonable doubt that defendant acted with depraved indifference to human life when he set the fire … . Inasmuch as defendant is challenging only the weight of the evidence with respect to that count and does not challenge the legal sufficiency of the evidence with respect to that count, we cannot reduce the conviction to the lesser included offense of reckless endangerment in the second degree … . * * *

We further agree with defendant that the verdict finding him guilty of grand larceny in the fourth degree and criminal possession of stolen property in the fourth degree is against the weight of the evidence. With respect to each of those counts, the People were required to establish that the value of the stolen motor vehicle exceeded $100 … . It is well settled that a witness "must provide a basis of knowledge for his [or her] statement of value before it can be accepted as legally sufficient evidence of such value" … . "Conclusory statements and rough estimates of value are not sufficient" … . Although the monetary element of each crime is quite low, the People did not attempt to meet that threshold through the testimony of any witness. The testimony of a detective that the vehicle was "[d]efinitely worth over probably 10,000" did not satisfy the monetary element of either crime inasmuch as he provided no basis of knowledge for his statement of value. We therefore further modify the judgment by reversing those parts convicting defendant of grand larceny in the fourth degree and criminal possession of stolen property in the fourth degree and dismissing counts eight and nine of the indictment. People v Box, 2020 NY Slip Op 01813, Fourth Dept 3-13-20

HEARSAY.

'RELIABLE HEARSAY' IN A PRESENTENCE INVESTIGATION (PSI) REPORT IS A SUFFICIENT BASIS FOR A FINDING DEFENDANT USED VIOLENCE IN THE COMMISSION OF A SEX OFFENSE; LEVEL TWO RISK ASSESSMENT UPHELD (CT APP).

The Court of Appeals, over an extensive two-judge dissent, determined documentary evidence of "reliable hearsay" was sufficient for a finding defendant used violence to coerce the child victim in this "course of sexual conduct against a child" case, Therefore defendant was properly adjudicated a level two risk of reoffense:

At a SORA hearing conducted as defendant was nearing completion of his prison sentence, he was adjudicated a level two risk of reoffense due, in part, to the assessment of ten points under risk factor one, use of violence. That finding was based on information in the Presentence Investigation (PSI) report prepared in connection with

the offense stating that "[o]n one or more occasions, he used physical force to coerce the victim into cooperation," information also included in the case summary prepared by the Board of Examiners of Sex Offenders. Defendant argues that this evidence was insufficient to supply evidence of use of violence because it constituted hearsay and did not more specifically describe his conduct. …

SORA adjudications, by design, are typically based on documentary evidence under the statute's "reliable hearsay" standard. Case summaries and PSI reports meet that standard … , meaning they can provide sufficient evidence to support the imposition of points. PSI reports are prepared by probation officers who investigate the circumstances surrounding the commission of the offense, defendant's record of delinquency or criminality, family situation and social, employment, economic, educational and personal history, analyzing that data to provide a sentencing recommendation (see CPL 390.30[1]). Their primary function is to assist a criminal court in determining the appropriate sentence for the particular defendant based on the specific offense. Defendants have a right to review the report prior to sentencing (see CPL 390.50[2][a]) and may challenge the accuracy of any facts contained therein at that time (see CPL 400.10). * * *

Because there is record support for the imposition of points under risk factor one, there is no basis to disturb the Appellate Division order. People v Diaz, 2020 NY Slip Op 01114, CtApp 2-18-20

HEARSAY.

ADMISSION OF A HEARSAY STATEMENT BY A BYSTANDER WHO TOLD A POLICE OFFICER DEFENDANT HAD RUN INTO A HOUSE WAS (HARMLESS) ERROR (FOURTH DEPT).

The Fourth Department determined it was (harmless) error to admit the hearsay statement attributed to a bystander who told a police officer the defendant had run into a house after a car chase:

Defendant contends that County Court erred in allowing inadmissible hearsay testimony when the police officer was allowed to testify at trial that the bystander told him that the fleeing suspect ran into the house. We agree. The statement of the bystander was inadmissible hearsay because it was admitted for the truth of the matters asserted therein … . Indeed, the import of the bystander's statement was to confirm that the suspect had indeed fled into the house, and thereby confirm that someone inside the house, i.e., defendant, perpetrated the crime. Nevertheless, we conclude that the error was harmless because the evidence of defendant's guilt is overwhelming and there is no significant probability that defendant would have been acquitted but for the admission of the hearsay testimony … . Defendant was identified by the victim and the other eyewitness as a perpetrator of the

robbery, which had occurred in broad daylight, close in time to the show-up identification procedure. Those identifications of defendant were corroborated by testimony of the police officer, who observed the suspect flee from the stolen vehicle toward the house where defendant was apprehended. Moreover, the evidence strongly supported an inference that defendant was not in the house for innocent purposes because he did not live at that address and had tried to conceal his identification in an uninhabited part of the house. People v Harrington, 2020 NY Slip Op 02399, Fourth Dept 4-24-20

HEARSAY.

ANONYMOUS 911 CALL WAS NOT ADMISSIBLE AS AN EXCITED UTTERANCE OR AS A PRESENT SENSE IMPRESSION; CONVICTION REVERSED (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined the recording of the 911 call was not admissible as an excited utterance or as a present sense impression:

… [T]he People did not present sufficient facts from which it could be inferred that the anonymous caller personally observed the incident … . The anonymous caller merely stated to the 911 operator that "[s]omebody just got shot on East 19th and Albemarle" and that it "was a guy with crutches. He started to shoot." Nothing in these brief, conclusory statements, which were made at least five minutes after the shooting occurred, suggested that the caller was reporting something that he saw, as opposed to something he was told … . Moreover, although there was testimony that the call was made from a payphone located in the vicinity of the shooting, the People did not demonstrate that the payphone was situated outdoors or in a place where the actual site of the shooting would be visible. Accordingly, the statement did not qualify as an "excited utterance" … .

For similar reasons, the declarations of the 911 caller were not admissible under the "present sense impression" exception to the hearsay rule. " Present sense impression' declarations . . . are descriptions of events made by a person who is perceiving the event as it is unfolding" … . Here, as just explained, the People failed to demonstrate that the anonymous caller was describing events that he actually perceived. People v Thelismond, 2020 NY Slip Op 01368, Second Dept 2-26-20

HEARSAY.

