NEW YORK APPELLATE DIGEST, LLC

Criminal Law
July 2020

An Organized Compilation of the Summaries of New York State Appellate Decisions Addressing Criminal Law Released in July 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 of Any Page to Return There.

Copyright 2020 New York Appellate Digest, LLC

Contents

Table of Contents

Table of Contents

Table of Contents

Table of Contents

APPEALS.

ALTHOUGH THE 'LEGALLY INSUFFICIENT EVIDENCE' ISSUE WAS NOT PRESERVED BY THE MOTION FOR A TRIAL ORDER OF DISMISSAL, THE APPEAL WAS HEARD IN THE INTEREST OF JUSTICE; THE ELEMENT OF RECKLESSNESS IN THIS ASSAULT CASE WAS LEGALLY INSUFFICIENT; INDICTMENT DISMISSED (FOURTH DEPT).

The Fourth Department, reversing defendant's assault convictions and dismissing the indictment, determined the evidence of recklessness was legally insufficient. Although the issue was not preserved by the motion for a trial order of dismissal, the appeal was heard in the interest of justice. The facts were not described:

Defendant failed to preserve that contention for our review, however, "because [her] motion for a trial order of dismissal was not specifically directed at the ground[] advanced on appeal' " … . We nevertheless exercise our power to review her challenge as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]).

We agree with defendant that the conviction of both counts of assault in the third degree is not supported by legally sufficient evidence … . The evidence submitted by the People is insufficient to establish that defendant acted recklessly, "i.e., that [s]he perceived a substantial and unjustifiable risk of [injury] and that [her] conscious disregard of that risk constituted a gross deviation from the standard of conduct that a reasonable person would observe in that situation" … . People v Romeiser, 2020 NY Slip Op 04054, Fourth Dept 7-17-20

ATTORNEYS, CONFLICT OF INTEREST.

THE INITIAL PROSECUTOR IN DEFENDANT'S CASE BECAME THE TRIAL JUDGE'S LAW CLERK; DEFENDANT WAS NOT INFORMED AND WAIVED HIS RIGHT TO A JURY TRIAL; THE WAIVER WAS NOT 'KNOWINGLY' AND 'INTELLIGENTLY' MADE (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined defendant's motion to vacate his conviction after a bench trial should have been granted. The initial prosecutor in defendant's case became the trial judge's law

clerk. Defendant was never informed and waived his right to a jury trial. Defendant argued he would not have waived a jury trial had he known the former prosecutor was the trial judge's law clerk:

The evidence at the hearing established that the prosecutor who appeared for over six months on the People's behalf during the preliminary proceedings in this case was subsequently appointed to serve as the trial court's confidential law clerk. When the law clerk brought that conflict to the trial court's attention, the trial court appropriately screened the law clerk off from any participation in this case. When defendant sought to waive his right to a jury trial and to be tried by the court alone, however, the trial court—which had recognized the conflict and had already taken steps to mitigate it—failed to inform defendant that its law clerk had previously prosecuted defendant in this case. Moreover, although defense counsel was aware of the law clerk's prior role as prosecutor, it is undisputed that defense counsel failed to inform defendant of that fact. Defense counsel subsequently admitted that, had he recalled the fact that the prosecutor had become the trial court's law clerk, he would have advised defendant to retain his right to a jury trial. Additionally, defendant testified at the posttrial hearing that he would not have waived his right to a jury trial had he been aware of the fact that his former prosecutor was now serving as the trial court's law clerk. Contrary to the motion court's determination, defendant's testimony in that regard was not incredible. Indeed, defendant identified rational, case-specific reasons why he distrusted the fairness of the law clerk.

Under the unique circumstances of this case, we conclude that defendant's waiver of his right to a jury trial, which was made when he was the only participant in the waiver proceeding who was ignorant of the fact that his former prosecutor had become the trial judge's legal advisor, was not tendered "knowingly and understandingly" and was not "based on an intelligent, informed judgment" … . People v Mineccia, 2020 NY Slip Op 04028, Fourth Dept 7-17-20

ATTORNEYS, JURY NOTES.

THE EX PARTE ORDER ALLOWING THE PROSECUTOR TO SEIZE AND READ DEFENDANT'S NON-LEGAL MAIL DID NOT REQUIRE DISQUALIFICATION OF THE PROSECUTOR OR A MISTRIAL; THE PROSECUTOR'S DEMONSTRATION OF THE OPERATION OF THE MURDER WEAPON (A KNIFE) DID NOT WARRANT A MISTRIAL; AND THE FAILURE TO NOTIFY THE COURT AND THE ATTORNEYS OF THE JURY NOTE REQUESTING THE EXAMINATION OF THE KNIFE WAS NOT AN O'RAMA VIOLATION AND DID NOT WARRANT A MISTRIAL (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Oing, affirmed defendant's murder conviction after addressing several unusual issues in depth: (1) The prosecutor obtained a ex parte order allowing the opening and reading of defendant's non-legal mail to determine whether defendant was threatening an eyewitness. After reading two batches of mail, the prosecutor determined no threats were being made, informed defense counsel of the order and turned the mail over to defense counsel. The First Department determined there were no related grounds for disqualifying the prosecutor or for granting a mistrial. (2) When the defendant was on the stand he denied knowing the knife (murder weapon) could be flipped open with one hand. During her questioning the prosecutor demonstrated that the knife could be flipped open. The Second Department determined the "prosecutor-as-an-unsworn witness" argument did not warrant a mistrial, in part because of the curative instructions to the jury. (3) The knife was brought into the jury room after a request from the jury about which the court and the attorneys were not made aware. The judge and the attorneys had agreed that the jury's examination of the knife would be allowed and the examination was done according to the agreed procedure. This was not an O'Rama violation because it involved only the examination of a physical object, not an instruction or the substance of any trial evidence. Therefore a mistrial on this ground was not warranted. People v Jenkins, 2020 NY Slip Op 04014, First Dept 7-16-20

CONSTRUCTIVE POSSESSION, DNA.

THE DEFENDANT'S DNA ON THE WEAPON AND DEFENDANT'S PRESENCE AS A PASSENGER IN THE CAR WHERE THE WEAPON WAS FOUND WERE NOT SUFFICIENT TO PROVE DEFENDANT POSSESSED THE WEAPON AT THE TIME ALLEGED IN THE INDICTMENT; DEFENDANT'S CONVICTION REVERSED BASED ON A WEIGHT OF THE EVIDENCE ANALYSIS (FOURTH DEPT).

The Fourth Department, reversing defendant's possession of a weapon conviction, applying a weight of the evidence analysis, determined the defendant's DNA on the weapon and his presence as a passenger in the car where the weapon was found was not enough:

It is undisputed that the driver owned the vehicle and that the duffle bag belonged to him as well. The People relied on evidence that defendant's DNA profile matched that of the major contributor to DNA found on the handgun and that the driver was excluded as a contributor thereto. Although " an inference could be made [from that evidence] that defendant had physically possessed the gun at some point in time' " … , that evidence alone … does not establish that defendant actually possessed the handgun on the date and at the time alleged in the indictment … . …

Defendant was not the owner or operator of the vehicle, nor did the duffle bag in the locked trunk belong to him, and there was no evidence that defendant possessed or had access to the keys for the vehicle or that he had any access to or control over the trunk and duffle bag … . Contrary to the People's contention, defendant's statement to the police did not constitute an admission that he had possessed the handgun … or that he knew about its presence in the duffle bag and, in any event, mere knowledge of the presence of the handgun would not establish constructive possession … . People v Hunt, 2020 NY Slip Op 04270, Fourth Dept 7-24-20

COVID-19, HABEAS CORPUS.

