

NEW YORK APPELLATE DIGEST, LLC

A Succinct Collection of the Salient Issues Addressed in the Criminal Law Decisions Released by Our New York State Appellate Courts in December 2020. The Citations Link to the Decisions on the Official New York Courts Website. The Full Decision-Summaries Are Available in the December 2020 Criminal Law Update Pamphlet.
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Criminal Law
Practice Newsletter
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710.30 NOTICE.

DEFENDANT WAS ENTITLED TO NOTICE THE PEOPLE WERE GOING TO PRESENT EVIDENCE SHE TYPED IN THE COMBINATION TO A SAFE IN RESPONSE TO A REQUEST FROM A DETECTIVE, NEW TRIAL ORDERED (SECOND DEPT).

[People v Porter, 2020 NY Slip Op 08122, Second Dept 12-30-20](#)

Practice Point: Typing in the combination to open a safe in response to a detective's direction was a communication of incriminating information. The defendant should have been provided with pre-trial notice of that testimonial evidence which may not have been voluntarily provided and therefore may be subject to suppression.

ALIBI EVIDENCE.

ALTHOUGH DEFENDANT DID NOT GIVE TIMELY NOTICE OF ALIBI EVIDENCE, COUNTY COURT DEPRIVED DEFENDANT OF HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE BY PRECLUDING THE ALIBI EVIDENCE; THE UNPRESERVED ERROR WAS CONSIDERED IN THE INTEREST OF JUSTICE (THIRD DEPT).

[People v Lukosavich, 2020 NY Slip Op 07953, Third Dept 12-24-20](#)

Practice Point: The defendant's right to put on a defense may override a procedural error like the failure to give timely notice of an alibi.

APPEAL, WAIVER OF, ATTORNEYS, INEFFECTIVE ASSISTANCE.

THE APPEAL WAIVERS WERE NOT EXECUTED UNTIL SENTENCING AND WERE THEREFORE INVALID; ARGUMENTS ABOUT A LATE FILED OMNIBUS MOTION AND DEFENSE COUNSEL'S FAILURE TO FILE OMNIBUS MOTIONS DID NOT SURVIVE THE GUILTY PLEAS (FOURTH DEPT).

[People v Parker, 2020 NY Slip Op 07747, Fourth Dept 12-23-20](#)

Practice Point: Appeal waivers which are not executed until sentencing are invalid. Guilty pleas will waive the right to appeal many issues. Here the judge's refusing to hold a Huntley hearing, and the argument counsel was ineffective for failing to file an omnibus motion did not survive defendant's guilty plea.

APPEAL, WAIVER OF.

A NUMBER OF GUILTY-PLEA CONVICTIONS REVERSED BECAUSE THE DEFENDANTS WERE TOLD THE WAIVER OF APPEAL WAS AN ABSOLUTE BAR TO APPEAL (CT APP).

[People v Bisono, 2020 NY Slip Op 07484, CtApp 12-15-20](#)

Practice Point: If a defendant is told the waiver of appeal is an absolute bar to appeal, the waiver is invalid. The Court of Appeals has approved the following colloquy: "By waiving your right to appeal, you do not give up your right to take an appeal by filing a notice of appeal . . . within 30 days of the sentence. But, if you take an appeal, you are by this waiver giving up the right to have the appellate court consider *most* claims of error, and whether the sentence I impose, whatever it may be, is excessive and should be modified. As a result, the conviction by this plea and sentence will normally be final" (NY Model Colloquies, Waiver of Right to Appeal ...). An illegal sentence, for example, can be challenged despite a waiver of appeal.

APPEALS, JUDGES, SUPPRESSION RULINGS.