HEARSAY STATEMENTS BY THE ONLY WITNESS TO IDENTIFY DEFENDANT AS A PERPETRATOR INDICATED THE WITNESS WAS NOT IN FACT ABLE TO IDENTIFY ANY OF THE PERPETRATORS; THE INCONSISTENT STATEMENTS SHOULD HAVE BEEN ADMITTED BECAUSE THEY WENT TO A CORE ISSUE IN THE CASE IMPLICATING THE RIGHT TO PUT ON A DEFENSE; CONVICTION REVERSED (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined that a hearsay statement allegedly made by the only witness (Lindsay) to identify the defendant as one of the masked intruders in this home-invasion murder-assault-burglary case should have been allowed in evidence. Lindsay, who was shot by one of the intruders, initially claimed he could not identify anyone because they were wearing face-coverings. He later identified the defendant and the others, claiming that he initially did not identify them because he was afraid. The witness who was not allowed to testify, Boyd, is Lindsay's brother. Boyd would have testified that Lindsay repeatedly told him he could not identify any of the intruders. Boyd had contacted defense counsel only after Lindsay testified so no foundation for Boyd's testimony had been laid. The prosecutor was willing to allow Lindsay to be recalled for that purpose:

"Once a proper foundation is laid, a party may show that an adversary's witness has, on another occasion, made oral or written statements which are inconsistent with some material part of the trial testimony, for the purpose of impeaching the credibility and thereby discrediting the testimony of the witness" … . "Since evidence of inconsistent statements is often collateral to the ultimate issue before the [trier of fact] and bears only upon the credibility of the witness, its admissibility is entrusted to the sound discretion of the Trial Judge'" … . Indeed, "[i]t is well established that the trial courts have broad discretion to keep the proceedings within manageable limits and to curtail exploration of collateral matters" … . However, "the trial court's discretion in this area is circumscribed by the defendant's constitutional rights to present a defense and confront his accusers" … . "Thus, while a trial court may preclude impeachment evidence that is speculative, remote, or collateral, [that] rule . . . has no application where the issue to which the evidence relates is material in the sense that it is relevant to the very issues that the [trier of fact] must decide'" … .

"Where the truth of the matter asserted in the proffered inconsistent statement is relevant to a core factual issue of a case, its relevancy is not restricted to the issue of credibility and its probative value is not dependent on the inconsistent statement" … . Under such circumstances, the right to present a defense may "encompass[ ] the right to place before the [trier of fact] secondary forms of evidence, such as hearsay" … . "Indeed where

constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice'" … . People v Butts, 2020 NY Slip Op 03243, Second Dept 6-10-20

IDENTIFICATION.

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

IDENTIFICATION.

IT WAS (HARMLESS) ERROR TO ALLOW A POLICE OFFICER TO IDENTIFY DEFENDANT IN SECURITY CAMERA FOOTAGE (FOURTH DEPT).

The Fourth Department determined it was (harmless) error to allow a police officer to identify defendant in security camera footage:

Defendant … contends that the court erred in permitting a police detective to give testimony identifying defendant as the shooter in the security camera footage and drawing certain inferences from that footage … . To the extent that defendant's contention is preserved for our review (see CPL 470.05 [2]), we conclude that any error in the admission of that testimony is harmless … . We note that the court sustained at least one objection from defense counsel after a nonresponsive answer from the police detective and issued a curative instruction with respect to that answer, which the jury is presumed to have followed … . We also note that the court's final instructions to the jury alleviated much of the prejudice of the police detective's testimony of which defendant now complains. The court instructed the jury that they were the sole and exclusive judges of the facts, that the testimony of police officers should not automatically be accepted, and that defendant's identity was a disputed issue in the case. The court also instructed the jury how it should evaluate the accuracy of identification testimony. Again, the jury is presumed to have followed those instructions … . People v Jordan, 2020 NY Slip Op 01817, Fourth Dept 3-13-20

IDENTIFICATION.

LINEUP IDENTIFICATION WAS UNDULY SUGGESTIVE, CONVICTION REVERSED (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined the lineup identification procedure was unduly suggestive:

… [W]e agree with the defendant's contention that the hearing court erred in finding that the pretrial identification procedure, a lineup, was not unduly suggestive. The defendant was the only person in the lineup with dreadlocks, and dreadlocks featured prominently in the description of one of the assailants that the complainant gave to the police. In addition, the dreadlocks were distinctive and visible despite the fact that the defendant and the fillers all wore hats … . Accordingly, the lineup identification should have been suppressed.

The error was not harmless as it cannot be said that there is no reasonable possibility that the error might have contributed to the defendant's conviction … . Therefore, we reverse the judgment of conviction and order a new trial. People v Colsen, 2020 NY Slip Op 01514, Second Dept 3-4-20

IDENTIFICATION.

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

INFORMATION.

THE INFORMATION SUFFICIENTLY ALLEGED THE ELEMENTS OF OFFICIAL MISCONDUCT; THE 'OBTAIN A BENEFIT' ELEMENT OF THE OFFENSE CAN BE INFERRED FROM THE OTHER ALLEGATIONS (CT APP).

The Court of Appeals determined the information charging defendant with official misconduct in violation of Penal Law section 195 was not jurisdictionally defective because the "obtain a benefit" element of the offense could be inferred from the allegations. The defendant, an alcohol and substance abuse treatment program aide at a prison, was charged with the unauthorized provision of prison documents concerning an incident at the prison to an inmate. The allegations were sufficient to infer that the defendant intended that providing the documents benefited the inmates involved:

With respect to the third element—that defendant must act with the intent to obtain a benefit or deprive another of a benefit—defendant's intent may be reasonably inferred from her conduct and the surrounding circumstances … . …[T]he information, with defendant's statement attached as a supporting deposition, sufficiently alleged that defendant disclosed information to an inmate that the inmate was not authorized to have, and that defendant knew that this disclosure was unauthorized. From those allegations, coupled with defendant's admissions in her statement regarding inappropriate contact with and favors conducted for inmates involved in the unusual incident and the disclosure, one can reasonably infer that defendant committed the unauthorized disclosure with the intent to benefit herself or the inmates involved. Notably."benefit" is defined as "any gain or advantage to the beneficiary and includes any gain or advantage to a third person pursuant to the desire or consent of the beneficiary" (Penal Law § 10.00 [17]). In this case, the People were not required to specify in the information whether defendant intended to benefit herself or the inmates, because either or both would satisfy this element of the statute and both theories are supported by defendant's statement to police … . People v Middleton, 2020 NY Slip Op 02530, CtApp 4-30-20

INTOXICATION DEFENSE, BUSINESS RECORDS.