THE PETITIONS FOR WRITS OF HABEAS CORPUS SEEKING RELEASE FROM RIKERS ISLAND BASED UPON THE RISK OF CONTRACTING COVID-19 PROPERLY DENIED (FIRST DEPT).

The First Department determined the petitions for writs of habeas corpus brought by inmates at Rikers Island, arguing the risk of contracting COVID-19 at the jail required release, were properly denied. State and Federal

constitutional arguments were raised. The analysis, which is too complex to fairly summarize here, came down to weighing the danger to the inmates against the danger to the public entailed by release:

Far from acting recklessly, respondents [city and state] have demonstrated great care to ensure the safety of everyone who enters the facility. By any objective measure, they have been anything but indifferent to the risk that COVID-19 poses to the jail population.

Even petitioners admit that respondents have taken substantial measures to reduce the spread of the virus on Rikers Island, and have had success in doing so. Moreover, petitioners have not cited to any controlling authority to establish that anything short of release constitutes deliberate indifference. …

That the State has agreed to release a significant number of detainees to help control the spread of the virus actually demonstrates that it has given a great deal of consideration to who should and should not be released, and its decision not to release petitioners based on their criminal history backgrounds is thus persuasive. Coupled with what the State and City have done to protect detainees, discussed above, we conclude that the weighing of interests falls in respondents' favor. Matter of People ex rel. Stoughton v Brann, 2020 NY Slip Op 04236, First Dept 7-23-20

EXPERT OPINION.

PROPER FOUNDATION FOR EXPERT OPINION EVIDENCE FINDING THAT THE TESTED SUBSTANCES CONTAINED COCAINE WAS NOT LAID AND THE TESTIMONY WAS THEREFORE INADMISSIBLE; CONVICTIONS ON TWO DRUG-POSSESSION COUNTS REVERSED, NEW TRIAL ORDERED (SECOND DEPT).

The Second Department, reversing defendant's conviction on two drug possession counts, determined the People did not provide a proper foundation for the testimony of two experts who tested the substances alleged to contain cocaine:

The opinion testimony by these experts was inadmissible, because the People failed to lay a foundation for the competence of the testimony. "[A]n expert who tests a substance for the presence of cocaine may not rely solely upon a test involving a comparison of the substance at issue to a known standard when the accuracy of the known standard is not established" … . Here, the evidence adduced at trial reflected that Lin and Lopez each tested the purity of a sample of the substance recovered from the defendant by using a test which relied upon a comparison

to a known standard. The People failed to introduce any direct evidence as to the accuracy of the standard used for comparison. Although an expert's testimony that a substance contains cocaine is admissible when it is "not based solely upon comparative tests using a known standard but also on a series of other tests not involving known standards" … , here, the People failed to establish that either Lin or Lopez performed any other tests that did not involve comparison to a known standard. Thus, the Supreme Court should not have permitted their testimony, and a new trial is required on the counts charging criminal possession of a controlled substance in the fifth degree … . People v Campbell, 2020 NY Slip Op 03800, Second Dept 7-8-20

FALSE ARREST (CIVIL).

THE CITY NEED NOT PROVE THE POLICE CORROBORATED INFORMATION PROVIDED BY AN INFORMANT IN A CIVIL ACTION FOR FALSE ARREST STEMMING FROM THE EXECUTION OF A SEARCH WARRANT BASED UPON 'BAD CI INFORMATION' (SECOND DEPT).

The Second Department determined that, in the context of a civil trial alleging false imprisonment stemming from police officers entering plaintiffs' apartment to execute a search warrant, the city does not have to prove the police properly corroborated the informant's allegations on which the warrant was based. Apparently, the informant provided "bad … information:"

To prevail on a cause of action alleging false arrest or false imprisonment, a plaintiff must prove (1) intentional confinement by the defendant, (2) of which the plaintiff was aware, (3) to which the plaintiff did not consent, and (4) which was not otherwise privileged … . "The existence of probable cause constitutes a complete defense to a cause of action alleging false arrest and false imprisonment" … . Unlike in a criminal prosecution, where the hearsay statements of an informant can only constitute probable cause if it is demonstrated that the informant is reliable and had a sufficient basis for his or her knowledge, in a trial in a civil action alleging false arrest or false imprisonment, it is not "appropriate for a jury to determine, as a factual matter, whether the police obtained sufficient corroboration of the information provided by an informant" … . In a civil action resulting from the detention of the occupants of premises searched pursuant to a search warrant, "there is a presumption of probable cause for the detention which the plaintiff must rebut with evidence that the warrant was procured based upon the false or unsubstantiated statements of a police officer" … . Ali v City of New York, 2020 NY Slip Op 04138, Second Dept 7-23-20

FORFEITURE.

QUESTION OF FACT WHETHER FORFEITURE OF DEFENDANT'S VEHICLE WOULD BE A CONSTITUTIONALLY IMPERMISSIBLE EXCESSIVE FINE (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined there was a question of fact whether forfeiture of defendant's vehicle would impose an excessive hardship and would constitute an constitutionally impermissible excessive fine. Defendant pled guilty to possession of a weapon which was found in his vehicle:

Plaintiff established by a preponderance of the evidence that defendant, the registered and titled owner of the vehicle, who pleaded guilty to criminal possession of a firearm, used the vehicle as a means of committing the crime of criminal possession of a firearm … .

In opposition, defendant, acting pro se, submitted an affidavit and supporting evidence in support of his argument that forfeiture of the vehicle, which he needed for getting to work with his tools and picking up his children from school, would impose an excessive and tremendous hardship on him and his family, particularly given that this is his sole criminal offense, and in light of other mitigating facts. This evidence is sufficient to raise an issue of fact as to whether, under all the factual circumstances, civil forfeiture of the vehicle would be grossly disproportionate to the offense and therefore a constitutionally impermissible excessive fine … . Property Clerk, N.Y. City Police Dept. v Nurse, 2020 NY Slip Op 03866, First Dept 7-9-20

GRAND JURY.

BECAUSE THE GRAND JURY MINUTES WERE NOT PART OF THE MOTION TO AMEND THE INDICTMENT OR THE RECORD ON APPEAL, IT COULD NOT BE DETERMINED WHETHER THE DEFENDANT WAS ACTUALLY INDICTED ON THE OFFENSE CHARGED IN THE AMENDED INDICTMENT; PLEA VACATED AND AMENDED INDICTMENT DISMISSED (THIRD DEPT).

The Third Department, vacating defendant's guilty plea and dismissing the amended indictment, held that, because the grand jury minutes did not accompany the motion to amend the indictment and were not available to the appellate court, it could not be determined whether defendant was indicted on the charged offense, a

jurisdictional defect. The People argued that the grand jury voted on the offense charged in the amended indictment but the wrong subdivision of the statute was set forth in the original indictment:

"The right to indictment by a [g]rand [j]ury has . . . been recognized as not merely a personal privilege of the defendant but a public fundamental right, which is the basis of jurisdiction to try and punish an individual"… . "[S]ince an infringement of defendant's right to be prosecuted only by indictment implicates the jurisdiction of the court," this claim is not waived by a guilty plea and may be raised for the first time on appeal … . Thus, "[b]efore a person may be publicly accused of a felony, and required to defend against such charges, the [s]tate must a [g]rand [j]ury that sufficient legal reasons exist to believe the person guilty" … . To that end, an indictment ensures that "the crime for which the defendant is brought to trial is in fact one for which he [or she] was indicted by the [g]rand [j]ury, rather than some alternative seized upon by the prosecution" … , providing a safeguard against prosecutorial authority by requiring the grand jury to "assess[] the sufficiency of the prosecutor's case" … .

