NEW YORK APPELLATE DIGEST, LLC

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An Organized Compilation of the Summaries of Selected New York State Appellate Decisions Addressing Criminal Law Released in December 2020. The Entries in the Table of Contents Link to the Summaries Which Link to the Decisions. Click on "Table of Contents" in the Header to Return There.

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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).

The Second Department, reversing defendant's conviction, in a full-fledged opinion by Justice Chambers, determined defendant was entitled to notice that the People were going to introduce evidence that she typed in the combination of a safe in response to a request from a detective:

Here, the Supreme Court erred in determining that the defendant's act of typing in the combination to the safe, which was made in direct response to Detective Theodore's request that the safe "needed to be opened," did not amount to a statement made to a law enforcement officer which, "if involuntarily made would render the evidence thereof suppressible upon motion pursuant to [CPL 710.20(3)]" … .

It is well settled that "any pertinent communication, whether made by statement or conduct," may be suppressed if made in violation of the defendant's right against self-incrimination … . Our view is that the defendant physically entering the combination to open the safe, rather than verbally communicating that combination to the police … , does not make her response any less communicative or testimonial in nature, since the act unquestionably expressed the contents of the defendant's mind … . To the extent our decision in People v Morales (248 AD2d 731) suggests a different conclusion, it should no longer be followed.

Moreover, since the defendant's knowledge of the safe's combination was the only evidence establishing her dominion and control over its contents, the act of unlocking the safe was undoubtedly incriminating … . In addition, the fact that the defendant was still in handcuffs and had not yet been advised of her Miranda rights when Detective Theodore made his request raises questions as to whether her act of unlocking the safe was voluntary … . Thus, this is not a situation where the requirement of a CPL 710.30 notice was obviated because there was no question of the voluntariness of the challenged statement. 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).

The Third Department, reversing the grand larceny conviction in the interest of justice, determined defendant's late request to present alibi evidence should have been granted:

County Court abused its discretion by precluding defendant from introducing testimony from defendant's father at trial. … The court rested its entire conclusion on the failure to comply with the Criminal Procedure Law and that good cause was not shown, despite the fact that defendant was not given an opportunity to respond to the People's informal motion to preclude the alibi testimony. Notably, the court did not make any findings that defendant had an improper purpose in providing the late notice nor did it weigh the possibility of prejudice to the People against the right of defendant to present a defense … . Instead, the court, without hearing from defendant, implemented the most "drastic sanction" without considering any lesser sanctions that may have protected the People from potential prejudice … . In making the appropriate inquiry, alibi testimony would have been important to defendant's defense given that much of the People's argument was based on accomplice testimony and that the People would not have been prejudiced as they were already aware of the father's statement. "Therefore, we find that County Court violated defendant's constitutional right to present a defense" … . 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).

The Fourth Department determined the waivers of appeal were invalid and defendant's arguments the court should have considered a late omnibus motion and defense counsel was ineffective for failing to file omnibus motions did not survive the guilty pleas:

The written waivers do not establish valid waivers because they were not executed until sentencing … and, even assuming, arguendo, that the written waivers had been executed at the time of the pleas, the court "failed to confirm that [defendant] understood the contents of the written waivers" … . …

Defendant contends in appeal No. 1 that the court abused its discretion in refusing to entertain, in the interest of justice and for good cause shown … , that part of his untimely omnibus motion seeking a Huntley hearing. We conclude, however, that defendant, by pleading guilty, forfeited appellate review of that contention. …

To the extent that defendant further contends in all three appeals that his first attorney's failure to file a timely omnibus motion constituted ineffective assistance of counsel, we conclude under these circumstances that defendant's contention likewise does not survive his guilty pleas. 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).

The Court of Appeals, over an extensive dissent with respect to one case, reversed a number of guilty-plea convictions because the judges told the defendants the waiver was an absolute bar to appeal:

The waivers of the right to appeal were invalid and unenforceable pursuant to our analysis in People v Thomas (34 NY3d 545 [2019]). It is well-settled that "a waiver of the right to appeal is not an absolute bar to the taking of a first-tier direct appeal" … . Nonetheless, in each case, among other infirmities, the rights encompassed by an appeal waiver were mischaracterized during the oral colloquy and in written forms executed by defendants, which indicated the waiver was an absolute bar to direct appeal, failed to signal that any issues survived the waiver and, in the Queens and Orleans Counties cases, advised that the waiver encompassed "collateral relief on certain nonwaivable issues in both state and federal courts" … . Viewing these deficiencies in the context of the record in each case and considering the totality of the circumstances, including in several cases defendants' significant mental health issues … , we cannot say that "defendants comprehended the nature [and consequences] of the waiver of appellate rights" … . 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).

The Second Department determined: (1) the motion court should not have decided the suppression motion on a ground not raised by the parties and the appellate court is powerless to review that issue (search valid pursuant to the automobile exception); (2) the other ground for upholding suppression argued by the People on appeal was decided in defendant's favor and therefore the appellate court cannot review it (search valid as an inventory search). The denial of the suppression motion was reversed and the matter was sent back for review of the inventory search issue should the People be so advised:

The People's current contention that the search of the defendant's SUV was proper under the automobile exception to the warrant requirement because the police had probable cause to believe that the SUV contained a weapon is improperly raised for the first time on appeal … . … [T]he hearing record reveals … the People were relying solely on the theory that the gun was recovered pursuant to a lawful inventory search after the SUV was removed from the location. This Court "cannot uphold conduct of the police, and thereby affirm a trial court's denial of suppression of evidence obtained pursuant to such conduct, on a factual theory not argued by the People before the trial court" … . …

As an alternative ground for upholding the suppression ruling, the People argue, as they did in the Supreme Court, that the recovery of the gun was lawful pursuant to a valid inventory search. However, because the Supreme Court decided the inventory search issue in the defendant's favor, this Court is precluded from reviewing that issue on the defendant's appeal … . … Under the circumstances presented here, where we lack statutory authority to review an issue resolved in the appellant's favor at a suppression hearing, the Court of Appeals has instructed that the required remedy is to "reverse the denial of suppression and remit the case to [the] Supreme Court for further proceedings" with respect to that issue … . People v Tates, 2020 NY Slip Op 07405, Second Dept 12-9-20

Practice Point: If a motion court bases it 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.

ASSAULT.

EVIDENCE OF SERIOUS PHYSICAL INJURY INSUFFICIENT, ASSAULT SECOND CONVICTION VACATED (SECOND DEPT).

The Second Department, vacating the assault second conviction, determined the evidence of "serious physical injury" was insufficient:

The Legislature has defined the term "[s]erious physical injury" to mean "physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ" … .

Here … the evidence at the trial failed to demonstrate that the complainant suffered the protracted impairment of the function of a bodily organ as a result of the attack charged in count 2 of the indictment. This prong of the statute, by the plain language of the word "protracted," requires evidence that the effects of the physical injury were experienced over an "extended" period of time … . The People fail to cite to any evidence in this case, medical or otherwise, to show that the injury to the complainant resulted in any "protracted impairment" in the functioning of any of the complainant's organs … . People v Clark, 2020 NY Slip Op 07911, Second Dept 12-23-20

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).