DEFENDANT WAS ENTITLED TO A JURY INSTRUCTION ON THE INTOXICATION DEFENSE; DEFENDANT SHOULD HAVE BEEN ALLOWED TO ATTEMPT TO LAY FOUNDATIONS FOR THE ADMISSION OF POLICE AND DISTRICT ATTORNEY BUSINESS RECORDS IN SUPPORT OF HIS INTOXICATION DEFENSE; NEW TRIAL ORDERED DESPITE DEFENDANT'S COMPLETION OF HIS SENTENCE (SECOND DEPT).

The Second Department, reversing defendant's forcible touching and sexual abuse convictions and ordering a new trial, despite defendant's having completed his sentence, determined defendant was entitled to a jury instruction on the intoxication defense, and defendant was wrongly precluded from attempting to lay foundations for the admission of certain police and district-attorney's-office business records supporting the intoxication defense:

The defendant also sought to introduce as a business record a Desk Appearance Ticket Investigation form (hereinafter the DAT form) which contains information from the arresting officer at the time of the arrest. Specifically, the DAT form contains the arresting officer's notation, "intox," and a box checked by the arresting officer indicating "under the influence of drugs/marihuana to the degree that he may endanger himself or others." The arresting officer testified that he had completed the form in his own handwriting. As the defendant contends, the trial court should have allowed the defendant to introduce the DAT form as an admissible business record of the Police Department … . …

The defendant likewise sought to introduce an Early Case Assessment Bureau sheet (hereinafter the ECAB sheet) apparently created by the Police Department or the District Attorney's office, as well as the testimony of the individual who created it to establish the foundation for its admission as a business record. The ECAB sheet supports the defendant's request for an intoxication charge and also provides a basis for impeachment of the arresting officer's testimony as to his perceptions of the defendant's condition at the time of the arrest. * * * Had the defendant been permitted to explore the circumstances under which the ECAB sheet was created, the defendant may have established that the statements contained in the ECAB sheet were admissible for the truth of those statements … . People v Sabirov, 2020 NY Slip Op 03378, Second Dept 6-17-20

JUDGES.

TRIAL JUDGE ASSUMED THE ROLE OF THE PROSECUTOR AND ELICITED CRUCIAL IDENTIFICATION TESTIMONY, NEW TRIAL ORDERED (SECOND DEPT).

The Second Department, ordering a new trial, determined the trial judge assumed the role of the prosecutor in eliciting crucial identification testimony:

"While neither the nature of our adversary system nor the constitutional requirement of a fair trial preclude a trial court from assuming an active role in the truth-seeking process,' the court's discretion in this area is not unfettered" … . The principle restraining the court's discretion is that a trial judge's "function is to protect the record, not to make it" … . Accordingly, while a trial judge may intervene in a trial to clarify confusing testimony and facilitate the orderly and expeditious progress of the trial, the court may not take on "the function or appearance of an advocate" … .

Here, the record demonstrates that after the two complainants, in response to questions by the prosecutor, were unable to positively identify the defendant as the perpetrator of the robbery, the Supreme Court improperly assumed the appearance or the function of an advocate by questioning the complainants until it elicited a positive in-court identification of the defendant from each of them … . Under these circumstances, the court's decision to elicit such testimony was an improper exercise of discretion and deprived the defendant of a fair trial. People v Mitchell, 2020 NY Slip Op 03541, Second Dept 6-24-20

JURORS.

CPL 330.30 MOTION ALLEGING JUROR MISCONDUCT DURING DELIBERATIONS, I.E. CONDUCTING A REENACTMENT, SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING (FOURTH DEPT).

The Fourth Department, reversing County Court, determined the Criminal Procedure Law 330.30 motion alleging misconduct during jury deliberations should not have been denied without a hearing. The defendant was charged with menacing a police officer and whether the defendant heard the announcement that the people

knocking on his door were deputy sheriffs was a critical issue. Defense counsel learned after the trial that the jurors had conducted a reenactment in the jury room to determine whether defendant heard the sheriffs:

… [I]n support of the motion, defendant submitted the affirmation of his attorney. Defendant's attorney alleged that, during post-verdict discussions with the jury, he learned that the jurors had attempted during their deliberations to determine whether defendant was aware that the people knocking at his door were sheriff's deputies by using the bathroom door in the deliberation room to reenact the moment when one of the deputies knocked on defendant's door and announced the deputies' presence. The court did not conduct a hearing and instead summarily denied the motion, ruling that, although the alleged jury reenactment constituted a conscious, contrived experiment that placed before the jury evidence not introduced at trial, the experiment was not directly material to any critical point at issue. That was error.

As defendant correctly contends, whether he could hear the announcement by the deputy was directly material to a critical point at issue in the trial—indeed, to an element of menacing a police officer—i.e., whether defendant "knew or reasonably should have known" that the people at his door were sheriff's deputies (Penal Law § 120.18 …). We conclude under the circumstances of this case that a hearing is required to ascertain whether and in what manner the alleged reenactment occurred, and whether such conduct "created a substantial risk of prejudice to the rights of the defendant by coloring the views of the . . . jur[y]" … . People v Newman, 2020 NY Slip Op 02449, Fourth Dept 4-24-20

JURY INSTRUCTIONS.

ALTHOUGH THE ASSAULT JURY INSTRUCTION DID NOT TRACK THE INDICTMENT, THE PEOPLE DID NOT OBJECT TO IT AND THE APPELLATE COURT MUST ASSESS THE SUFFICIENCY OF THE EVIDENCE ACCORDING TO THE INSTRUCTION; ASSESSED IN THE LIGHT OF THE JURY INSTRUCTION, THE ASSAULT COUNTS WERE NOT SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE; THE CRIMINAL USE OF A FIREARM JURY INSTRUCTION DID NOT TRACK THE INDICTMENT, VIOLATING DEFENDANT'S RIGHT TO BE TRIED ONLY ON THE CRIMES CHARGED (FOURTH DEPT).