The record before us only establishes that a grand jury indicted defendant for violating subdivision (7) of Penal Law § 120.05, not subdivision (3) of that statute. In their motion to amend, the People stated that "the grand jury was instructed on the correct section of the statute" — presumably subdivision (3) of Penal Law § 120.05 … — and that the amendment therefore did not change the theory of their case "as reflected in the instructions and the evidence before the [g]rand [j]ury," asserting that the charge in the original indictment (under subdivision [7]) was an "inadvertent misstatement." It is unclear if the People were representing that the grand jury actually indicted defendant under subdivision (3). People v Mathis, 2020 NY Slip Op 03696, Third Dept 7-2-20

GRAND JURY.

GRAND JURY EVIDENCE WAS LEGALLY SUFFICIENT IN THIS AGGRAVATED UNLICENSED OPERATION CASE; THE INDICTMENT SHOULD NOT HAVE BEEN DISMISSED (THIRD DEPT).

The Third Department, reversing County Court, determined, on the People's appeal, the evidence presented to the grand jury was legally sufficient to support the charged crimes (aggravated unlicensed operation of a motor vehicle). One issue was whether the ID defendant showed to the officer at the traffic stop was sufficient to connect the defendant to the Department of Motor Vehicles abstract:

In view of defendant's admission to the police officer during the stop that he did not have a driver's license, as well as the information in the certified abstract from the Department of Motor Vehicles, the evidence was legally sufficient to support the charges in the indictment … . Furthermore, by producing the identification card to the police officer, defendant adopted the information therein, including his date of birth … . Accordingly, contrary to defendant's assertion … , there was admissible evidence connecting defendant to the abstract. Because the record discloses that the evidence before the grand jury was legally sufficient to support the charged crimes, the indictment must be reinstated … . People v Reid, 2020 NY Slip Op 03827, Third Dept 7-9-20

GUILTY PLEAS, APPEALS.

THE BURGLARY PLEA COLLOQUY DID NOT INDICATE DEFENDANT INTENDED TO COMMIT A CRIME OTHER THAN TRESPASS IN THE PREMISES; THEREFORE THE COLLOQUY NEGATED AN ESSENTIAL ELEMENT OF THE CRIME; PRESERVATION FOR APPEAL IS NOT REQUIRED FOR THIS GENRE OF ERROR (FOURTH DEPT).

The Fourth Department vacated defendant's plea to burglary because the colloquy negated an essential element of the offense. The court noted that this type of error does not require preservation for appeal. The intent to commit burglary includes the intent to commit a crime in the premises other than trespass:

Although we agree with the People that defendant failed to preserve his contention for our review because he did not move to withdraw the plea or to vacate the judgment of conviction on that ground … , this case nevertheless falls within the rare exception to the preservation requirement … . Where a defendant's recitation of the facts "negates an essential element of the crime pleaded to, the court may not accept the plea without making further inquiry to ensure that [the] defendant understands the nature of the charge and that the plea is intelligently entered" … .

Here, defendant's factual recitation negated at least one element of the crime. Specifically, defendant negated the "intent to commit a crime therein" element of burglary (Penal Law § 140.25) because his factual recitation contradicted any allegation that "he intended to commit a crime in the apartment other than his trespass" (… see § 140.25). Criminal trespass in the second degree "cannot itself be used as the sole predicate crime in the intent to commit a crime therein' element of burglary" … . The court thus had a duty to conduct an inquiry to ensure that defendant understood the nature of the crime … . Instead, the court stated, "I just want to make sure . . . [that] you still accept [the plea deal], because you have an absolute right to go to trial . . . I think you

understand . . . [t]hat your defense of you going to the bathroom may be a difficult sell to a jury." Because that minimal inquiry by the court did not clarify the nature of the crime in order to ensure that the plea was intelligently entered, the court erred in accepting the guilty plea. People v Hernandez, 2020 NY Slip Op 04049, Fourth Dept 7-17-20

GUILTY PLEAS.

DEFENDANT'S INTELLECTUAL DISABILITY REQUIRED A MORE PROBING COLLOQUY BEFORE ACCEPTING THE GUILTY PLEA AND THE WAIVER OF APPEAL, PLEA VACATED (SECOND DEPT).

The Second Department, vacating defendant's guilty plea to murder, in a full-fledged opinion by Justice Manzanet-Daniels, determined defendant's intellectual disability required a more probing colloquy to ensure defendant understood the ramifications of the plea and the waiver of appeal:

Defendant's psychological assessments cast serious doubt about his ability to enter a knowing and voluntary plea. DOE records showed defendant to have been diagnosed as mentally retarded and to suffer from "severe academic delays." The records indicated that with an IQ of only 56, defendant had "extremely low" "general cognitive ability," with "overall thinking and reasoning abilities" in the bottom 0.2%. Those records further indicated that defendant's verbal comprehension, perceptual reasoning, working memory, and processing speed were "extremely low," in the bottom 0.2 to 2%.

The CPL 390 report, ordered by the trial court in aid of sentencing, confirmed the doubts regarding defendant's mental capacity and ability to understand or participate in the proceedings. Doctors at Bellevue observed defendant to suffer from an intellectual disability with "extremely low" intellectual functioning. Defendant's IQ placed him in the bottom one percentile as compared to his peers. The report noted that defendant's limited cognitive abilities placed him at increased risk of impulsive behavior without regard to the consequences of his actions. People v Patillo, 2020 NY Slip Op 03754, Second Dept 7-2-20

HEARSAY, EXTRINSIC EVIDENCE.

ALTHOUGH SECONDARY EVIDENCE (HEARSAY TESTIMONY) AND EXTRINSIC DOCUMENTARY EVIDENCE ARE NOT ADMISSIBLE FOR COLLATERAL MATTERS LIKE IMPEACHING CREDIBILITY, SUCH EVIDENCE IS ADMISSIBLE WHEN IT IS RELEVANT TO A CORE ISSUE; HERE THE CONTENTS OF A NOTE PRESENTED TO A BANK EMPLOYEE WAS RELEVANT TO THE 'THREATENED USE OF FORCE ' ELEMENT OF ROBBERY (FOURTH DEPT).

The Fourth Department, reversing defendant's robbery conviction and ordering a new trial on that count, determined the defendant should have been allowed to present a witness to demonstrate the note he presented to the bank employee did not threaten the use of force (an element of the robbery charge). The Fourth Department noted that secondary evidence (hearsay testimony) and extrinsic documentary evidence, which is prohibited for collateral issues, may be admissible when the evidence is relevant to a core issue:

"It is well established that the party who is cross-examining a witness cannot introduce extrinsic documentary evidence or call other witnesses to contradict a witness' answers concerning collateral matters solely for the purpose of impeaching that witness' credibility" … . That rule, however, "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 jury 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' " … . Here, defendant sought to call a witness whose testimony related to the content of the note defendant presented to the bank employee in the first incident. Defendant specifically sought to establish that the note he presented contained language that, according to defendant, did not threaten the immediate use of force, contrary to the testimony of the bank employee who received it. Although a threat of immediate use of force may be implicit and does not require the use of any specific words … , the use of threatening language is nevertheless a factor for the jury to consider when determining whether the defendant presented such a threat … . Inasmuch as the content of the note was relevant to whether defendant, either explicitly or implicitly, threatened the use of force, we conclude that the proposed testimony pertained to a noncollateral issue and that the court should have allowed the proposed witness to testify … . People v Snow, 2020 NY Slip Op 04024, Fourth Dept 7-17-20

IDENTIFICATION.