SUPREME COURT SHOULD NOT HAVE DENIED SUPPRESSION ON A GROUND NOT RAISED BY THE PARTIES; THE APPELLATE COURT IS POWERLESS TO REVIEW THAT ISSUE; THE APPELLATE COURT IS ALSO POWERLESS TO REVIEW THE SECOND GROUND FOR SUPPRESSION ARGUED BY THE PEOPLE ON APPEAL BECAUSE THAT SECOND ISSUE WAS RESOLVED BELOW IN DEFENDANT'S FAVOR; MATTER SENT BACK TO SUPREME COURT FOR REVIEW OF THE SECOND ISSUE SHOULD THE PEOPLE BE SO ADVISED (SECOND DEPT).

[People v Tate, 2020 NY Slip Op 07405, Second Dept 12-9-20](#)

Practice Point: If a motion court bases its ruling on a ground not raised by the parties, the appellate court cannot consider it. And a party cannot raise on appeal an issue which was decided in that party's favor.

ATTEMPT, STING.

DEFENDANT WAS THE TARGET OF A STING WHERE THE INVESTIGATOR POSED AS THE STEPFATHER OF A 14-YEAR-OLD GIRL WITH WHOM THE DEFENDANT WAS INVITED TO HAVE SEX; WHEN THE INVESTIGATOR SUMMONED THE STEPDAUGHTER TO MEET THE DEFENDANT, HE GOT UP AND WALKED AWAY; THE ATTEMPTED RAPE, CRIMINAL SEXUAL ACT AND ENDANGERING THE WELFARE OF A CHILD CONVICTIONS WERE NOT SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE (THIRD DEPT).

[People v Hiedeman, 2020 NY Slip Op 07954, Third Dept 12-24-20](#)

Practice Point: The appellate courts are tough on the proof requirements for attempt. A defendant must be dangerously close to committing the crime before the evidence will be deemed legally sufficient. Actions which can be characterized as preparatory are not enough.

BEST EVIDENCE RULE, SURVEILLANCE VIDEO.

AN EXCEPTION TO THE BEST EVIDENCE RULE APPLIED, ALLOWING TESTIMONY DESCRIBING THE CONTENTS OF DESTROYED VIDEO SURVEILLANCE (FOURTH DEPT).

[People v Jackson, 2020 NY Slip Op 07744, Fourth Dept 12-23-20](#)

Practice Point: Testimony describing the contents of a destroyed surveillance video was properly deemed admissible as an exception to the best evidence rule. The destruction of the video was adequately explained and the testimony was deemed reliable.

COMPETENT TO STAND TRIAL, JUDGES.

UNDER THE CIRCUMSTANCES, SUPREME COURT SHOULD HAVE GRANTED THE DEFENSE AND PROSECUTION'S JOINT REQUEST TO HAVE THE DEFENDANT'S COMPETENCE TO STAND TRIAL EVALUATED; ONCE A DEFENDANT IS DEEMED COMPETENT TO STAND TRIAL, THE DECISION WHETHER TO PRESENT AN INSANITY DEFENSE IS THE DEFENDANT'S, NOT THE COURT'S, TO MAKE (SECOND DEPT).

[People v Bellucci, 2020 NY Slip Op 07215, Second Dept 12-2-20](#)

Practice Point: The decision whether to present an insanity defense is the defendant's alone; a judge cannot direct the defendant to present the defense.

EVIDENCE, IRRELEVANT.

IT WAS ERROR TO ALLOW IN EVIDENCE PHOTOGRAPHS OF A BAYONET WHICH WAS NOT THE WEAPON USED IN THE STABBING; THE MAJORITY FOUND THE ERROR HARMLESS, THE DISSENT DISAGREED (FIRST DEPT).

[People v Guevara, 2020 NY Slip Op 07297, First Dept 12-3-20](#)

Practice Point: It is error to introduce in evidence a weapon, here a bayonet, which was admittedly not the murder weapon. The evidence is irrelevant but prejudicial.

EVIDENCE, SUPPRESSION HEARING, LEGALITY OF POLICE CONDUCT.