The Fourth Department, over a dissent, reversed the assault convictions, while affirming the murder conviction. The codefendant, intending to kill the decedent, also shot the two assault victims. Defendant was charged with

murder and assault as an accomplice. Although the indictment charged assault under a transferred intent theory, the jury was instructed to find the defendant guilty of assault only if he intended injure the assault victims. Because, on appeal, the sufficiency of the evidence must be measured by the what the jury was instructed to consider, and because there was no evidence the defendant intended to injure the assault victims (as opposed to the decedent), the assault convictions were not supported by legally sufficient evidence. Although the defendant did not preserve the error by objecting to another inaccurate jury instruction which did not track the indictment, the criminal use of a firearm count was also dismissed because defendant's right to the tried only on the crimes charged was violated:

"The doctrine of transferred intent' serves to ensure that a person will be prosecuted for the crime he or she intended to commit even when, because of bad aim or some other lucky mistake,' the intended target was not the actual victim" … . Although that theory may be applied to assault charges … , County Court's jury instruction in this case mandated that the jury could convict defendant of the counts of assault in the first degree only if they found that he acted "with the intent to cause serious physical injury to" each assault victim, rather than instructing the jury that they could convict defendant of those crimes if they concluded that he intended to cause such injury to the deceased victim but the codefendant actually caused injury to the assault victims. The prosecution did not object to that charge, and it is well settled that, when reviewing a "jury's guilty verdict, our review is limited to whether there was legally sufficient evidence . . . based on the court's charge as given without exception" … . Inasmuch as there is insufficient evidence that defendant knew that either of the assault victims was present or that he intended any harm to either of them … , we conclude that the evidence is not legally sufficient with respect to the assault counts as charged to the jury. * * *

Although the court's jury instructions did not specify assault in the first degree as the underlying crime for the criminal use of a firearm in the first degree count, and defendant did not object to the court's instructions and thus did not preserve this issue for our review, we conclude that "preservation is not required" … , inasmuch as "defendant has a fundamental and nonwaivable right to be tried only on the crimes charged" in the indictment … . Therefore, based on the indictment, defendant could only be convicted of that charge if he committed assault in the first degree … . Thus, we conclude that, because "the conviction[s] of assault in the first degree cannot stand, the conviction of criminal use of a firearm in the first degree, which requires commission of [the] class B violent felony offense[of assault in the first degree] while possessing a deadly weapon, also cannot stand" … . People v Spencer, 2020 NY Slip Op 01823, Fourth Dept 3-13-20

JURY INSTRUCTIONS.

DEFENDANT WAS CONVICTED OF STABBING THE VICTIM AT A CROWDED PARTY BUT NO ONE SAW DEFENDANT WITH A KNIFE; DEFENSE REQUEST FOR THE CIRCUMSTANTIAL EVIDENCE JURY INSTRUCTION SHOULD HAVE BEEN GRANTED; CONVICTION REVERSED (FOURTH DEPT).

The Fourth Department, reversing defendant's murder conviction, determined that the defense request fot eh circumstantial evidence jury instruction should have been granted. It was alleged defendant stabbed the victim but no one saw the defendant with a knife:

The victim was stabbed five times at a crowded house party where there were multiple ongoing fights, and the evidence established that the victim was involved in physical altercations with at least two other partygoers. One of the wounds was almost five inches deep, meaning that the blade of the knife must have been at least five inches long. None of the witnesses who observed defendant fighting with the victim observed anything in defendant's hand during the altercation, and no blood was discovered in the room in which defendant and the victim engaged in their altercation. All of the evidence at trial required the jury to infer that defendant was the perpetrator who had the knife and that he used that knife to stab the victim. We thus conclude that a circumstantial evidence instruction was warranted … . Contrary to the People's contention, this is not "the exceptional case where the failure to give the circumstantial evidence charge was harmless error" … . People v Swem, 2020 NY Slip Op 02435, Fourth Dept 4-24-20

JURY INSTRUCTIONS.

JURY SHOULD NOT HAVE BEEN CHARGED ON THE 'COMBAT BY AGREEMENT' EXCEPTION TO THE JUSTIFICATION DEFENSE, CRITERIA EXPLAINED; ERROR DEEMED HARMLESS HOWEVER (SECOND DEPT).

Although the error was deemed harmless, the Second Department determined the jury should not have been instructed on the "combat by agreement" exception to the justification defense. Defendant was on a bus when rival gang members got on the bus. Defendant (14 years old) pulled out a gun and shot, killing an innocent passenger:

Supreme Court should not have charged the jury with respect to the combat by agreement exception to the justification defense. The court granted the People's request for the instruction based upon generalized evidence that the defendant was a member of a gang which had a rivalry with other local gangs, including the gang with which the persons who approached the defendant were affiliated. However, any evidence of an alleged agreement in this case was tacit, open-ended as to time and place, and applicable to all members of the gangs of the parties involved as well as to all members of their affiliate gangs. The combat by agreement exception to justification is generally limited to agreements to combat between specific individuals or small groups on discrete occasions … . As there was no evidence of a combat agreement between the defendant and the specific persons who approached him on the bus, or among rival gang members during a discrete period of time or at a specific location, there was no reasonable view of the evidence that the combat by agreement exception applied to negate a justification defense in this case … . People v Anderson, 2020 NY Slip Op 01179, Second Dept 2-19-20

PRISON CONTRABAND.

COCAINE IS NOT DANGEROUS CONTRABAND WITHIN THE MEANING OF PROMOTING PRISON CONTRABAND IN THE FIRST DEGREE; CONVICTION REDUCED TO PROMOTING PRISON CONTRABAND IN THE SECOND DEGREE (PROHIBITING 'CONTRABAND,' AS OPPOSED TO 'DANGEROUS CONTRABAND') (FOURTH DEPT).