The Third Department, reversing defendant's convictions and dismissing the indictment, determined defendant did not come close enough to committing the sexual offenses suggested by the undercover investigator to meet the criteria for attempted rape, attempted criminal sexual act, and attempted endangering the welfare of a child. The undercover investigator suggested sex with his fictional 14-year-old stepdaughter. When the investigator indicated he was summoning the stepdaughter to meet the defendant, the defendant got up and walked away:

… [W]e cannot conclude that defendant came dangerously near engaging in sexual intercourse or oral sexual contact of any iteration with a minor under the age of 15 or any other act that would likely be injurious to the physical, mental or moral welfare of a child … . Although defendant engaged in conversations contemplating sexual contact with a 14-year-old and drove to a location where he was told a 14-year-old would be, under the circumstances of this case, his conduct did not pass the stage of mere preparation and bring him dangerously close to committing the attempted crimes of rape in the second degree, a criminal sexual act in the second degree or an act endangering the welfare of a child … . Moreover, intent to engage in sexual intercourse and the criminal sexual acts charged in the indictment cannot be inferred from the evidence, particularly given defendant's passive and noncommittal statements when discussing potential contact with the 14-year-old stepdaughter, as well as the fact that defendant did not bring a condom or any other sexual item to the campsite … . Accordingly, inasmuch as the verdict is not supported by legally sufficient evidence, we reverse the judgment of conviction and dismiss the indictment … . 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.

ATTORNEYS, RIGHT TO COUNSEL.

DEFENDANT WAS DEPRIVED OF HIS RIGHT TO COUNSEL WHEN HE REPRESENTED HIMSELF AT RESENTENCING (FOURTH DEPT).

The Fourth Department, reversing the resentencing, determined defendant was deprived of his right to counsel when he represented himself at resentencing:

We agree with defendant's contention in his main and pro se supplemental briefs, as the People correctly concede, that he was deprived of his right to counsel when Supreme Court permitted defendant to represent himself at the resentencing proceeding without properly ruling on defendant's multiple requests for assignment of counsel … . Denial of the right to counsel during a particular proceeding does not invariably require remittal for a repetition of the tainted proceeding, or any other remedy, inasmuch as "the remedy to which a defendant is entitled ordinarily depends on what impact, if any, the tainted proceeding had on the case as a whole" … . Here, however, the court's failure to consider defendant's motion for assigned counsel had an adverse impact on the resentencing proceeding because the absence of counsel prevented defendant from, inter alia, adequately contesting his adjudication as a second felony offender and arguing against the imposition of the maximum sentence permissible under the law. We therefore reverse the resentence and remit the matter to Supreme Court for resentencing, and we direct the court to ensure that defendant is afforded his right to counsel … . People v Caswell, 2020 NY Slip Op 07810, Fourth Dept 12-23-20

BEST EVIDENCE RULE, SURVEILLANCE VIDEO.

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

The Fourth Department, in a full-fledged opinion by Justice Bannister, determined an exception to the best evidence rule applied and testimony about the contents of a destroyed video surveillance was properly admitted in this grand larceny case:

Defendant appeals from a judgment … arising from the theft of wireless speakers valued in excess of $3,000 from a Target store … . Prior to trial, the People moved in limine for permission to introduce testimony from the store's asset protection team leader (APT leader) regarding the contents of destroyed video surveillance footage that had depicted the incident. * * *

The best evidence rule "simply requires the production of an original writing where its contents are in dispute and sought to be proven" … "The rule protects against fraud, perjury, and inaccurate recollection by allowing the [factfinder] to judge a document by its own literal terms" … . "Under a long-recognized exception to the best evidence rule, secondary evidence of the contents of an unproduced original may be admitted upon threshold factual findings by the trial court that the proponent of the substitute has sufficiently explained the unavailability of the primary evidence . . . and has not procured its loss or destruction in bad faith" … . The proponent of the secondary evidence "has the heavy burden of establishing, preliminarily to the court's satisfaction, that it is a reliable and accurate portrayal of the original. Thus, as a threshold matter, the trial court must be satisfied that the proffered evidence is authentic and correctly reflects the contents of the original before ruling on its admissibility" … . * * *

… [T]he People met their burden of establishing that the APT leader's testimony regarding the unpreserved footage was a reliable and accurate portrayal of the contents of that footage … . 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).

The Second Department, reversing the convictions, determined: (1) the trial judge should not have rejected the request by both defense counsel and the prosecutor to have the defendant's mental health and fitness for trial evaluated; and (2) once a defendant is found competent to stand trial the decision whether to present an insanity defense is the defendant's alone. Here defense counsel was ordered by the judge to present an insanity defense, over defendant's objection:

… [W]hen confronted with evidence that the defendant was not taking his required medication and was not able to communicate rationally with his attorney, the Supreme Court should have granted the joint applications of the People and the defense to have the defendant examined pursuant to CPL 730.30(1) to determine his fitness to proceed … . …

… [A] defendant found competent to stand trial has the ultimate authority, even over counsel's objection, to reject the use of a psychiatric defense … . Thus, once the Supreme Court determined the defendant to be competent to stand trial, it should not have interfered with that authority by "order[ing]" defense counsel, over the defendant's objection, to present an insanity defense. 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.

CONTEMPT.

DEFENDANT'S CONTEMPT CONVICTION FOR VIOLATING AN ORDER OF PROTECTION STANDS, DESPITE THE FACT THAT THE ORDER OF PROTECTION WAS BASED ON AN OFFENSE SINCE FOUND UNCONSTITUTIONAL (FIRST DEPT).

The First Department determined the order of protection based on a conviction for an offense which has been found unconstitutional was voidable, not void, and therefore remained in effect.

Defendant was properly convicted of first-degree criminal contempt under Penal Law § 215.51(b)(v) for violating an order of protection that had been issued upon his conviction of second-degree aggravated harassment under former Penal Law § 240.30(1)(a). The contempt conviction was valid even though the Court of Appeals declared that the aggravated harassment provision underlying the order of protection was unconstitutional in People v Golb (23 NY3d 455 [2014] … . Golb was decided after the order of protection was issued against defendant, but before he violated it. …

The Golb decision did not render defendant's order of protection void on its face, but merely voidable.

Defendant's underlying conviction was final before Golb was decided. The order of protection was indisputably valid at the time of its issuance. After Golb, there are no reported cases holding that convictions under former Penal Law § 240.30 (1)(a) are automatically vacated. Instead, where there was vacatur of a conviction or order of protection, it was in response to a request for relief either on appeal or in a posttrial motion … . …

Defendant did not challenge the order of protection by appealing the aggravated harassment conviction against him … . His subsequent CPL 440.10 motion to vacate the conviction and order of protection based on Golb was denied … . Defendant was therefore required to comply with the extant order and his violation constituted criminal contempt … . People v Brown, 2020 NY Slip Op 08011, First Dept 12-29-20

CONTEMPT.