THE POLICE WITNESSES AT THE SUPPRESSION HEARING WERE NOT CREDIBLE; THEREFORE DEFENDANT'S SUPPRESSION MOTION SHOULD HAVE BEEN GRANTED AND THE INDICTMENT DISMISSED (SECOND DEPT).

[People v Harris, 2020 NY Slip Op 08079, Second Dept 12-30-20](#)

Practice Point: This is a rare case in which the testimony of police officers at a suppression hearing was deemed incredible. For example, one officer testified he could see, from outside the car, that a credit card on the console was forged. The People did not meet their burden of going forward by showing the legality of police conduct.

FORGERY.

A DEFENDANT CAN NOT BE CONVICTED OF BOTH FORGERY AND POSSESSION OF A FORGED INSTRUMENT WITH RESPECT TO THE SAME FORGED INSTRUMENT (SECOND DEPT).

[People v Filan, 2020 NY Slip Op 08078, Second Dept 12-30-20](#)

Practice Point: You cannot be convicted of forgery and possession of a forged instrument with respect to the same instrument.

GUILTY PLEAS, ATTORNEYS, RIGHT TO COUNSEL.

DEFENDANT WAS HOUSED HOURS AWAY FROM HIS BROOKLYN ATTORNEY AND ATTEMPTS TO MOVE DEFENDANT TO NEW YORK CITY WERE UNSUCCESSFUL; UNDER THE CIRCUMSTANCES, DEFENDANT WAS DENIED HIS RIGHT TO CONSULT WITH HIS ATTORNEY BEFORE ENTERING A GUILTY PLEA; THE MOTION TO VACATE THE PLEA SHOULD HAVE BEEN GRANTED (SECOND DEPT).

[People v Hollmond, 2020 NY Slip Op 07222, Second Dept 12-2-20](#)

Practice Point: Housing a defendant hours away from his or her attorney may constitute a denial of the right to counsel.

GUILTY PLEAS, JUDGES.

DEFENDANT WAS NOT INFORMED OF THE RIGHTS HE WAS GIVING UP BY PLEADING GUILTY, THE JUDGE IMPROPERLY IMPOSED AN ENHANCED SENTENCE AND CHANGED THE TERMS OF THE PLEA AGREEMENT; GUILTY PLEA VACATED IN THE INTEREST OF JUSTICE (THIRD DEPT).

[People v Drayton, 2020 NY Slip Op 07952, Third Dept 12-24-20](#)

Practice Point: The sentencing judge must completely explain the rights given up by a guilty plea; the sentencing judge cannot enhance a sentence without notice or without giving the defendant the chance to withdraw the guilty plea; and the sentencing judge cannot unilaterally change the terms of the plea agreement.

IDENTITY.

A PHOTOGRAPH OF DEFENDANT WITH A HANDGUN TAKEN SIX WEEKS BEFORE THE SHOOTING WAS PROPERLY ADMITTED IN EVIDENCE AS TENDING TO SHOW HIS IDENTITY AS THE SHOOTER (FIRST DEPT).

[People v Bush, 2020 NY Slip Op 07722, First Dept 12-22-20](#)

Practice Point: Even in the absence of evidence the weapon possessed by the defendant in a photograph had anything to do with the charged offense, courts may admit the photo in evidence as tending to show the identity of the shooter.

INDICTMENT, WAIVER OF.

THE OMISSION OF NON-ELEMENTAL FACTUAL INFORMATION, HERE THE TIME OF THE INCIDENT, FROM THE WAIVER OF INDICTMENT FORM WAS A DEFECT WAIVED BY THE GUILTY PLEA (CT APP).

[People v Zaquan Walley, 2020 NY Slip Op 07691, CtApp 12-22-20](#)

Practice Point: A defect in a waiver of indictment which does not relate to an element of the crime is waived by a guilty plea.

INDICTMENTS, IDENTITY, MOLINEUX.