The Fourth Department, reversing (modifying) County Court, in a full-fledged opinion by Justice Troutman, over a two-justice concurrence and a dissent, determined cocaine does not meet the statutory definition of dangerous contraband within the meaning of the offense of promoting prison contraband in the first degree. The defendant's conviction, based upon the possession of three baggies of cocaine, was reduced to promoting prison contraband in the second degree:

"A person is guilty of promoting prison contraband in the first degree when . . . [that person] knowingly and unlawfully introduces any dangerous contraband into a detention facility" (Penal Law § 205.25 [1]). "Dangerous contraband" is defined as any contraband that is "capable of such use as may endanger the safety or security of a detention facility or any person therein" (§ 205.00 [4]). "[T]he test for determining whether an item is dangerous contraband is whether its particular characteristics are such that there is a substantial probability that the item will be used in a manner that is likely to cause death or other serious injury, to facilitate an escape, or to bring about other major threats to a detention facility's institutional safety or security" … . " [W]eapons, tools, explosives and similar articles likely to facilitate escape or cause disorder, damage or physical injury are

examples of dangerous contraband,' " whereas an " alcoholic beverage is an example of [ordinary] contraband' " … . Drugs, unlike weapons, are not inherently dangerous, and thus general penological concerns about the drug possessed that "are not addressed to the specific use and effects of the particular drug are insufficient to meet the definition of dangerous contraband" … . * * *

Central to our dissenting colleague's analysis is a distinction between narcotic and non-narcotic controlled substances. The unstated premise is that cocaine is classified as a narcotic because it is inherently dangerous. We respectfully disagree with that premise. Cocaine may be unhealthy, but it is not a narcotic, at least not from a scientific, medical, or pharmacological viewpoint … . People v Simmons, 2020 NY Slip Op 03350, Fourth Dept 6-12-20

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

PROSECUTORIAL MISCONDUCT, UNCHARGED OFFENSES.

PROSECUTORIAL MISCONDUCT AND IRRELEVANT MOLINEUX EVIDENCE REQUIRED REVERSAL (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined that prosecutorial misconduct and the admission of irrelevant evidence of another crime required reversal:

"[O]n summation, a prosecutor may not improperly encourage[ ] inferences of guilt based on facts not in evidence'" … As we determined in People v Ramirez (150 AD3d at 899-900), the prosecutor here improperly suggested that the jury should disregard the grand jury testimony of one of the People's main witnesses, and invited the jury to speculate that a missing witness would have given supporting testimony if he had been called to testify. …

"The rule of Molineux is familiar: Evidence of uncharged crimes is inadmissible where its only purpose is to show bad character or propensity towards crime" … . However, "evidence of other crimes may be admitted to show motive, intent, the absence of mistake or accident, a common scheme or plan or the identity of the guilty party" … . "In addition, evidence of uncharged crimes may be admitted as necessary background material when relevant to a contested issue in the case, or to complete the narrative of the events if such evidence is inextricably interwoven with the crime charged" … . "Still, even if technically relevant for one of these or some other legitimate purpose, Molineux evidence will not be admitted if it is actually of slight value when compared to the possible prejudice to the accused'" … .

The fact that the defendant allegedly resisted arrest six months after the incident in question after violating an order of protection against him held by one of the complainants was not relevant in this matter. The defendant was not resisting arrest for the crimes charged at trial, and resisting arrest in this instance was too far removed from the underlying incident to be deemed admissible as evidence of consciousness of guilt … . People v Ramirez, 2020 NY Slip Op 01087, Second Dept 2-13-20

RESTITUTION.

HEARING REQUIRED TO DETERMINE THE AMOUNT OF RESTITUTION AND TO WHOM RESTITUTION SHOULD BE PAID; UNPRESERVED ERRORS CONSIDERED ON APPEAL IN THE INTEREST OF JUSTICE (FOURTH DEPT).

The Fourth Department determined the record did not include sufficient evidence to support the restitution order and remitted the matter for a hearing:

Defendant's contention in her main brief that the court erred in ordering her to pay restitution without a hearing is not preserved for our review inasmuch as defendant "did not request a hearing to determine the [proper amount of restitution] or otherwise challenge the amount of the restitution order during the sentencing proceeding" … . We nevertheless exercise our power to review that contention as a matter of discretion in the interest of justice … . Moreover, even assuming, arguendo, that defendant's further challenge to the court's purported failure to direct restitution to an appropriate person or entity… required preservation under these circumstances … , we likewise exercise our power to reach that unpreserved contention as a matter of discretion in the interest of justice … . As the People correctly concede, the record does not contain sufficient evidence to establish the amount of restitution imposed, nor does it establish the recipient of the restitution … . We therefore modify the judgment by vacating that part of the sentence ordering restitution, and we remit the matter to County Court for a hearing to determine restitution in compliance with Penal Law § 60.27. People v Meyers, 2020 NY Slip Op 02419, Fourth Dept 4-24-20

RIGHT TO COUNSEL.

DEFENDANT'S RIGHT TO COUNSEL ATTACHED AT THE PENNSYLVANIA ARRAIGNMENT; SUBSEQUENT QUESTIONING BY PENNSYLVANIA POLICE IN THE ABSENCE OF COUNSEL VIOLATED DEFENDANT'S RIGHT TO COUNSEL; NEW YORK POLICE DID NOT MAKE A REASONABLE INQUIRY INTO DEFENDANT'S REPRESENTATIONAL STATUS (FOURTH DEPT).

The Fourth Department, affirming the suppression of statements made by defendant, determined defendant had requested counsel at his arraignment in Pennsylvania and therefore subsequent questioning by Pennsylvania police about New York (Jamestown) offenses in the absence of counsel violated his right to counsel:

On March 28, 2017, defendant participated in a preliminary arraignment in Pennsylvania … , and the record supports the finding of County Court that defendant requested counsel during that proceeding. On April 4, 2017, members of the Jamestown Police Department traveled to Pennsylvania to interview defendant about the Jamestown arsons. Although the Jamestown police officers ultimately did not interview defendant themselves, they observed while Pennsylvania State Troopers interrogated defendant, in the absence of defense counsel, about the offenses allegedly committed in Pennsylvania. During that interrogation, the Pennsylvania State Troopers also questioned defendant about the New York offenses, and defendant made inculpatory statements about the Jamestown fires. * * *

…[E]even though the interview was carried out by Pennsylvania State Troopers, their interrogation is nevertheless subject to this state's right to counsel jurisprudence inasmuch as they were agents of the Jamestown police officers … . „„

The Court of Appeals has held that "an officer who wishes to question a person in police custody about an unrelated matter must make a reasonable inquiry concerning the defendant's representational status when the circumstances indicate that there is a probable likelihood that an attorney has entered the custodial matter, and the accused is actually represented on the custodial charge" … . Here, although the [Jamestown] captain asked whether defendant was represented by counsel, based on this record, we conclude that the captain's inquiry was not reasonable inasmuch as he failed to ask whether defendant had requested counsel. People v Young, 2020 NY Slip Op 01825, Fourth Dept 3-13-20

SEARCHES.