STATUTORY CRITERIA FOR CRIMINAL CONTEMPT FIRST DEGREE NOT MET; CONVICTION REDUCED TO CRIMINAL CONTEMPT SECOND DEGREE (SECOND DEPT).

The Second Department determined the statutory criteria for criminal contempt first degree were not met and reduced the conviction to criminal contempt second degree:

As the People concede, the evidence was legally insufficient to establish the defendant's guilt of criminal contempt in the first degree in violation of Penal Law § 215.51(c). An essential element of that crime is that the defendant has violated an order of protection issued pursuant to "sections two hundred forty and two hundred fifty-two of the domestic relations law, articles four, five, six and eight of the family court act and section 530.12 of the criminal procedure law, or an order of protection issued by a court of competent jurisdiction in another state, territorial or tribal jurisdiction, which requires the respondent or defendant to stay away from the person or persons on whose behalf the order was issued" … . Here, the defendant was accused of violating an order of protection issued pursuant to Criminal Procedure Law § 530.13. Criminal Procedure Law § 530.13, which provides protection to victims of crimes other than family offenses, is not one of the authorities enumerated in Penal Law § 215.51(c). Accordingly, the defendant's conviction of criminal contempt in the first degree was legally insufficient because the People could not prove an essential element of the offense … . However, because the evidence was legally sufficient to support a conviction of the lesser included offense of criminal contempt in the second degree (see Penal Law § 215.50[3]), the defendant's conviction is reduced accordingly … . People v Smith, 2020 NY Slip Op 07229, Second Dept 12-2-20

DOUBLE JEOPARDY.

ALTHOUGH THE TWO INDICTMENTS ALLEGED THE SAME MODUS OPERANDI FOR MEDICAID FRAUD, THE CHARGES INVOLVED DIFFERENT PARTIES AND TIME PERIODS; THE WRIT OF PROHIBITION SEEKING TO PRECLUDE PROSECUTION ON DOUBLE JEOPARDY GROUNDS DENIED OVER A DISSENT (FIRST DEPT).

The First Department, over a dissent, denied the writ of prohibition seeking to preclude a second prosecution for medicaid fraud on double jeopardy grounds. Although the alleged scheme to defraud was the same, the two indictments involved different parties and different time periods:

In essence, the wrongdoing charged in each indictment is the filing of fraudulent Medicaid reimbursement claims and related misconduct, such as payment of kickbacks. However, the indictments charge different specific criminal acts, which were perpetrated on different dates and over different time periods. Moreover, the indictments do not allege fraudulent billing of any of the same managed care organizations. While it appears that the different fraudulent acts charged in the two indictments had a similar modus operandi and were part of a common plan, this alone does not suffice to render them part of the same "criminal transaction" under CPL 40.10(2)(b) … . Matter of Dieffenbacher v Jackson, 2020 NY Slip Op 08015, First Dept 12-29-20

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).

The First Department, over an extensive dissent, determined admitting in evidence photographs of a bayonet which was not used in the stabbing was harmless error. The dissent argued the error was not harmless in this first degree manslaughter case:

The court should not have permitted the People to introduce photographs taken by the police of an M9 bayonet that was found in a collection of knives in defendant's bedroom, but was concededly not the weapon used in the crime. The photographs were irrelevant

as demonstrative evidence … , because nothing in the record provided a basis for the court to conclude that the bayonet in the photographs resembled the weapon that defendant used to stab the victim … . Even assuming that defendant's statement supported the inference that the unrecovered weapon used in the crime was also a bayonet, and that it came from defendant's collection, there was no evidence that all of defendant's bayonets, which could have come from different eras and armed forces, looked like M9s.

FROM THE DISSENT:

… [T]he People told the jury in its summation that a bayonet knife is designed to kill people; that killing people is the only use for a bayonet knife; that a bayonet knife is not used to open things; and that the army and military gives out weapons, like bayonet knives, to kill people. None of these statements were elicited during the testimony of any witness or made in response to defense counsel's summation, nor could they have been reasonably inferred from the evidence. 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).

The Second Department, reversing Supreme Court, in a full-fledged opinion by Justice Miller, determined defendant's motion to suppress should have been granted because the People's witnesses at the suppression hearing were not credible. Therefore the People did not meet their burden to show the legality of the police conduct. The indictment was dismissed. The police witnesses offered conflicting versions of the stop of the car in which defendant was a passenger and the ability to determine, from outside the car, that a credit card on the console was forged:

"Given the severely undermined credibility of the arresting officer[s], it is unclear exactly what happened during the encounter between the officer[s] and the defendant, and the hearing court was confronted with choices of possible scenarios" … . Under similar circumstances, this Court has stated that, "where credibility is in issue, multiple choice questions are neither desirable nor acceptable," and the fact-finder should refuse to "select a credible version based upon guesswork"… . …

… [W]e decline to credit any of the testimony of the People's witnesses … . Accordingly, "[u]pon scrutiny of the People's evidence at the suppression hearing, we can only conclude that they failed to carry their burden of going forward and demonstrating the legality of the police conduct in the first instance[,]" including the legality of the stop … . In view of this failure, "all further actions by the police as a direct result of the stop were illegal . . . [and] the evidence recovered as a result of the unlawful stop must be suppressed" … . Accordingly, "exercising our independent power of factual review, we conclude that the defendant's motion to suppress . . . should have been granted"… . Without the suppressed evidence, there would not be legally sufficient evidence to prove the defendant's guilt. Accordingly, the indictment must be dismissed … . 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).

The Second Departed noted "'an individual may be charged with both forgery and criminal possession of a forged instrument, [but] [s]he cannot be convicted of both crimes with respect to the same forged instrument'" … . 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.

GRAND JURIES, JUSTIFICATION DEFENSE.

THE CHARGES AGAINST DEFENDANT STEMMED FROM HIS STRIKING AND SERIOUSLY INJURING AN EIGHT-POUND DOG; THERE WAS NO NEED TO INSTRUCT THE GRAND JURY ON THE JUSTIFICATION DEFENSE; INDICTMENT REINSTATED OVER A DISSENT (SECOND DEPT).

The Second Department, reversing Supreme Court on the People's appeal, over an extensive dissent, determined the grand jury proceedings were not defective due to the prosecutor's failure to instruct the grand jury on the justification defense. The charges against the defendant stemmed from his striking and severely injuring a dog. The Second Department held a reasonable view of the evidence did not warrant the justification instruction:

"'[A] prosecutor should instruct the Grand Jury on any complete defense supported by the evidence which has the potential for eliminating a needless or unfounded prosecution'" … . "The failure to charge justification constitutes reversible error only when the defense is 'supported by a reasonable view of the evidence—not by any view of the evidence, however artificial or irrational'" … . …

There is no reasonable view of the evidence that forcefully striking and injuring the approximate eight-pound terrier poodle in the manner undertaken by the defendant, who was approximately 6 feet tall and weighed 200 pounds, was necessary as an emergency measure to avoid, at most, a bite by this small animal through denim pants. People v Jimenez, 2020 NY Slip Op 07223, Second Dept 12-2-20

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).