ALTHOUGH IT WAS ERROR TO DENY THE DEFENSE REQUEST FOR A RODRIGUEZ HEARING BASED UPON THE PROSECUTOR'S ASSERTION THE COMPLAINANT AND THE DEFENDANT KNEW EACH OTHER, THE TRIAL TESTIMONY DEMONSTRATED THE COMPLAINANT AND DEFENDANT IN FACT KNEW EACH OTHER; THE DISSENT ARGUED THE COURT OF APPEALS REQUIRES THAT THE IDENTIFICATION ISSUE BE RESOLVED BEFORE TRIAL (SECOND DEPT).

The Second Department affirmed defendant's conviction over a substantive dissent. Arguing against a Wade hearing addressing the suggestiveness of the complainant's identification of the defendant from single photograph displays, the prosecutor told the judge the complainant and the defendant knew each other and the identification procedures were merely confirmatory. Defendant denied knowing the complainant and requested a Rodriguez hearing. The judge denied the request based on the People's assertion the identification procedures were confirmatory. The denial of the Rodriguez hearing was deemed to be error, but the majority concluded the hearing was not necessary because the trial testimony demonstrated the complainant knew the defendant. The dissent argued the Court of Appeals, in the Rodriguez case, required resolution of the identification issue before trial:

The Supreme Court erred in relying on the People's mere assurances of familiarity in denying the defendant's pretrial request for a Rodriguez hearing … . Nevertheless, a hearing with regard to the single-photograph identifications made by the complainant soon after the shooting was ultimately unnecessary inasmuch as the complainant's trial testimony demonstrated that he was sufficiently familiar with the defendant, whom he knew and referred to by the defendant's street name,"Chulo," such that the complainant's identification of the defendant from the photo display was merely confirmatory … . * * * When a crime has been committed by a . . . long-time acquaintance of a witness there is little or no risk that comments by the police, however suggestive, will lead the witness to identify the wrong person'" … . Any suggestiveness of the initial photo identification procedure or the purported taint thereafter was not a concern since " the protagonists are known to one another'" … . People v Carmona, 2020 NY Slip Op 03672, Second Dept 7-1-20

INDICTMENTS.

THE DUPLICITY IN THE INDICTMENT WAS REMEDIED BY DETAILS PROVIDED TO THE DEFENSE PRIOR TO TRIAL AND BY DETAILED TRIAL EVIDENCE (FOURTH DEPT).

The Fourth Department held the prosecutor had remedied the duplicity in the indictment by providing information in a supplemental bill of particulars and a "trial indictment" after the motion to dismiss for duplicity was made, information corroborated by detailed trial evidence;

With respect to the counts of criminal sexual act in the first degree, after defendant made his motion, the prosecutor provided him with a supplemental bill of particulars that identified a precise date for each of the first 10 counts of criminal sexual act in the first degree. We conclude that dismissal of those counts is not required because the duplicity was "cured by reference to a bill of particulars supplementing the indictment" … . „

With respect to the counts of rape in the first degree, although the duplicity of those counts was left unaddressed by the supplemental bill of particulars, before trial, the prosecutor provided defendant with a document styled as a "trial indictment," which indicated that the People intended to prove a specific instance with respect to each of the counts on which defendant was ultimately convicted … . In addition, the People provided evidence of those specific instances of forced sexual intercourse at trial by offering the testimony of the victim … . The victim's testimony was detailed, graphic, and corroborated by receipts, photographs, and emails that allowed the victim to pinpoint the precise dates on which each of those incidents of forced sexual intercourse occurred. "Because defendant was convicted only of those counts of [rape in the first degree] where pretrial notice of specific instances was given and where those specific instances were proved at trial" … , we conclude that dismissal of those counts as duplicitous was not required. People v Quiros, 2020 NY Slip Op 04279, Fourth Dept 7-24-20

JURORS.

FOR CAUSE CHALLENGE TO A JUROR SHOULD HAVE BEEN GRANTED, NEW TRIAL ORDERED (FIRST DEPT).

The First Departing, ordering a new trial, determined defendant's for cause challenge to a juror should have been granted:

The challenged panelist stated that he could not be "fully fair" if defendant did not testify and "defend himself," and that it might be difficult for him to acquit a defendant who did not testify, because then "we only get one side." This reflected a state of mind likely to preclude the rendering of an impartial verdict (see CPL 270.20[1][b]), and the court did not elicit an unequivocal assurance that he would set aside any bias and render an impartial verdict based on the evidence … . When the court asked if he would "hold it against" defendant if defendant did not testify, he responded "No, not hold it against him, but —- I don't know." When the court further asked whether defendant's failure to testify would trouble the panelist to the point where he could not give defendant a fair trial, he responded "I think I'll be able to give him a fair trial." Although expressions such as "I think" are not disqualifying, here the panelist's responses, viewed as a whole, fell short of the required express and unequivocal declarations … . "If there is any doubt about a prospective juror's impartiality, trial courts should err on the side of excusing the juror, since at worst the court will have replaced one impartial juror with another" … . People v Laverpool, 2020 NY Slip Op 03745, First Dept 7-2-20

JURORS.

IN THIS BATSON CHALLENGE CASE, THE MAJORITY HELD THE DEFENSE'S FAILURE TO ADDRESS THE PROSECUTOR'S STATED REASON FOR EXCLUDING A PROSPECTIVE JUROR, I.E. THAT THE PROSPECTIVE JUROR WAS NOT AFRICAN-AMERICAN, PRECLUDED APPEAL ON THAT ISSUE; THE DISSENT ARGUED THE THREE-STEP BATSON PROCEDURE WAS NOT FOLLOWED WITH RESPECT TO THAT JUROR, REQUIRING REVERSAL (SECOND DEPT).

The Second Department, over an extensive two-justice dissent, determined defendant's Batson challenges were properly handled by the court and properly denied. The defense challenged the exclusion of several African-American potential jurors. With respect to one of the potential jurors, Putsam, the prosecutor answered the challenge by simply saying Putsam was not African-American. Although all three stages of a Batson challenge were addressed with respect to the other challenged jurors, nothing further was argued with respect to Putsam. The dissent argued the required three-step process was not followed with Putsam, requiring reversal and a new trial:

A review of the trial transcript leads to the inescapable conclusion that the Supreme Court engaged in all three analytical steps required by Batson v Kentucky and our corresponding case authorities. The defendant made no argument of any kind as to juror Pustam during step three. Accordingly, she has failed to preserve the specific argument which she raises for the first time on appeal, which is based, in part, at least, on facts that are outside the record, to wit, that Pustam's Trinidadian heritage qualifies as "African-American." Indeed, any appellate consideration of this new argument would require this Court to (1) assume facts not within this record; and (2) more importantly, ignore the fact that defense counsel did not dispute or challenge the People's contention that Pustam was not "African-American."