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

SEARCHES.

DEFENDANT WAS ALONE IN HIS CAR ARGUING WITH SOMEONE ON HIS PHONE WHEN THE POLICE APPROACHED; THE POLICE DID NOT HAVE AN OBJECTIVE, CREDIBLE REASON FOR THE APPROACH; THE HANDGUN FOUND IN AN INVENTORY SEARCH SHOULD HAVE BEEN SUPPRESSED (THIRD DEPT).

The Third Department, reversing County Court and dismissing the indictment, determined the police officers did not have an objective credible reason for approaching defendant, who was in his car outside a nightclub just after the club closed. The defendant was arrested after a check on his license revealed it had been suspended. The handgun found in an inventory search of the car should have been suppressed:

… [D]efendant's engagement in an argument on his cell phone while alone in his private vehicle — did not provide any apparent nexus to the drug and weapons crimes that police said were typically committed in the area, or give rise to any other objective reason to question his presence. Nothing about a driver's conduct in arguing on a cell phone, without more, suggests criminal activity related to weapons or drugs … . A sole occupant

of a private vehicle arguing with someone who is not present gives rise to no apparent reason for police to intervene, such as potential safety concerns … .

Thus, we find that police did not have the requisite objective, credible reason for approaching defendant's vehicle in the first instance. The encounter was further invalid because police had no objective, credible reason to extend the initial conversation by running defendant's driver's license after he responded to their initial inquiry and provided the information they requested … . The officer gave no explanation for his decision to intrude further at that point, nor does the record reveal such an explanation. Nothing about the exchange with defendant gave rise to any reason to suspect that he was not telling the truth … . Defendant's driver's license did not appear to belong to someone else … or reveal anything unusual on its face … . Lacking an objective, credible reason that justified police in approaching defendant's vehicle and making inquiries, the encounter was invalid at its inception … . People v Stover, 020 NY Slip Op 01676, Third Dept 3-12-20

SEARCHES.

SUPREME COURT PROPERLY FOUND THAT THE OFFICER DID NOT HAVE SUFFICIENT GROUNDS TO STOP DEFENDANT ON THE STREET, DETAIN HIM, SEARCH HIS BAG AND TRANSPORT HIM TO THE BURGLARY SCENE FOR A SHOWUP IDENTIFICATION (FOURTH DEPT).

The Fourth Department affirmed Supreme Court's ruling that the officer did not have a sufficient basis for detaining the defendant on the street, searching defendant's bag and transporting defendant to the burglary scene:

The evidence at the suppression hearing established that the officer who initiated the encounter with defendant was responding to a radio dispatch of a burglary in progress. Because other officers were already at the scene of the burglary when he arrived, the officer canvassed the nearby area in his patrol car. Shortly thereafter, the officer noticed defendant three blocks from the burglary scene, walking alone and carrying a bag and a cell phone. The officer approached defendant, exited his vehicle, and asked defendant what he was doing, and defendant stated that he was looking through garbage cans. The officer then searched defendant's bag in order to check for weapons and informed defendant that he was going to drive defendant back to the scene of the burglary in order to determine whether defendant was a suspect. The officer placed defendant in the back of the patrol car and drove him to the scene of the crime, where a showup identification was conducted and defendant was identified as the burglar and arrested. The evidence also established that, prior to beginning his shift on the day of the

encounter, the officer received a "be on the lookout" (BOLO) photograph depicting defendant and reflecting that defendant may have been involved in a prior burglary.

Contrary to the People's contention, we perceive no basis in the record for disturbing the court's finding that the officer did not recognize defendant as the individual depicted in the BOLO until after he drove defendant to the scene of the burglary for the showup identification … .

Although the officer justified the search of defendant's bag as a check for weapons, the record does not reflect that, at any time during the encounter, the officer "reasonably suspected that defendant was armed and posed a threat to [his] safety" … . Further, all the officer could definitively recall of the initial radio dispatch reporting the burglary in progress was that it described the suspect as a male, although the officer also testified that the dispatch might have identified the suspect as Hispanic and wearing a dark hooded sweatshirt. The vague description of the suspect provided by the radio dispatch, as recounted by the officer at the suppression hearing, did not provide the officer with the requisite reasonable suspicion to effect what was at least a forcible detention of defendant and to transport him to take part in a showup identification … . People v Nazario, 2020 NY Slip Op 00955, Fourth Dept 2-7-20

SEARCHES.

THE MAJORITY HELD THE WARRANTLESS SEARCH OF DEFENDANT'S BACKPACK WAS JUSTIFIED BECAUSE IT OCCURRED CLOSE IN TIME TO DEFENDANT'S ARREST ON THE STREET AND WAS JUSTIFIED BY EXIGENT CIRCUMSTANCES; THE DISSENT ARGUED THERE WAS NO PROOF THE BACKPACK WAS WITHIN THE GRABBABLE AREA AND NO PROOF OF EXIGENT CIRCUMSTANCES (SECOND DEPT).

The Second Department, over a dissent, determined the warrantless search of defendant's backpack occurred close in time to the arrest and was justified by exigent circumstances. The dissent argued there was no evidence the backpack was within the grabbable area of the defendant and no evidence there were exigent circumstances. Defendant had fallen off his bicycle after he was stopped by the police, the complainant had identified the defendant at the scene, and there were five or six officers around the defendant at the time of the search of the backpack:

According to the testimony adduced at the suppression hearing, after being chased by the police, the defendant fell off his bicycle onto the street. When the complainant arrived one minute later and identified the defendant, the defendant was standing up and had not yet been handcuffed. Immediately after the complainant's identification, the defendant was placed under arrest. Approximately two minutes after the defendant's arrest, the police searched the subject backpack which was "on the street, at the location of the arrest." These facts show that the arrest and search of the backpack were for all practical purposes conducted at the same time and in the same place … . Additionally, at the time of the arrest, the backpack, which was "on the street, at the location of the arrest," could have been accessed by the defendant and had not yet been reduced to the exclusive control of the police.