The Second Department, reversing Supreme Court, in a full-fledged opinion by Justice Miller, considering the appeal in the interest of justice, determined defendant's motion to withdraw his guilty plea should have been granted. Defendant was housed far away from his Brooklyn attorney and the attempts to have him moved to New York City were ignored by the Department of Corrections. The Second Department held defendant had been deprived of his right to counsel:

Under the circumstances here, and particularly in view of the defendant's substantiated and uncontradicted testimony that he was deprived of his constitutional right to consult with his attorney in advance of trial, the Supreme Court improvidently exercised its discretion in denying the defendant's application pursuant to CPL 220.60(3) to withdraw his plea of guilty. Under the circumstances … we conclude that the interests of justice would have been better served had the defendant been permitted to withdraw his plea of guilty. * * *

This Court has recognized that "[s]imple justice . . . mandates that a plea must be knowingly and intelligently given and, if it be to any degree induced by fear or coercion, it will not be permitted to stand" … . 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).

The Third Department, vacating defendant's guilty plea in the interest of justice, determined: (1) defendant was not informed of the rights he was giving up by pleading guilty; (2) the judge improperly enhanced defendant's sentence; and (3) the judge improperly changed the terms of the plea agreement:

County Court advised defendant that, by pleading guilty, he would be giving up "all of [his] constitutional rights, [his] presumption of innocence, [his] rights to a jury trial, suppression hearings, also all of [his] appellate rights." There was no mention of defendant's right to be confronted by witnesses or the privilege against self-incrimination … . Furthermore, the record fails to disclose that the court ascertained whether defendant conferred with his counsel regarding the trial-related rights that were being forfeited upon his guilty plea … . Rather, the court merely asked him whether he had enough time to talk with his counsel about "the facts of [the] drug charges, going to trial, not going to trial[] and things like that" and "[his] jury trial rights, all [his] other rights." In the absence of any affirmative showing that defendant fully comprehended and voluntarily waived his constitutional rights, the plea must be vacated as invalid … . … "A sentencing court may not impose an enhanced sentence unless it has informed the defendant of specific conditions that the defendant must abide by or risk such enhancement, or give the defendant an opportunity to withdraw his or her plea before the enhanced sentence is imposed" … . The plea colloquy reflects that, by pleading guilty, the People would recommend that defendant be sentenced to concurrent prison terms of 3½ years … . … [T]he court abruptly sentenced defendant to concurrent prison terms of nine years … and directed that the sentence be served under the supervision of Willard. County Court abused its authority by changing the terms of the plea agreement … . … [T]he court, without any discussion with the parties, unilaterally conditioned defendant's opportunity to participate in the Willard program on accepting the maximum nine-year sentence. Additionally, the record does not indicate that defendant was given the opportunity to withdraw his plea … . Because defendant was not informed of, or actually understood, the ramifications of the sentencing

change nor was provided with the opportunity to withdraw his guilty plea, the plea was invalid …". 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.

GUILTY PLEAS.

DEFENDANT, AT THE PLEA PROCEEDINGS, WAS NOT INFORMED OF THE PERIOD OF POSTRELEASE SUPERVISION TO BE IMPOSED OR THE MAXIMUM WHICH COULD BE IMPOSED; GUILTY PLEA VACATED (SECOND DEPT).

The Second Department, vacating defendant's guilty plea, noted County Court did not specify the period of postrelease supervision which would be imposed, or the maximum which could be imposed at the plea proceedings:

"'[A] trial court has the constitutional duty to ensure that a defendant, before pleading guilty, has a full understanding of what the plea connotes and its consequences'" … . "To meet due process requirements, a defendant 'must be aware of the postrelease supervision component of that sentence in order to knowingly, voluntarily and intelligently choose among alternative courses of action'" … , and "[w]ithout such procedures, vacatur of the plea is required" … . It is not enough for a court to generally inform a defendant that a term of postrelease supervision will be imposed as a part of the sentence … . Rather, for a plea of guilty to be knowing, intelligent, and voluntary, the court must inform the defendant of either the specific period of postrelease supervision that will be imposed or, at the least, the maximum potential duration of postrelease supervision that may be imposed … .

Here, at the plea proceeding, the County Court did not specify the period of postrelease supervision to be imposed or, alternatively, the maximum potential duration of postrelease supervision that could be imposed. The court's failure to so advise the defendant prevented his plea from being knowing, voluntary, and intelligent. People v Cabrera, 2020 NY Slip Op 08074, Second Dept 12-30-20

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).

The First Department noted that a photograph of defendant with a small handgun taken six weeks before the charged shooting was properly admitted in evidence:

A photograph of defendant holding a small handgun, taken approximately six weeks before the charged shooting, and recovered from defendant's phone pursuant to the warrant, was properly admitted. It could be inferred from video footage introduced at trial that a small handgun was used in the shooting. As in People v Alexander (169 AD3d 571 [1st Dept 2019], lv denied 34 NY3d 927 [2019]), the photograph was "relevant to show that defendant had access to such a weapon, thus tending to establish his identity as the perpetrator, and there was no requirement of proof that the [firearm] in the photograph was the actual weapon used in the crime" … . 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.

INCLUSORY CONCURRENT COUNTS.

ASSAULT THIRD IS AN INCLUSORY CONCURRENT COUNT OF ASSAULT SECOND (SECOND DEPT).

The Second Department noted that assault third is an inclusory concurrent count of assault second:

… [T]he defendant's conviction of assault in the third degree must be vacated as an inclusory concurrent count of assault in the second degree (see CPL 300.40[3][b]; Penal

Law §§ 120.05[2]; 120.00[1] …). People v Cullins, 2020 NY Slip Op 07219, Second Dept 12-2-20

INCLUSORY CONCURRENT COUNTS.

ATTEMPTED SECOND DEGREE MURDER COUNT MUST BE DISMISSED AS AN INCLUSORY CONCURRENT COUNT OF ATTEMPTED FIRST DEGREE MURDER (FOURTH DEPT).

The Fourth Department determined the attempted second degree murder count must be dismissed as an inclusory concurrent count of attempted first degred murder:

… [T]he part of the judgment convicting defendant of attempted murder in the second degree must be reversed and count two of the indictment dismissed because attempted murder in the second degree is an inclusory concurrent count of attempted murder in the first degree … . People v Mcdonald, 2020 NY Slip Op 07825, Fourth Dept 12-23-20

INCLUSORY CONCURRENT COUNTS.

CRIMINAL POSSESSION OF A WEAPON SECOND DEGREE AND CRIMINAL POSSESSION OF A FIREARM ARE INCLUSORY CONCURRENT COUNTS (SECOND DEPT).