ALL BUT ONE COUNT OF THE INDICTMENT WAS RENDERED DUPLICITOUS BY THE CHILD-VICTIM'S GRAND JURY TESTIMONY IN THIS SEXUAL ABUSE CASE; THE SIMILAR UNCHARGED OFFENSES SHOULD NOT HAVE BEEN ADMITTED UNDER MOLINEUX AS BACKGROUND EVIDENCE; NEW TRIAL ORDERED (THIRD DEPT).

[People v Holtslander, 2020 NY Slip Op 07250, Third Dept 12-3-20](#)

Practice Point: Even if Molineux evidence is not admitted to show a generalized propensity to commit the crime, it may be inadmissible because it is too prejudicial.

JURIES, DUAL JURIES.

THE “DUAL JURY” PROCEDURE USED TO TRY DEFENDANT, WHO WAS CONVICTED, AND THE CO-DEFENDANT, WHO WAS ACQUITTED, ALLOWED THE CO-DEFENDANT’S ATTORNEY TO ACT AS A SECOND PROSECUTOR; CONVICTIONS REVERSED AND NEW TRIAL ORDERED (FIRST DEPT).

[People v Feliciano, 2020 NY Slip Op 07145, First Dept 12-1-20](#)

Practice Point: In this case using two juries to try two defendants simultaneously required reversal because one defendant’s defense undermined the other’s, effectively creating two prosecutors for one of the defendants.

JURORS.

AFTER THE DISCHARGE OF A JUROR FOR MISCONDUCT, THE TRIAL COURT PROPERLY REPLACED THE JUROR WITH AN ALTERNATE WHO HAD BEEN EXCUSED AND SENT HOME; THERE WAS A DISSENT (FIRST DEPT).

[People v Murray, 2020 NY Slip Op 08007, First Dept 12-29-30](#)

Practice Point: After a juror was discharged for misconduct, the trial judge properly replaced the juror with an alternate who had already been sent home. Deliberations had not yet begun.

MATERIAL STAGES, DEFENDANT’S RIGHT TO BE PRESENT.

DEFENDANT WAS REMOVED FROM THE COURTROOM WHEN HE DISRUPTED THE PROCEEDINGS AS THE GUILTY VERDICT WAS BEING DELIVERED; DEFENDANT SHOULD FIRST HAVE BEEN WARNED THAT HE WOULD BE REMOVED IF HE CONTINUED TO DISRUPT THE PROCEEDINGS; NEW TRIAL ORDERED (SECOND DEPT).

People v Antoine, 2020 NY Slip Op 07907, Second Dept 12-23-20

Practice Point: Removing the defendant from the courtroom just after the guilty verdict but before the jury was discharged, without first warning the defendant, required reversal.

SENTENCING, JUDGES.

DEFENDANT WAS REPEATEDLY WARNED HE COULD BE SENTENCED TO 45 YEARS AFTER TRIAL WHEN, IN FACT, HIS SENTENCE WOULD BE CAPPED AT 20 YEARS; DEFENDANT WAS NOT AWARE OF THIS GROUND FOR AN ATTACK ON HIS SENTENCE AND THEREFORE DID NOT NEED TO PRESERVE THE ISSUE FOR APPEAL BY MOVING TO WITHDRAW THE PLEA; PLEA VACATED (FIRST DEPT).

People of the State of New York v Joseph, 2020 NY Slip Op 07472, First Dept 12-10-20

Practice Point: A defendant who is misinformed about the length of the sentence which could be imposed after trial is entitled to vacate his guilty plea. Here the defendant was repeatedly told he could be sentenced to 45 years, but his sentence would have been capped at 20.

SENTENCING, JUDGES.

SENTENCE IMPOSED AFTER THE SECOND TRIAL SHOULD NOT HAVE BEEN HIGHER THAN THE SENTENCE IMPOSED AFTER THE FIRST TRIAL (SECOND DEPT).

[People v Diaz, 2020 NY Slip Op 07392, Second Dept 12-9-20](#)

Practice Point: Here the sentence imposed after a second trial should not have been longer than the sentence imposed after the first trial. The defendant's conduct since the imposition of the first sentence did not provide any basis for the increase.