Additionally, the circumstances support a reasonable belief that the search of the backpack was necessary to ensure the safety of the arresting officers and the public. The police responded to and arrested the defendant for a burglary, a violent crime. In addition, the defendant was not cooperative with the police. Indeed, the defendant was arrested at the conclusion of a police chase, following his flight from the police on a bicycle. Moreover, the setting of the defendant's arrest and search of the backpack was a public street. These circumstances gave rise to objective and legitimate reasons for the search of the backpack … . People v Mabry, 2020 NY Slip Op 03540, Second Dept 6-24-20

SEARCHES.

THE PEOPLE DID NOT DEMONSTRATE THE IMPOUNDMENT OF DEFENDANT'S CAR AND THE INVENTORY SEARCH WERE LAWFUL; SEIZED EVIDENCE SUPPRESSED AND INDICTMENT DISMISSED (SECOND DEPT).

The Second Department, reversing defendant's conviction and dismissing the indictment, determined the People did not demonstrate the impoundment of defendant's car and the inventory search which turned up a weapon and a marijuana cigarette were lawful. Therefore the seized items should have been suppressed. The defendant parked in a visitor's space and went into the police station to pick up a friend's property. After presenting his ID, the police discovered a bench warrant, arrested him, impounded his car and conducted an inventory search:

The People failed to establish the lawfulness of the impoundment of the defendant's car and subsequent inventory search … . The arresting officer testified that the defendant's vehicle was legally parked in a visitor's parking space, and the officer was unaware of posted time limits pertaining to the visitor parking spaces. Although the officer testified that he impounded the defendant's vehicle to safeguard the defendant's property

against a potential burglary, the People presented no evidence demonstrating any history of burglary or vandalism in the area where the defendant had parked his vehicle. Thus, the People failed to establish that the impoundment of the defendant's vehicle was in the interests of public safety or part of the police's community caretaking function … . Moreover, the People failed to present any evidence as to whether the New York City Police Department had a policy regarding impoundment of vehicles, what that policy required, or whether the arresting officer complied with that policy when he impounded the defendant's vehicle … . People v Weeks, 2020 NY Slip Op 02198, Second Dept 4-2-20

SEARCHES.

THE POLICE OFFICER DID NOT HAVE A FOUNDED SUSPICION OF CRIMINAL ACTIVITY WHEN HE ASKED THE DEFENDANT POINTED QUESTIONS IN THIS STREET STOP SCENARIO; THE SEIZED EVIDENCE SHOULD HAVE BEEN SUPPRESSED (FOURTH DEPT).

The Fourth Department, reversing County Court, determined the police officer did not have a founded suspicion of criminal activity at the time defendant was asked about the contents of a bag he was carrying. The defendant answered "weed," was frisked, and a firearm was seized. The evidence should have been suppressed:

The evidence at the suppression hearing establishes that the arresting officer was on routine patrol in what he described as a high-crime area known to be an "open air drug market," where there had also been numerous burglaries and robberies. That officer had been a member of the police force for only a few months, and he was under the supervision of a training officer. The arresting officer testified that he observed defendant walking on a sidewalk shortly after midnight on a chilly night, with temperatures near 40 degrees, and that defendant was wearing a mask that covered the lower part of his face. The officer had not received any reports of recent crimes in the area, was not responding to any call, and did not observe defendant engage in any illegal activity. The officer pulled his patrol vehicle in front of defendant's path of travel, exited the patrol vehicle along with the training officer, approached defendant, and asked defendant why he was wearing a mask. Defendant replied that he was walking his dog, and the unchallenged evidence at the hearing establishes that he was indeed walking a dog. * * *

Based on the evidence at the suppression hearing, the People failed to meet their burden of establishing that the training officer had the requisite founded suspicion … . Thus, we conclude that the training officer's inquiry and

the subsequent frisk of defendant by the arresting officer was not a proper escalation of the level one encounter. …

We further conclude that the frisk of defendant and seizure of the gun was not justified "as having been in the interests of the officer['s] safety, since there was no testimony that the [arresting] officer[ ] believed defendant to be carrying a weapon . . . , and the People presented no other evidence establishing that the [arresting] officer had reason to fear for his safety" … . People v Wallace, 2020 NY Slip Op 01796, Fourth Dept 3-13-20

SEARCHES.

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

SEARCHES.

WARRANTLESS MANUAL SEARCH OF DEFENDANT'S IPAD AT JFK AIRPORT PROPER; CRITERIA FOR SEARCHES OF ELECTRONIC DEVICES AT BORDERS EXPLAINED (SECOND DEPT).

The Second Department determined defendant's iPad was properly searched by a Department of Homeland Security (DHS) agent at JFK airport after defendant, an airline pilot, had flown from Montreal to JFK. Based upon an investigation in Texas, DHS believed defendant may have had child pornography on his iPad. Defendant was asked to provide the password after he was told the iPad would be seized if he did not provide the password. Defendant provided the password and child pornography was found:

Because "[t]he Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border," and "the expectation of privacy is less at the border than it is in the interior"… , border searches are generally deemed reasonable "simply by virtue of the fact that they occur at the border" … . Thus, "[r]outine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant" … . However, "highly intrusive searches" may require reasonable suspicion in light of the significance of the individual "dignity and privacy interests" infringed … .

While federal circuit courts are split as to whether reasonable suspicion or something less than that is required to justify a manual search of an electronic device for contraband at the border, no court has required a warrant or probable cause for either a manual or forensic search of an electronic device for contraband at the border … . Even assuming reasonable suspicion was required, here, the DHS Agents possessed reasonable suspicion to search the defendant's iPad for child pornography … . …

Further, contrary to the defendant's contention, the defendant was not coerced into entering the password to unlock his iPad, in violation of his right against self-incrimination, his right to due process, or CPL 60.45. The defendant, who was told that he was free to leave, was not in custody when he was asked to enter the password … . The fact that the defendant's iPad would be detained if he did not enter the password did not mean that he was "subjected to the coercive atmosphere of a custodial confinement"… . Further, since the DHS Agents had reasonable suspicion that contraband could be found on the iPad, the Agents could perform a forensic search of the iPad without a warrant … . People v Perkins, 2020 NY Slip Op 03425, Second Dept 6-17-20

SEARCHES.