The Second Department determined criminal possession of a weapon in the second degree and criminal possession of a firearm are inclusory concurrent counts:

… [B]ecause the charge of criminal possession of a weapon in the second degree and the charge of criminal possession of firearm are inclusory concurrent counts, the conviction of criminal possession of a firearm, as well as the sentence imposed thereon, must be vacated, and that count of the indictment must be dismissed … . People v Nicoletti, 2020 NY Slip Op 07401, Second Dept 12-9-20

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).

The Court of Appeals, reversing the Appellate Division, determined the omission of the time of the incident from the waiver of indictment form was a defect waived by the guilty plea:

Shortly after the Appellate Division rendered its decision, we held in People v Lang (34 NY3d 545, 567 [2019]) that any "omission from the indictment waiver form of non-elemental factual information that is not necessary for a jurisdictionally-sound indictment is [] forfeited by a guilty plea" and "must be raised in the trial court" … . The time of incident is not an element of second-degree criminal possession of a weapon (Penal Law § 265.03 [2]), and defendant was on notice of the crime charged. Therefore, Lang controls. 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).

The Third Department, reversing defendant's conviction and ordering a new trial determined: (1) the duplicitous counts of the indictment should have been dismissed pre-trial, not post-trial; (2) the evidence of similar uncharged offenses under Molineux should not have been admitted as "background evidence." The defendant was charged with sexual abuse of a child. With the exception of one incident (count 1), the child was not able to pinpoint when the abuse happened. All but count 1 were rendered duplicitous by the grand jury testimony (indicating that more than one offense occurred in the one-month

time-frame of the indictment counts). In addition, the similar uncharged allegations were too prejudicial to be allowed under Molineux:

"[U]nder . . . Molineux jurisprudence, we begin with the premise that uncharged crimes are inadmissible and, from there, carve out exceptions" … . The proffered Molineux evidence was not necessary to resolve any ambiguity as to count 1, and thus was beyond the Molineux exception for background information as provided by County Court in its ruling … . If the court had dismissed counts 2 through 13 as duplicitous prior to the People's presentation of their case-in-chief, that likely would have changed the court's calculus as to the admission of the victim's testimony regarding uncharged crimes — including whether to allow testimony regarding the incidents referred to in those dismissed counts, which would no longer be direct evidence of charged crimes. Even if the testimony regarding the uncharged criminal conduct was permissible for a nonpropensity purpose, its prejudicial nature outweighed the minimal probative value that may be attributed to it as to count 1 … . While in some circumstances the undue prejudice resulting from Molineux evidence may be mitigated by a limiting instruction, here such an instruction was only provided once in the final charge to the jury, and not at the time of the victim's testimony, despite County Court having indicated that those instructions would be provided at the time that such evidence was admitted … . 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).

The First Department, reversing defendant's (Feliciano's) murder and robbery convictions, determined the "dual jury" procedure used to try Feliciano and his co-defendant, Roberts, deprived Feliciano of a fair trial. Feliciano's defense was he was with Roberts when Roberts committed the crimes but did not participate. Roberts' defense

was he did not participate in the crimes at all. Feliciano was convicted and Roberts was acquitted:

In reviewing Feliciano's claim on appeal that he was entitled to a severance, we are required to consider the entire record, including, retrospectively, the full trial record … . Feliciano must demonstrate that he was unduly prejudiced by the severance and that a joint trial "substantially impair[ed defendant's] defense" … . "[T]he level of prejudice required to override the strong public policy favoring joinder" exists "where the core of each defense is in irreconcilable conflict with the other and where there is a significant danger, as both defenses are portrayed to the trial court, that the conflict alone would lead the jury to infer defendant's guilt" … . A trial before dual juries, which constitutes a modified form of severance, is to be used sparingly and is evaluated under standards for reviewing severance motions generally, as set forth above … . * * *

[Damaging] … testimony and evidence was unsolicited by the People and would never have been presented to Feliciano's jury, but for Roberts' cross examination. Roberts' counsel's pursuit of his client's defense, contemporaneously undermined Feliciano's. Accordingly, he effectively became a "second prosecutor" and was able to impeach … witnesses to Feliciano's detriment in a manner that the People were unable to. Under these circumstances, a dual jury trial was improper as it did not prevent Feliciano from being prejudiced by Roberts' antagonistic defense … . 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).

The First Department, over a dissent, determined the trial court properly replaced a juror for misconduct with an alternate jury who had been excused and sent home:

The plain language of CPL 270.35 (1) states, in relevant part, that

“If at any time after the trial jury has been sworn and before the rendition of its verdict, a juror is unable to continue serving . . . the court must discharge such juror. If an alternate juror or jurors are available for service, the court must order that the discharged juror be replaced by the alternate juror whose name was first drawn and called, provided, however, that if the trial jury has begun its deliberations, the defendant must consent to such replacement.”

Thus, according to the plain language of CPL 270.35 (1), the trial court was required to decide if the alternate was “available for service,” and did not require the consent of defendant given that the jury had not begun its deliberations. 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.

LESSER INCLUDED COUNTS.

SECOND DEGREE MURDER COUNT DISMISSED A LESSER INCLUDED COUNT OF FIRST DEGREE MURDER (FOURTH DEPT).

The Fourth Department dismissed the second degree murder count as a lesser included count of first degree murder. People v Beard, 2020 NY Slip Op 07763, Fourth Dept 12-23-20

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).

The Second Department, reversing the conviction, over a dissent, determined the defendant should not have been removed form the courtroom without first issuing a warning. The defendant was removed after disrupting the court as the verdict was being delivered:

After the jury foreperson announced "guilty" on the final charge (count 4) of criminal possession of a weapon in the second degree, the clerk proceeded to read back the verdict in order to inquire collectively of the jurors whether such was their verdict (see CPL 310.80). Before the jurors could respond, the defendant disrupted the proceeding by using profanity and declaring his innocence. The trial court immediately directed that the court officers remove the defendant from the courtroom. The defendant repeated his protestation and again the court directed that he be removed from the courtroom. Three more times the defendant either proclaimed his innocence or uttered a one-word profanity, and in each instance the court responded by directing that the defendant be removed from the courtroom. At some point during the foregoing exchanges, the defendant was apparently removed from the courtroom. The clerk read the verdict again, and made the requisite inquiry, to which the jurors responded. The defendant's counsel thereafter requested that the jury be polled … . The jury was polled and the verdict was entered. …

A criminal defendant's right to be present at all material stages of trial is encompassed within the confrontation clauses of the Federal and State Constitutions … and the New York Criminal Procedure Law … . The defendant's outbursts and removal from the courtroom occurred during a material stage of the trial, as the jury had not yet been polled and the verdict had therefore not yet been entered … . However, "[a] defendant's right to be present during trial is not absolute," and "[t]he defendant may be removed from the courtroom if, after being warned by the trial court, the disruptive conduct continues" … . 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).