The Court of Appeals has been clear that "[w]hen, as here, a party raises an issue of a pattern of discrimination in excluding jurors, and the court accepts the race neutral reasons given, the moving party must make a specific objection to the exclusion of any juror still claimed to have been the object of discrimination … . The defendant's failure to discuss juror Pustam at all during step three suggests that counsel was not challenging any comment or determination made by the Supreme Court during step two as to Pustam. Similarly, the court's exception noted unilaterally on the record at the conclusion of step three failed to preserve any "specific" argument for the defendant on appeal, as is expressly required by the Court of Appeals. Therefore, without preservation, our analysis of this appeal cannot reach the cases of People v Pescara (162 AD3d 1772) and People v Chance (125

AD3d 993), cited by the dissent in support of a Batson reversal on the basis of skin color. People v Taylor, 2020 NY Slip Op 03807, Second Dept 7-8-20

JURORS.

THE PROSPECTIVE JUROR AND A PROSECUTION WITNESS WERE FRIENDS; DEFENDANT'S FOR CAUSE CHALLENGE TO THE JUROR SHOULD HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction and ordering a new trial, determined that defendant's for cause challenge to a juror should have been granted. The juror and a prosecution witness were friends:

… [T]he prospective juror gave "some indication of bias" … by stating that her friendship with a prosecution witness "might" "affect [her] ability to be fair and impartial in this case" and that serving as a juror "might be awkward" in light of that friendship … .

Contrary to the court's determination, the prospective juror did not give an unequivocal assurance of impartiality by merely stating, during follow-up questioning, that she would not feel compelled to "answer" to the witness for her verdict. The fact that a prospective juror would not feel compelled to answer to another person for their verdict does not necessarily mean that such prospective juror "can be fair" … . Indeed, a person could be unable to judge a case impartially while simultaneously being confident that he or she would not have to answer for the verdict to any other person. Thus, the prospective juror's assurances that she would not feel compelled to answer to the witness for her verdict does not constitute the unequivocal assurance of impartiality required by law. People v Cobb, 2020 NY Slip Op 04055, Fourth Dept 7-17-20

JURY INSTRUCTIONS, JUDGES.

JUSTIFICATION DEFENSE JURY INSTRUCTION WAS NOT SUFFICIENT; NEW TRIAL MUST BE BEFORE A DIFFERENT JUDGE BECAUSE OF THE JUDGE'S EXCESSIVE INVOLVEMENT (SECOND DEPT).

The Second Department, reversing defendant's convictions for assault second and criminal possession of a weapon fourth degree, determined: (1) the jury charge did not adequately convey that if the jury acquitted on the top count (assault first) based upon the justification defense, it must not consider the lesser counts; and (2) the new trial must be before a different judge because of the judge's excessive involvement. The jury acquitted defendant of assault first:

… [T]he Supreme Court's jury charge failed to adequately convey to the jury that if it found the defendant not guilty of assault in the first degree based on justification, then "it should simply render a verdict of acquittal and cease deliberation, without regard to" assault in the second degree and criminal possession of a weapon in the fourth degree … . Thus, the court's instructions may have led the jurors to conclude that deliberation on each of the two counts required reconsideration of the justification defense, even if they had already acquitted the defendant of assault in the first degree based on justification … . Because we cannot say with any certainty and there is no way of knowing whether the acquittal on assault in the first degree was based on a finding of justification, a new trial is necessary … . In light of the defendant's acquittal on the charge of assault in the first degree, the highest offense for which the defendant may be retried is assault in the second degree … .

In this case, the new trial must be before a different Justice. At trial, the Supreme Court engaged in extensive questioning of witnesses, usurped the roles of the attorneys, elicited and assisted in developing facts damaging to the defense on direct examination of the People's witnesses, bolstered the witnesses' credibility, and generally created the impression that it was an advocate for the People … . People v Savillo, 2020 NY Slip Op 03928, Second Dept 7-15-20

JUVENILE DELINQUENCY.

FAMILY COURT ABUSED ITS DISCRETION BY DENYING THE REQUEST FOR AN ADJOURNMENT IN CONTEMPLATION OF DISMISSAL IN THIS JUVENILE DELINQUENCY PROCEEDING (SECOND DEPT).

The Second Department, reversing Family Court, determined Family Court abused its discretion in denying appellant's request for an adjournment in contemplation of dismissal in this juvenile delinquency proceeding:

The Family Court has broad discretion in determining whether to adjourn a proceeding in contemplation of dismissal … . Although, as it is often stated, a respondent is not entitled to an adjournment in contemplation of dismissal merely because this was his or her "first brush with the law" … , a respondent's criminal and disciplinary history is nevertheless relevant to a court's discretionary determination of whether to adjourn a proceeding in contemplation of dismissal … . Other relevant factors include, but are not necessarily limited to, a respondent's history of drug or alcohol use … , a respondent's association with gang activity … , a respondent's academic and school attendance record … , the nature of the underlying incident … , a respondent's decision to accept responsibility for his or her actions … , any recommendations made in a probation or mental health report … , the degree to which the respondent's parent or guardian is involved in the respondent's home and academic life … , and the ability of the respondent's parent or guardian to provide adequate supervision … .

Here, the Family Court improvidently exercised its discretion in denying the appellant's application pursuant to Family Court Act § 315.3(1) for an adjournment in contemplation of dismissal. This proceeding constituted the appellant's first contact with the court system, the appellant took responsibility for his actions, and the record demonstrates that he had learned from his mistakes. Matter of Brian M., 2020 NY Slip Op 03785, Second Dept 7-8-20

SEARCHES.

ALL THE ITEMS IN DEFENDANT'S CAR WERE NOT LISTED IN A WRITTEN INVENTORY, IN VIOLATION OF THE POLICE DEPARTMENT'S INVENTORY-SEARCH POLICY; THEREFORE THE FIREARM WAS NOT FOUND DURING A VALID INVENTORY SEARCH AND SHOULD HAVE BEEN SUPPRESSED (THIRD DEPT).

The Third Department, reversing Supreme Court, over a dissent, determined the firearm seized from defendant's car before the car was towed from a crash scene was not found in a valid inventory search. No written inventory was created. The Third Department held that, under the Albany Police inventory search policy, which the court found reasonable, all items in the vehicle should be listed in written inventory. The dissent argued the policy only required "valuable" property to be listed:

Despite the reasonableness of the policy, [Officer] Elliott's testimony reveals that he did not comply with it and, therefore, Supreme Court erred in denying defendant's suppression motion. To that end, Elliott testified that it is the Albany Police Department's policy, as related to inventory searches, that "[a]nything valuable is . . . logged and placed into our property for safekeeping." Elliott further testified that, because nothing of value was found in the car, nothing was seized and an inventory list was not created relative to the contents of the vehicle. This testimony conflates the requirement that a written inventory always be created with the discretion given to police officers to determine which property is valuable and, as such, must be taken into custody for safekeeping. Thus, from his testimony, it is apparent that Elliott did not comply with the policy regarding inventory searches, as it clearly mandates that an inventory search always be completed and the vehicle be "completely inventoried," not allowing for discretion of the individual officers … . People v Jones, 2020 NY Slip Op 03826, Third Dept 7-9-20

SENTENCING, YOUTHFUL OFFENDER.