WARRANTLESS SEARCH OF DEFENDANT'S BACKPACK AFTER HE WAS HANDCUFFED NOT JUSTIFIED; CONVICTION REVERSED (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined the warrantless search of defendant's backpack was not justified. The appeal was heard because the waiver of appeal was deemed invalid:

Officer Musa approached the defendant, who, in response to Officer Musa's inquiry, provided his name. The defendant was carrying a backpack, and Officer Musa observed what appeared to be credit cards or identification cards in an outside mesh pocket. Officer Musa arrested the defendant for criminal trespass, handcuffed him, and removed the backpack from the defendant. Officer Musa then searched the backpack at the scene of the arrest … . * * *

" All warrantless searches presumptively are unreasonable per se,' and, thus, [w]here a warrant has not been obtained, it is the People who have the burden of overcoming' this presumption of unreasonableness" …. " [E]ven a bag within the immediate control or grabbable area' of a suspect at the time of his [or her] arrest may not be subjected to a warrantless search incident to the arrest, unless the circumstances leading to the arrest support a reasonable belief that the suspect may gain possession of a weapon or be able to destroy evidence located in the bag'" … . People v Chy, 2020 NY Slip Op 03244, Second Dept 6-10-20

SORA.

AN ENTRY IN THE CASE SUMMARY ALONE IS NOT A SUFFICIENT BASIS FOR AN ASSESSMENT OF POINTS (FOURTH DEPT).

The Fourth Department, reducing defendant's risk level, determined that an entry in the case summary alone is not sufficient to justify an assessment of points:

We agree with defendant that the People failed to prove by the requisite clear and convincing evidence that he had committed a continuing course of sexual misconduct, i.e., risk factor 4 on the risk assessment instrument (RAI) … . The sole evidence presented by the People in support of that risk factor was the case summary prepared by the Board of Examiners of Sex Offenders. At the SORA hearing, however, defendant specifically denied the

allegation within the case summary that he engaged in a continuing course of sexual misconduct, and instead testified that he engaged in one instance only. Indeed, it is undisputed that defendant was charged with and pleaded guilty to one count of rape in the third degree … stemming from a specific instance of intercourse that occurred on one specified day. We conclude that "the case summary alone is not sufficient to satisfy the People's burden of proving the risk level assessment by clear and convincing evidence where, as here, defendant contested the factual allegations related to [the] risk factor" … . People v Maund, 2020 NY Slip Op 02011, Fourth Dept 3-20-20

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

STREET STOPS.

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

TRAFFIC STOP.

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

TRAFFIC STOP.

THE SECTION OF THE VEHICLE AND TRAFFIC LAW RELIED ON BY THE POLICE FOR THE VEHICLE STOP MAY NOT HAVE BEEN APPLICABLE AND THE STOP THEREFORE MAY HAVE BEEN ILLEGAL; DEFENSE COUNSEL'S FAILURE TO MAKE A MOTION TO SUPPRESS ON THAT GROUND CONSTITUTED INEFFECTIVE ASSISTANCE; PLEA VACATED AND MATTER REMITTED (FOURTH DEPT).

The Fourth Department, vacating defendant's guilty plea, determined the initial stop of the vehicle in which defendant attempted to flee from a public housing complex parking area may not have been justified and the defense attorney was ineffective for failing to move to suppress on that ground. The vehicle stop was based on the alleged violation of Vehicle and Traffic Law 1211 (unsafe backing). But the statute does not apply to parking areas as opposed to parking lots. The Fourth Department held the application of the law to a parking area would not constitute an objectively reasonable mistake of law which could justify the stop. On the record before it, however, the Fourth Department could not determine whether the area in question met the statutory definition of a parking lot:

… [D]efendant had a valid argument that the initial vehicle stop was unlawful because the parking area in which the police purportedly observed unsafe backing was not a "parking lot" within the meaning of Vehicle and Traffic Law § 129-b … . …

Defendant also had a valid argument that the initial vehicle stop could not be justified due to the police officers' objectively reasonable, yet mistaken, belief that the parking area was a "parking lot" as defined by Vehicle and Traffic Law § 129-b … ….

Although contentions that defense counsel was ineffective survive only to the extent that "the plea bargaining process was infected by [the] allegedly ineffective assistance or that . . . defendant entered the plea because of [defense counsel's] allegedly poor performance" … , the court's consideration of the aforementioned arguments here would likely have resulted in suppression of the handgun and, concomitantly, dismissal of some or all of the indictment … . We therefore conclude that defendant demonstrated that "there is a reasonable probability that, but for counsel's error[], [defendant] would not have pleaded guilty" … . People v Allen, 2020 NY Slip Op 03295, Fourth Dept 6-12-20

UNCHARGED OFFENSES.

ALTHOUGH IT WAS ERROR TO ALLOW THE PROSECUTION TO CROSS-EXAMINE A DEFENSE WITNESS ABOUT PRIOR UNCHARGED OFFENSES ALLEGEDLY INVOLVING THE DEFENDANT, THE ERROR WAS HARMLESS; THE DISSENTERS ARGUED THE ERROR WAS REVERSIBLE (FIRST DEPT).

The First Department, over a two-justice dissent, determined, although the trial court erred in allowing cross-examination of a defense witness (and co-defendant), Calderon, about prior uncharged offenses allegedly involving defendant, the error was harmless. The dissenters argued the error was reversible:

We agree with the dissent that the prosecutor improperly cross-examined Calderon concerning three other crimes in which he had left the scene in a dark SUV. Some of the questions included a partial or complete recitation of the license plate number of the SUV used in the instant crime. This was a clear attempt to associate defendant with uncharged crimes, and the court should have sustained defense counsel's objections to this line of questioning. Similarly, the prosecutor should not have made two references in her summation to the use of this "getaway vehicle" in other crimes when discussing Calderon's testimony. * * *

The evidence at trial demonstrates that there is no "significant probability, rather than only a rational possibility," that the jury would have acquitted defendant had it not been for the references to the SUV's connection with Calderon's other crimes … . People v Vasquez, 2020 NY Slip Op 02237, First Dept 4-9-20