SENTENCING, JUDGES.

THE APPELLATE DIVISION REDUCED DEFENDANT'S SENTENCE, IN PART BECAUSE THE SENTENCING JUDGE MAY HAVE BEEN REACTING TO CRITICISM OF HOW THE TRIAL WAS HANDLED (SECOND DEPT).

[People v Morales, 2020 NY Slip Op 07919, Second Dept 12-23-20](#)

Practice Point: The appellate court here reduced defendant's sentence because the sentencing judge was angered by criticism of the way the trial was handled.

WARRANTLESS ARREST INSIDE HOME.

ALTHOUGH IT APPEARS THE POLICE HAD PROBABLE CAUSE TO ARREST THE DEFENDANT BEFORE THEY ENTERED THE HOME AND THEREFORE COULD HAVE GOTTEN AN ARREST WARRANT, THERE WAS NO CONSTITUTIONAL VIOLATION BECAUSE THE POLICE ENTERED THE HOME WITH CONSENT; DEFENSE COUNSEL ARGUED THE POLICE DID NOT GET A WARRANT TO DELAY THE ATTACHMENT OF THE RIGHT TO COUNSEL AND PROCURE STATEMENTS (SECOND DEPT).

[People v Cuencas, 2020 NY Slip Op 08118, Second Dept 12-30-20](#)

Practice Point: Even though the police had probable cause to request a warrant before going to defendant's home, and probably did not procure the warrant to delay the

attachment of the right to counsel, the arrest in the home was valid because the police entered the home upon consent.

WEAPON, INVOLUNTARY POSSESSION OF A.

EVEN THOUGH THE DEFENDANT ARGUED HE NEVER HAD ACTUAL OR CONSTRUCTIVE POSSESSION OF THE WEAPON FOUND IN ANOTHER'S HOUSE, DEFENDANT WAS ENTITLED TO THE "INVOLUNTARY POSSESSION" JURY INSTRUCTION; POSSESSION, EITHER ACTUAL OR CONSTRUCTIVE, IS NOT VOLUNTARY IF IT IS FOR SO BRIEF A PERIOD OF TIME THAT THE DEFENDANT COULD NOT HAVE TERMINATED POSSESSION (CT APP).

[People v J.L., 2020 NY Slip Op 07663, CtApp 12-17-20](#)

Practice Point: Even though the defendant argued he did not have actual or constructive possession of a weapon in a house where he was a guest, he was still entitled to a jury instruction on "involuntary possession;" i.e., possession was for so short a time that defendant did not have a chance to terminate possession.

WEAPON, TEMPORARY INNOCENT POSSESSION OF A.

DEFENDANT, WHO ACCEPTED POSSESSION OF THE WEAPON FROM HIS FRIEND, DID SO IN ANTICIPATION OF A POSSIBLE CONFRONTATION; DURING THE CONFRONTATION DEFENDANT SHOT TWO PEOPLE; THE ARGUMENT THAT DEFENDANT ACTED IN SELF-DEFENSE DID NOT RENDER DEFENDANT'S POSSESSION OF THE WEAPON TEMPORARY AND LAWFUL (CT APP).

[People v Williams, 2020 NY Slip Op 07664, CtApp 12-17-20](#)

Practice Point: When a defendant accepts possession of a weapon from another in anticipation of needing it for self-defense, the criteria for temporary innocent possession are not met.

WITNESS TAMPERING.

WITNESS TAMPERING CONVICTION AFTER TRIAL REVERSED; NO CHARGES WERE PENDING AT THE TIME OF THE COMMUNICATIONS WITH THE WITNESS (FOURTH DEPT).

People v Diroma, 2020 NY Slip Op 07817, Fourth Dept 12-23-20

Practice Point: If no charges are pending, a defendant cannot commit witness tampering.

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