ALTHOUGH DEFENDANT COMPLETED HIS SENTENCE HE IS ENTITLED TO A DETERMINATION WHETHER HE SHOULD BE ADJUDICATED A YOUTHFUL OFFENDER; THE ORDER OF PROTECTION EXCEEDED THE STATUTORY TIME LIMIT (SECOND DEPT).

Although defendant had already completed his sentence, the Second Department held he was entitled to a determination whether he should be adjudicated a youthful offender, even if that relief was not requested. In addition, the Second Department noted the order of protection exceeded the maximum time allowed in the Criminal Procedure Law and did not take into account defendant's jail-time:

In People v Rudolph (21 NY3d 497, 499), the Court of Appeals held that compliance with CPL 720.20(1), which provides that the sentencing court "must" determine whether an eligible defendant is to be treated as a youthful offender, "cannot be dispensed with, even where defendant has failed to ask to be treated as a youthful offender, or has purported to waive his or her right to make such a request." Compliance with CPL 720.20(1) requires the sentencing court to actually consider and make an independent determination of whether an eligible youth is entitled to youthful offender treatment … .

Here, the record does not demonstrate that the Supreme Court considered whether to adjudicate the defendant a youthful offender. "Generally, under such circumstances, the sentence is vacated, and the matter remitted to the sentencing court for resentencing after determining whether the defendant should be treated as a youthful offender"… . However, in this case, the defendant has served his sentences. Under these circumstances, we remit the matter to the Supreme Court, Kings County, to determine whether the defendant should be afforded youthful offender treatment and thereafter submit a report to this Court advising of its determination, and hold the appeals in abeyance in the interim … . People v Shehi, 2020 NY Slip Op 03676, Second Dept 7-1-20

SENTENCING, YOUTHFUL OFFENDER.

DECISION ON APPEAL RESERVED AND MATTER REMITTED FOR A DETERMINATION WHETHER DEFENDANT SHOULD BE AFFORDED YOUTHFUL OFFENDER STATUS (FOURTH DEPT).

The Fourth Department, reserving decision on the appeal and remitting the matter, determined County Court should have ruled on whether defendant should be afforded youthful offender status:

Pursuant to CPL 720.10 (2) (a) (ii) and (3), because defendant was convicted of an armed felony offense (see CPL 1.20 [41]), he is ineligible for a youthful offender adjudication unless the court determines that one of two mitigating factors is present. "If the court, in its discretion, determines that neither of the CPL 720.10 (3) factors is present and states the reasons for that determination on the record, then no further determination is required" (… see People v Middlebrooks, 25 NY3d 516, 527 [2015]). "If, on the other hand, the court determines that one or more of those factors are present, and therefore defendant is an eligible youth, the court then must determine whether he is a youthful offender" … . As the People correctly concede, the court failed to follow the procedure set forth in Middlebrooks. People v Williams, 2020 NY Slip Op 04092, Fourth Dept 7-17-20

SENTENCING.

DEFENDANT WAS PROPERLY SENTENCED TO INCARCERATION UPON A VIOLATION OF PROBATION IN THIS FELONY DWI CASE, DESPITE DEFENDANT'S COMPLETION OF THE SIX-MONTH PERIOD OF INCARCERATION ORIGINALLY IMPOSED (FOURTH DEPT).

The Fourth Department determined defendant was properly sentenced to imprisonment after a violation of probation in this felony DWI case, despite his completion of the original six-month sentence:

County Court sentenced defendant to six months of imprisonment and five years of probation on each count. Several years later, after serving the imprisonment portion of his sentence, defendant admitted that he had violated the conditions of his probation. He now appeals from a judgment that revoked his sentence of probation and sentenced him to concurrent indeterminate terms of imprisonment. * * *

Courts have held that, where a defendant is originally sentenced pursuant to section 60.21 and then later violates the terms of his or her probation or conditional discharge after fully serving his or her term of incarceration, the defendant cannot be sentenced to an additional term of incarceration without violating the rule against multiple punishments for the same offense … . Defendant thus contends that, inasmuch as he completed the imprisonment portion of his original sentence, the court was not authorized to impose an additional sentence of imprisonment upon his admission that he violated the conditions of his probation. We reject that contention.

Contrary to defendant's contention, he was not originally sentenced to a term of imprisonment under Penal Law § 60.21 with respect to any of the three counts. That section provides, in pertinent part, that "[n]otwithstanding [section 60.01 (2) (d)], when a person is to be sentenced upon a conviction for a violation of [Vehicle and Traffic Law § 1192 (2), (2-a) or (3)], the court may sentence such person to a period of imprisonment authorized by article seventy of this title and shall sentence such person to a period of probation or conditional discharge" (§ 60.21 …). The probation or conditional discharge imposed pursuant to section 60.21 is to run consecutively to any period of imprisonment imposed pursuant to article 70. Here, however, defendant was not sentenced to a period of imprisonment pursuant to Penal Law article 70. Rather, he was sentenced on each count to a traditional split sentence pursuant to Penal Law § 60.01 (2) (d), with the period of probation running concurrently with the period of imprisonment. Thus, Penal Law § 60.21 is inapplicable to this case and does not preclude the imposition of a sentence of imprisonment upon the revocation of probation … . People v Boldt, 2020 NY Slip Op 04284, Fourth Dept 7-24-20

SENTENCING.

DEFENDANT'S SENTENCE FOR MANSLAUGHTER REDUCED BASED UPON DEFENDANT'S BACKGROUND, REMORSE AND LACK OF A CRIMINAL HISTORY (FOURTH DEPT).

The Fourth Department reduced defendant's sentence for manslaughter based upon his background, remorse, and lack of a criminal history:

… [T]he 24-year determinate sentence is unduly harsh and severe considering, inter alia, defendant's background, genuine show of remorse, and lack of prior criminal history. Thus, we modify the judgment as a matter of discretion in the interest of justice by reducing the sentence to a determinate term of imprisonment of 19 years and five years of postrelease supervision, which falls within the sentence range negotiated by the parties … . People v Jeffords, 2020 NY Slip Op 04037, Fourth Dept 7-17-20

SENTENCING.

DEFENDANT'S SENTENCE REDUCED IN THIS MANSLAUGHTER, BURGLARY, MURDER CASE DUE TO DEFENDANT'S AGE AND MENTAL ILLNESS (FOURTH DEPT).

The Fourth Department found defendant's sentence of 25 years to life in this manslaughter, burglary, murder case unduly harsh and severe due to his age and his mental illness. Sentence reduced to 15 years to life:

This Court "has broad, plenary power to modify a sentence that is unduly harsh or severe under the circumstances, even though the sentence may be within the permissible statutory range," and may exercise that power, "if the interest of justice warrants, without deference to the sentencing court" … . Defendant was 20 years old at the time of the offense. His criminal history consisted of only three incidents within the year leading up to the killing, all of which stemmed from the onset of defendant's documented schizophrenia and all charges were dismissed as a result of defendant's incapacity due to mental disease or defect. Here, at trial, both experts testified that, at the time of the killing, defendant was experiencing delusions. Indeed, the People's own expert expressly recognized that defendant had a diminished capacity to understand the wrongfulness of his actions at the time and that "the action was a product of his symptoms of mental illness." … [W]e modify the judgment by reducing the sentences of imprisonment imposed for manslaughter in the first degree under count one of the indictment and for burglary in the first degree under counts three and four of the indictment to determinate terms of 15 years, to be followed by the five years of postrelease supervision imposed by the court, and by reducing the sentence imposed for murder in the second degree under count two of the indictment to an indeterminate term of incarceration of 15 years to life. People v Gillie, 2020 NY Slip Op 04275, Third Dept 7-24-20

SENTENCING.