The First Department, in a full-fledged opinion by Justice Renwick, determined defendant's guilty plea should be vacated because he was under the impression he was avoiding a 45 year sentence when, in fact, he could have been sentenced to a maximum of 20 years. Although defendant did not move to withdraw his plea which is usually required to preserve the issue for appeal, here the defendant had no knowledge of the ground for a motion to withdraw:

… [T]he court repeatedly told defendant that he faced a possible sentence of 45 years, but not that defendant's sentence would ultimately be reduced to 20 years. …

The Court of Appeals … has carved out an exception to the preservation doctrine, in certain instances. "because of the 'actual or practical unavailability of either a motion to withdraw the plea' or a 'motion to vacate the judgment of conviction,'" reasoning that " 'a defendant can hardly be expected to move to withdraw his plea on a ground of which he has no knowledge' " … . …

Here, the court's misinformation had great significance. The court repeatedly warned defendant that he could face 45 years in prison if he proceeded to trial on all three of his open burglary cases, and neither the prosecutor nor defense counsel corrected the record. Moreover, defendant, who had already had a failed allocution, did not plead guilty until just before jury selection was to begin, and after the court had repeatedly warned him that he could face as much as 45 years in jail if he proceeded to trial and was convicted. 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).

The Second Department, reducing defendant's sentence imposed after a second trial, determined the sentence imposed after the first trial should not have been "enhanced:"

"Under the Due Process Clause of the New York State Constitution, a presumption of vindictiveness applies where a defendant successfully appeals an initial conviction, and is re-tried, convicted, and given a greater sentence than that imposed after the initial conviction" … . "[C]riminal defendants should not be penalized for exercising their right to appeal" … . Where, as here, the defendant is convicted of the same count at a new trial following a successful appeal, the sentencing court may not impose a higher sentence unless its reasons for doing so affirmatively appear on the record, and are "'based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding'" … . Inasmuch as the prosecutor asserted that the defendant demonstrated no remorse for his crimes, the record reflects only that the defendant pleaded not guilty to the charges and exercised his constitutional right to remain silent … . In addition, the ongoing impact of the crime on the complainant does not constitute "identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding" … . Accordingly, the court should not have imposed the higher sentence. 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).

The Second Department, reducing defendant's sentence, over a dissent, determined the sentencing judge reacted to criticism of how the trial was conducted:

The Supreme Court imposed the maximum period of imprisonment of 4½ years' incarceration … and 2 years postrelease supervision … , apparently based upon the defendant's claim during the presentence interview that the judge, the prosecutor, and the jury showed favoritism to the arresting officer, and the defendant did not like how the trial was conducted. At sentencing, when the court asked the defendant to explain that statement, the defendant stated that, although he thought the jury showed "favoritism," he wanted "to move on from this" and he"learned [his] lesson." The court, in response, stated that although "[o]bviously this is not the crime of the century," and "you're entitled to your opinion," that opinion demonstrated a "willingness not to accept any responsibility."

"An intermediate appellate court has broad, plenary power to modify a sentence that is unduly harsh or severe under the circumstances" … . Contrary to the conclusion of our dissenting colleague, that power "may be exercised, if the interest of justice warrants, without deference to the sentence court" … , especially where, as here, the sentencing court acted, at least in part, out of umbrage to criticism as to how the trial was conducted. In this case, considering the nonviolent nature of the crime involving a relatively small amount of drugs in the defendant's possession, the defendant's reported substance abuse issues, and the fact that the defendant is married and has a young child, the sentence was excessive to the extent indicated herein … . 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.

SENTENCING, YOUTHFUL OFFENDERS.

CONSIDERING ALL THE MITIGATING FACTORS, DEFENDANT SHOULD HAVE BEEN ADJUDICATED A YOUTHFUL OFFENDER (FOURTH DEPT).

The Fourth Department, reversing defendant's assault conviction in the interest of justice and adjudicating defendant a youthful offender, in a full-fledged, comprehensive opinion by Justice Troutman, determined mitigating factors supported youthful offender status. Defendant was attacked by another high school student and didn't realize the victim, a teacher, had intervened. The defendant injured the teacher's hand with a knife. The Fourth Department went through all the so-called Cruikshank mitigating factors (People v Cruickshank, 105 AD2d 325, 334 [3d Dept 1985]) and further noted the sentencing court did not abuse its discretion by considering additional factors not mentioned in Cruikshank. All involved, including the prosecutor, the victim and the probation department, had recommended a youthful offender adjudication:

In addition to the Cruickshank factors, the parties raised and the court considered additional matters related to equity and discrimination. We reject defendant's contention that the court abused its discretion in considering matters outside the Cruickshank factors. The applicable precedent states that the factors that must be considered "include" those nine factors … , and thus, as a matter of logic, those factors were never meant to be an exhaustive list of considerations. We conclude that matters of equity and discrimination are appropriate for sentencing courts to consider. Although we do not conclude that the court abused its discretion, we urge future courts to consider whether a defendant may be facing discrimination based on protected characteristics such as race or gender and to take an intersectional approach by considering the combined effect of the defendant's specific characteristics and any bias that may arise therefrom … . Here, the prosecutor employed appropriate and effective restorative justice techniques and advocated for the result he believed just. We note that "prosecutors have 'special responsibilities . . . to safeguard the integrity of criminal proceedings and fairness in the criminal process' " … , and this prosecutor deserves to be commended for discharging those responsibilities here. People v Z.H., 2020 NY Slip Op 07824,, Fourth Dept 12-23-20

SENTENCING.

DESPITE THE HORRIFIC NATURE OF THE CRIME, DEFENDANT'S SENTENCE WAS REDUCED BECAUSE OF HIS MENTAL ILLNESS AND INTELLECTUAL DISABILITY (FIRST DEPT).

The First Department, despite the horrific nature of the crime in this attempted murder and robbery case, over a dissent, reduced defendant's sentence from 14 to 10 years because of his mental illness and intellectually disability:

This Court takes very seriously the severity of the injuries inflicted on the two victims in this case, and our reduction of defendant's prison sentence in no way diminishes our horror at the pain and suffering they endured at the hands of defendant and his codefendants. However, based on the record before us, we find that defendant presents an extraordinary circumstance meriting the use of our interest of justice powers to reduce his prison sentence.

First, the record unequivocally shows that defendant has suffered intellectual and mental deficiencies since his childhood, which our Court has held renders a defendant's conduct less blameworthy … . Second, defendant's cognitive disabilities rendered him overly susceptible to influence and manipulation … . Here, prior to the incident defendant had no felony or misdemeanor convictions and only one youthful offender adjudication stemming from a school fight. For the first 19 years of his life, defendant exhibited no inclination towards committing crime, let alone violent crime. This strongly suggests that defendant's association with codefendant Torres, which began just one to two years prior to the incident, played an outsize influence on defendant and his role in the attacks. Third, defendant was 19 at the time of the incident, which, in combination with his cognitive deficiencies, rendered him even more susceptible to negative influences … . We have long held that a defendant's young age may render the individual less culpable … . Finally, in research cited by defendant, people with serious psychiatric disorders are more likely to be violently victimized and housed in segregation while incarcerated. … As defendant himself stated in his CPL article 730 examination, he attempted suicide over 35 times while at Rikers Island. We find, therefore, that an extended term of incarceration would have an extremely harsh impact on defendant. People v Watt, 2020 NY Slip Op 07721, First Dept 12-22-20

SENTENCING.