DEFENDANT'S SENTENCE REDUCED TO TIME-SERVED BASED UPON HIS HEALTH (FIRST DEPT).

The First Department reduced defendant's sentence for assault second, aggravated harassment and criminal possession of a weapon based upon defendant's health:

The trial evidence established that the defendant engaged in a 10-month campaign of harassment, wherein he terrorized the attorneys and two female staff at the law firm representing his wife in divorce proceedings. The defendant called the firm more than 1,500 times during that period, and engaged in vile communication which became progressively more sexual, racist and threatening in nature. The evidence likewise supports the conclusion that defendant caused physical injury to his wife's matrimonial lawyer when defendant hit the victim in the shin with his four-pronged cane during a court proceeding. * * *

While we otherwise find no basis to disturb defendant's sentence and do not consider him deserving of this court's leniency, we exercise our interest of justice jurisdiction. In so doing, we extend to him the compassion and consideration he neglected to show the four women simply doing their jobs, and reduce his sentence to time served because of defendant's age and chronic health conditions (including coronary artery disease, hypertension and diabetes), and the fact that he has only a few months to serve before his release date. People v Spinac, 2020 NY Slip Op 04002, First Dept 7-16-20

SENTENCING.

RESTITUTION ORDERED WAS GREATER THAN THAT AGREED TO IN THE PLEA AGREEMENT; ALTHOUGH THE ISSUE WAS NOT PRESERVED, THE APPEAL WAS CONSIDERED IN THE INTEREST OF JUSTICE; RESTITUTION VACATED AND MATTER REMITTED (THIRD DEPT).

The Third Department, vacating the restitution award in the interest of justice, determine the restitution ordered was not that agreed to in the plea agreement:

Defendant contends that Supreme Court improperly enhanced the sentence by ordering him to pay restitution in an amount greater than what was agreed to under the plea agreement. The record supports his claim, and the People concede that the restitution award should be reduced. Although defendant failed to preserve his claim by requesting a hearing or objecting to the amount of restitution at sentencing, we deem it appropriate to take corrective action in the interest of justice … . As defendant was not sentenced in accordance with the plea agreement, the matter must be remitted to Supreme Court to provide defendant with the opportunity to either accept the sentence with the enhanced restitution award or withdraw his guilty plea … . In addition, as Supreme Court failed to set forth the time and manner of payment of the amount of restitution in the restitution order, this omission must also be addressed upon remittal … . People v Gravell, 2020 NY Slip Op 04344, Third Dept 7-30-20

SENTENCING.

RESTITUTION PAYABLE TO THE CRIME VICTIMS BOARD EXCEEDED THE STATUTORY CAP FOR A FELONY (SECOND DEPT).

The Second Department noted that the restitution amount payable to the Crime Victims Board exceeded the statutory cap:

… [T]he amount of restitution payable to the Crime Victims Board for the family of Sherman Richardson improperly exceeds $15,000 and violates the statutory cap in Penal Law § 60.27(5)(a). Penal Law § 60.27(5)(a) provides that, except with the consent of the defendant or in instances where restitution is ordered as a condition of probation or conditional discharge, "the amount of restitution or reparation required by the

court shall not exceed fifteen thousand dollars in the case of a conviction for a felony" … . This provision is qualified by Penal Law § 60.27(5)(b), which allows a court to order restitution in excess of this amount as long as the sum is "limited to the return of the victim's property, including money, or the equivalent value thereof" … . As for the restitution payable to the Crime Victims Board for Richardson's family, the amount in excess of $15,000 did not meet the requirements of Penal Law § 60.27(5), since the amount of the defendant's restitution set by the Supreme Court was not intended as reimbursement for the value of the property destroyed. However, restitution in the sum of $3,374.75 to Enterprise Rent-A-Car, the owner of the vehicle operated by the defendant and later set on fire, was proper … . People v Grant, 2020 NY Slip Op 03674, Second Dept 7-1-20

SENTENCING.

THE PERSISTENT FELONY OFFENDER STATEMENT WAS INADEQUATE BECAUSE IT DID NOT CLEARLY INDICATE THE PERIODS OF DEFENDANT'S PRIOR INCARCERATION; THEREFORE, BECAUSE THE TEN-YEAR CUT-OFF PERIOD IS TOLLED DURING INCARCERATION, IT COULD NOT BE DETERMINED WHETHER DEFENDANT'S PRIOR FELONIES FELL WITHIN THE TEN-YEAR CUT-OFF PERIOD FOR A VALID PERSISTENT FELONY OFFENDER SENTENCE (FOURTH DEPT).

The Fourth Department, reversing County Court, determined the persistent felony offender statement was inadequate because it did not clearly describe the periods of defendant's incarceration, which tolls the ten-year cut off for consideration of prior felonies. The matter was remitted for the submission of a valid statement and resentencing:

The sentences upon the predicate violent felony convictions "must have been imposed not more than ten years before commission of the felony of which the defendant presently stands convicted" (§ 70.04 [1] [b] [iv]). However, "[i]n calculating the ten year period . . . , any period of time during which the person was incarcerated for any reason between the time of commission of the previous felony and the time of commission of the present felony shall be excluded and such ten year period shall be extended by a period or periods equal to the time served under such incarceration" (§ 70.04 [1] [b] [v]). It is undisputed that, here, the sentences for defendant's two prior violent felony convictions were imposed more than 10 years before defendant committed the subject violent felony offense (see §§ 70.04 [1] [b]; 70.08 [1] [a], [b]). Thus, the prior violent felony convictions may be considered predicate violent felony convictions only in accordance with the tolling provision of section 70.04 (1) (b) (v) based upon defendant's subsequent periods of incarceration.

Because the tolling provision of Penal Law § 70.04 (1) (b) (v) is implicated, the persistent violent felony offender statement filed by the People was required to "set forth the date of commencement and the date of termination as well as the place of imprisonment for each period of incarceration to be used for tolling of the ten year limitation" (CPL 400.15 [2]; see CPL 400.16 [1], [2]). Here, however, the statement filed by the People did not comply with that requirement … . Moreover, contrary to the position taken by the People that the statement substantially complies with CPL 400.15, the absence of the required information deprived defendant of the requisite "reasonable notice and an opportunity to be heard" with respect to the tolling period … . People v Watkins, 2020 NY Slip Op 04265, Fourth Dept 7-24-20

STATEMENTS, SENTENCING.

DEFENDANT TOLD THE POLICE HE DIDN'T WANT TO TALK, HIS STATEMENT SHOULD HAVE BEEN SUPPRESSED BUT THE ERROR WAS HARMLESS; CONSECUTIVE SENTENCES FOR POSSESSION OF THE KNIFE AND MURDER BY STABBING FOUND PROPER (FOURTH DEPT).

The Fourth Department determined defendant's statement should have been suppressed but found the error harmless. The Fourth Department further held that defendant was properly sentenced to consecutive sentences for possession of the knife and murder by stabbing:

… [D]efendant unequivocally informed the police immediately after being advised of his Miranda rights that "he didn't want to talk." No reasonable police officer could have interpreted that statement as anything other than a desire not to talk to the police … . Regardless, the police continued the interrogation, thereby failing to " scrupulously honor[ ]' defendant's right to remain silent" … .

Nevertheless, the error is harmless because the evidence of defendant's guilt is overwhelming and there is no reasonable possibility that any error in admitting defendant's statements to the police contributed to his conviction … . * * *

In cases concerning consecutive sentencing in the CPW [criminal possession of a weapon] context, we employ a framework that "appropriately reflects the heightened level of integration between the possession and the ensuing substantive crime for which the weapon was used" … . To determine whether a single act constituted both offenses under section 70.25 (2), we look to when the crime of possession was completed, i.e., both the actus reus and mens rea … ."Only where the act of possession is accomplished before the commission of the

ensuing crime and with a mental state that both satisfies the statutory mens rea element and is discrete from that of the underlying crime may consecutive sentences be imposed" … . Consecutive sentencing is permissible here because defendant's act of possessing the knife was accomplished before he used it to kill the victim and "defendant's possession [thereof] was marked by an unlawful intent separate and distinct from" his intent with respect to the homicide … . Indeed, the mental state associated with the CPW count, i.e., intent to use the knife unlawfully, is discrete from the mental state associated with the homicide count, i.e., negligence … . People v Colon, 2020 NY Slip Op 04257, Fourth Dept 7-24-20

STREET STOPS.

POLICE DID NOT HAVE REASONABLE SUSPICION DEFENDANT WAS ENGAGED IN CRIMINAL ACTIVITY AT THE TIME OF THE STOP AND PURSUIT; THEREFORE THE WEAPON DISCARDED BY DEFENDANT SHOULD HAVE BEEN SUPPRESSED (FIRST DEPT).

The First Department, reversing Supreme Court and dismissing the indictment, determined the police who stopped and pursued the defendant did not have reasonable suspicion of criminal activity at the outset. So the weapon discarded by the defendant should have been suppressed:

"Police pursuit is regarded as significantly impeding a person's freedom of movement, thus requiring justification by reasonable suspicion that a crime has been, is being, or is about to be committed" … . By contrast, "mere surveillance need not be justified by reasonable suspicion" … .

Although the police actions began as permissible observation, while following defendant slowly in their car without turning on their lights or sirens … , observation gave way to pursuit when the officers turned on their lights and sirens to cross the street against traffic and pull up ahead of defendant. Even crediting one of the officer's testimony that his intent was to get a better view and alert oncoming traffic, not to cut off, block, or alarm defendant, the objective impact of this maneuver was "intimidating" and communicated "an attempt to capture or . . . intrude upon [defendant's] freedom of movement" … .

Because it is undisputed that the circumstances before this police activity were not sufficient to create reasonable suspicion, it was unlawful and could not be validated by any subsequently acquired suspicion … . When defendant discarded a handgun during the course of the illegal pursuit, he did not voluntarily abandon it and it should have been suppressed … . People v Collins, 2020 NY Slip Op 03852, First Dept 7-9-20

SUPERIOR COURT INFORMATION.

ANY CHALLENGE BASED ON A DEFECT IN THE SUPERIOR COURT INFORMATION AND WAIVER OF APPEAL FOR FAILURE TO SET FORTH THE DATE AND TIME OF THE OFFENSE WAIVED BY THE GUILTY PLEA; THE PLEA WAS INVALID BECAUSE OF THE INCOMPLETE COLLOQUY (THIRD DEPT).

The Third Department, vacating defendant's guilty plea, determined the plea colloquy did not demonstrate defendant fully understood and voluntarily waived his right to trial. The court noted that the failure to set forth the date and time of the offense in the superior court information (SCI) and the waiver of indictment was not a jurisdictional defect and any related error was not preserved for appeal and was forfeited by the guilty plea:

Notwithstanding the omission of the date and approximate time of the offense, the waiver of indictment and the SCI, together with the underlying accusatory instruments prepared in connection with the incident, gave defendant reasonable notice of the felony sex crime with which he was being charged. In light of this, as well as the absence of any indication that defendant raised an objection before County Court to the sufficiency of the waiver of indictment or the SCI, or requested a bill of particulars, defendant's challenge to the waiver of indictment and the SCI was forfeited by his guilty plea … . …

Preliminarily, we note that defendant's challenge to the voluntariness of the plea is not precluded by his appeal waiver … and was preserved by his unsuccessful postallocution motion to withdraw his plea … . During the plea proceedings, County Court advised defendant that he was giving up a number of important rights by pleading guilty, including the right "to take the case to trial," the "right to cross-examine people who testified against you," and "the right to testify yourself or call your own witnesses." The court further explained that he could not be convicted at trial unless the People proved to a jury beyond a reasonable doubt that he was guilty of the crime. The court, however, failed to mention the privilege against self-incrimination or ascertain whether defendant conferred with counsel regarding the trial-related rights that he was waiving and the constitutional consequences of entering a guilty plea … . Absent an affirmative showing that defendant fully understood and voluntarily waived his trial-related constitutional rights, the plea was invalid and must be vacated … . People v Oliver, 2020 NY Slip Op 03697, Third Dept 7-2-20

VACATE CONVICTION, ATTORNEYS.

DESPITE HAVING MADE A PRIOR MOTION TO VACATE HIS CONVICTION ON INEFFECTIVE ASSISTANCE GROUNDS, DEFENDANT WAS ENTITLED TO A HEARING ON THE INSTANT MOTION WHICH WAS SUPPORTED BY AN AFFIDAVIT BY HIS ATTORNEY WHO ACKNOWLEDGED HE TOLD DEFENDANT A GUILTY PLEA WOULD NOT RESULT IN DEPORTATION (THIRD DEPT).

The Third Department, reversing County Court, determined defendant was entitled to a hearing on his motion to vacate his conviction on ineffective assistance grounds. The fact that defendant had made a similar motion which was denied did not preclude the instant motion which, unlike the prior motion, was supported by an affidavit from the attorney who handled defendant's guilty plea. Defendant argued he would not have pled guilty had he been aware of the deportation consequences:

Contrary to the People's contention, defendant's failure to include an affidavit from this attorney on the first CPL article 440 motion did not preclude him from filing the second CPL article 440 motion that did contain such an affidavit (see CPL 440.10 [3] [c]…). We further note that County Court's denial of defendant's motion was not mandatory as CPL 440.10 (3) provides that "in the interest of justice and for good cause shown [the court] may in its discretion grant the motion if it is otherwise meritorious and vacate the judgment" … .

In that vein, we note the numerous statements made in the supporting affidavit of defendant's former attorney with respect to his representation of defendant in his 2000 criminal matter. The affidavit indicates that, upon being retained by defendant, his sole focus was on negotiating a favorable split sentence that would allow defendant to be released from custody as soon as possible. He admits that, in pursuing a favorable sentence, he did not conduct any investigation of the facts surrounding the underlying criminal offense, initiate any preindictment discovery or otherwise raise what he now identifies are arguably fatal deficiencies in the charges brought against defendant. With respect to defendant's allegation that he was affirmatively misinformed regarding the potential immigration consequences of entering a guilty plea to a class C drug felony, the attorney candidly concedes that, despite being aware of the fact that defendant was only a lawful permanent resident and not a citizen of the United States at the time that defendant entered his September 2000 guilty plea, he specifically advised defendant that his guilty plea would have no effect on his lawful permanent resident status and that he would not be deported from the country. People v Perez, 2020 NY Slip Op 03825, Third Dept 7-9-20

Copyright 2020 New York Appellate Digest, LLC