THE SENTENCING COURT DID NOT CONSIDER THE REQUIRED FACTORS WHEN SENTENCING DEFENDANT AFTER DEFENDANT'S VIOLATION OF THE TERMS OF INTERIM PROBATION; SENTENCE VACATED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the sentencing court did not take the necessary factors into consideration in sentencing defendant after defendant violated the terms of interim probation:

We agree with defendant that the court failed to exercise its discretion at sentencing. "[T]he sentencing discretion is a matter committed to the exercise of the court's discretion . . . made only after careful consideration of all facts available at the time of sentencing" … . Due consideration should be "given to, among other things, the crime charged, the particular circumstances of the individual before the court and the purpose of a penal sanction, i.e., societal protection, rehabilitation and deterrence" … .

Here, the court initially imposed a sentence of interim probation and advised defendant that, if he violated the terms of interim probation, the court would impose a term of 4½ years' incarceration with 3 years' postrelease supervision. When defendant violated the terms of interim probation, the court informed defendant at sentencing that it would not consider a lesser sentence because "your word is your word. That was the deal. I don't think that would speak well for the program nor would it speak well of me . . . I'd lose confidence in myself." The court further stated that "[w]e made an agreement, we made a deal . . . I'm going to abide by that deal." The sentencing transcript is devoid of any indication that the court considered the crime charged, defendant's circumstances, or the purpose of the penal sanction … . Nor is there any indication that the court considered the presentence report, which was prepared after the plea. We conclude that "the sentencing transcript, read in its entirety, does not reflect that the court conducted the requisite discretionary analysis" … . People v Ruise, 2020 NY Slip Op 07785, Fourth Dept 12-23-20

SEX OFFENDER REGISTRATION ACT (SORA).

DEFENDANT WAS ENTITLED TO A DOWNWARD DEPARTURE FROM LEVEL TWO TO LEVEL ONE IN THIS CHILD PORNOGRAPHY CASE (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant was entitled to a downward departure reducing his risk level from two to one. Defendant was convicted of possession of child pornography. The Court of Appeals has warned that over assessment of the risk should be avoided in child pornography cases:

… A preponderance of the evidence established that scoring under factors three and seven overassessed the risk posed by defendant, and that he should receive a downward departure (see Gillotti, 23 NY3d at 863-64). As the transcript of the federal plea proceeding makes clear, the federal prosecutor characterized defendant's case as being on the very low end of the child pornography possession spectrum and did not contest a nonincarceratory disposition notwithstanding that the federal guidelines recommended a sentence of 33 to 41 months. The federal district court provided a long explanation on the record of why defendant was deserving of a nonincarceratory disposition, including his lifetime of hard work, his dedication to family, the many character letters provided, and the limited time period in which defendant was actually viewing child pornography. The Probation Department also recommended a nonincarceratory disposition in its presentencing report. An independent psychological evaluation of defendant found no cognitive impairment or compulsion that would suggest that defendant was likely to reoffend. In sum, this is the kind of case that Gillotti envisioned warranting a downward departure in order to avoid overassessing risk by rote application of factors three and seven. People v Gonzalez, 2020 NY Slip Op 07468, First Dept 12-10-20

SEX OFFENDER REGISTRATION ACT (SORA).

THE SEXUAL INTERCOURSE WAS DEEMED NONCONSENSUAL SOLELY BECAUSE THE VICTIM WAS 14; THE DEFENDANT WAS 27; DEFENDANT WAS NOT ENTITLED TO A DOWNWARD DEPARTURE TO RISK LEVEL ONE; THERE WAS A SUBSTANTIVE DISSENT (FIRST DEPT).

The First Department, over a dissent, determined defendant was not entitled to a downward risk level departure from level two to level one. The defendant was 27 when he had sexual intercourse with the fourteen-year-old victim. The majority argued the age difference precluded a departure:

The record shows that this 27 year-old defendant engaged in nonconsensual sexual intercourse with the victim, who was 14 years old, the only relevant crime considered by the SORA court regarding his risk level designation. * * *

While courts have recognized that sexual conduct that was nonconsensual solely by virtue of age may result in an over-assessment in risk level designation, those cases did not involve a defendant who was nearly twice as old as the victim, as in this case … . People v Romulus, 2020 NY Slip Op 07512, First Dept 12-15-20

SEX OFFENDER REGISTRATION ACT (SORA).

UPWARD DEPARTURE SUPPORTED BY EVIDENCE DEFENDANT COMMITTED RAPE TO TAKE REVENGE UPON SOMEONE OTHER THAN THE VICTIM; THE FACT DEFENDANT HAD BEEN DEPORTED DID NOT RENDER THE APPEAL MOOT (CT APP).

The Court of Appeals, in a brief memorandum decision, upheld the Appellate Division's finding that the upward departure was justified because it was based on a risk factor not addressed the Sex Offender Registration Act (SORA) Guidelines. The court noted that the fact defendant had been deported did not render the appeal moot:

Under the circumstances presented here, we reject the People's argument that defendant's appeal is rendered moot by his deportation … . On the merits, we conclude that it was not an abuse of discretion for the Appellate Division to sustain the upward departure based on the People's proof that defendant raped the victim in order to take

revenge upon someone other than the victim—a risk factor not adequately captured by the Guidelines. People v Rosario, 2020 NY Slip Op 07688, CtApp 12-22-20

STREET STOPS, APPEAL, WAIVER OF.

THE WAIVER OF APPEAL WAS INVALID BECAUSE THE JUDGE SUGGESTED THE WAIVER WAS AN ABSOLUTE BAR TO APPEAL; THE OFFICER WHO APPROACHED DEFENDANT ON THE STREET WAS NOT JUSTIFIED IN REACHING FOR AN OBJECT IN DEFENDANT'S SWEATSHIRT POCKET; DEFENDANT'S FLIGHT AND DISCARDING OF THE WEAPON WAS NOT INDEPENDENT OF THE OFFICER'S UNJUSTIFIED ACTIONS; THE GUN SHOULD HAVE BEEN SUPPRESSED (SECOND DEPT).

The Second Department, finding the waiver of appeal invalid, granted defendant's suppression motion and dismissed the indictment. The officer who approached defendant saw the shape of something heavy in defendant's sweatshirt pocket, said "what's this" and reached for it. At that point defendant ran and discarded a weapon:

When explaining the waiver of the right to appeal, the Supreme Court stated, inter alia, that as a result of the waiver, the defendant was "giving up [his] independent right to appeal [his] case to a higher court," and that the case "ends here" upon sentencing. These statements incorrectly suggested that the waiver may be an absolute bar to the taking of an appeal … . …

The officer was justified in conducting a common-law inquiry, and the officer was permitted to ask the defendant if he was carrying a weapon … . However, the officer was not justified in attempting to touch the defendant's sweatshirt pocket as a minimally intrusive self-protective measure, since the defendant did not engage in any conduct justifying such an intrusion … . The defendant's response of fleeing and discarding the gun was not "an independent act involving a calculated risk attenuated from the underlying [illegal] police conduct" … . People v Soler, 2020 NY Slip Op 07404, Second Dept 12-9-20

Practice Point: Although the police officer was justified in approaching the defendant and asking if he was carrying a weapon, the officer was not justified in reaching out to touch

the object in defendant's pocket. The weapon should have been suppressed despite defendant's flight.

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).

The Second Department, in a full-fledged opinion by Justice Chambers raising a question of first impression, determined the police did not violate the New York Constitution when they entered the home looking for defendant and made a warrantless arrest. The police had probable cause when they went to the home and defense counsel argued they did not get a warrant in order to delay the attachment of the right to counsel and obtain statements. The Second Department determined there was no Payton violation because the motion court credited the police testimony claiming they entered the home with the consent of the person who answered the door:

… [T]he defendant's appellate counsel specifically contends that where the police, armed with probable cause and ample time to obtain an arrest warrant, nevertheless choose to make a warrantless arrest in the absence of exigent circumstances, their conduct must be deemed to violate the defendant's indelible right to counsel under the New York State Constitution (see People v Harris, 77 NY2d at 440).

While this issue presents what appears to be an important constitutional question of first impression, we see no viable path to resolving this question in the defendant's favor within the current framework of New York law. Although the hearing evidence fully supports the defendant's view that the police went to the subject residence with the intent of making a warrantless arrest—indeed, the People did not present any evidence to suggest any alternative motive for the early morning visit—New York law does not presently recognize a "new category of Payton violations based on subjective police intent" (… People v Harris, 77 NY2d 434). Therefore, we decline to find that the police conduct in this case

amounted to a violation of the defendant's constitutional rights under Payton and/or Harris.

Moreover, since the hearing court's supportable finding of voluntary consent negates the defendant's Payton claim, we need not consider the defendant's further contention regarding the causal link between the warrantless arrest and his subsequent statements to the police. 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, INVOLUTARY 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).

The Court of Appeals, in a full-fledged opinion by Judge Rivera, over a three-judge dissent, reversing defendant's conviction, determined there was a reasonable view of the evidence which supported a jury instruction on voluntary (involuntary) possession of a weapon. In addition to actual and constructive possession, there is the concept of involuntary possession. Both actual and constructive possession can be involuntary if it is so fleeting that the defendant was not able to terminate possession. Defendant argued he was a guest for the night in the house where the weapon was found and did not possess it all, either actually or constructively. The Court of Appeals noted that "involuntary possession" conflicted with "no possession at all," but the jury still should have been instructed on involuntary possession because there was evidence to support the instruction:

The distinction among constructive, knowing, and voluntary possession that defendant emphasizes is reflected in the Criminal Jury Instructions' model charge on voluntary

possession, which provides that "[p]ossession . . . is voluntary when the possessor was aware of [their] physical possession or control . . . for a sufficient period to have been able to terminate the possession" (CJI2d [NY] Voluntary Possession § 15.00 [2] … . * * *

… [T]he trial court denied the charge here, not because the requested charge lacked evidentiary support, but because the court considered the proposed language more confusing than helpful. … . This determination was in error because the requested charge did not inject confusion into the instructions. Rather, it addressed an entirely different aspect of the charged possessory crime: the temporal requirement of voluntary possession. Indeed, the requested charge would have clarified the law because the charge, as erroneously given, allowed the jury to conclude that if defendant had control over the area where the gun was found—i.e., the bedroom—then he had constructive possession of the gun, regardless of how long he was actually aware of its presence. This is not an accurate statement of the relevant law where, as here, there is a reasonable view of the evidence that the possession may not have been voluntary. 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).

The Court of Appeals, in a full-fledged opinion by Judge Stein, over two concurring opinions, determined defendant was not entitled to a jury instruction on temporary and lawful possession of a firearm. Defendant was leaving a friend's apartment building when he saw a man, Carson, pull a gun out of his pocket. Defendant and Carson had a history of violent confrontations, including shootings. Defendant went back to his friend's (Foe's) apartment. Foe picked up a loaded gun and offered to walk defendant out of the building.

When they got to the lobby Foe handed defendant the gun. When defendant saw Carson he believed Carson was about to shoot him and defendant shot Carson and a bystander:

… "[A] defendant may not be guilty of unlawful possession if the jury finds that [the defendant] found the weapon shortly before [the defendant's] possession of it was discovered and [the defendant] intended to turn it over to the authorities" … . We have also indicated that temporary and lawful possession may result where a defendant "took [the firearm] from an assailant in the course of a fight" … and the circumstances do not otherwise evince an intent to maintain unlawful possession of the weapon . In such scenarios, "[t]he innocent nature of the possession negates . . . the criminal act of possession" … . Ultimately, whether the weapon is found fortuitously or obtained by disarming an attacker, "the underlying purpose of the charge is to foster a civic duty on the part of citizens to surrender dangerous weapons to the police" … . …

… [D]efendant's possession did not "result temporarily and incidentally from the performance of some lawful act, [such] as disarming a wrongful possessor" or unexpected discovery … . Rather, under the circumstances presented here, defendant's contention that his possession should be legally excused on the grounds of self-defense amounts to a claim that he was entitled to possess the weapon for his protection. Even crediting defendant's testimony that he had been confronted by Carson at the building's exit earlier and that Carson had displayed a firearm at that time, defendant testified that he then safely retreated to Foe's apartment. There was no evidence suggesting that Carson chased after defendant when he re-entered the building, or that Carson had any awareness of defendant's location in the building. Further, defendant admitted that he accepted possession of the firearm from Foe in the stairwell, at a time when he was unaware of Carson's whereabouts and was not facing any imminent threat to his safety. Defendant then chose to retain possession of the firearm and to enter the lobby with the weapon in his hand. Under these circumstances, the only reasonable conclusion to be drawn from the evidence is that defendant armed himself in anticipation of a potential confrontation; however, the law is clear that defendant "may not avoid the criminal [possession] charge by claiming that he possessed the weapon for his protection" … . 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).

The Fourth Department, reversing the witness tampering conviction and dismissing the indictment, determined the evidence was legally insufficient:

On appeal from a judgment convicting him upon a jury verdict of tampering with a witness in the third degree … , defendant contends that the conviction is based upon legally insufficient evidence. We agree. Although the evidence established that defendant assaulted the victim in violation of an order of protection and a few days later left the victim voicemails threatening her with violence if she pressed charges against him, defendant had not yet been arrested or charged with a crime in connection with the violation of the order of protection at the time he left the voicemails. Thus, at that time, the victim was not "about to be called as a witness in a criminal proceeding" … . 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.