

NEW YORK APPELLATE DIGEST, LLC

A Succinct Collection of the Salient Issues Addressed in the Civil Procedure
Decisions Released by our New York State Appellate Courts in March
2021. The Entries in the Table of Contents Link to the Summaries Which Link
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Criminal Law Practice
Newsletter
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APPEALS, ATTORNEYS, JUDGES, INEFFECTIVE ASSISTANCE, EVIDENCE.

DEFENDANT WAS CONVICTED OF FELONY MURDER, TWO COUNTS OF ROBBERY AND CRIMINAL POSSESSION OF A WEAPON BASED PRIMARILY ON HIS CONFESSION; THE ROBBERY CONVICTIONS WERE AGAINST THE WEIGHT OF THE EVIDENCE; THE JUDGE DID NOT MAKE THE REQUIRED MINIMAL INQUIRY WHEN DEFENDANT REQUESTED NEW COUNSEL; COUNSEL WERE INEFFECTIVE FOR FAILING TO REQUEST THE REDACTION OF DEFENDANT'S VIDEO STATEMENT; NEW TRIAL ORDERED ON THE FELONY MURDER AND CRIMINAL POSSESSION OF A WEAPON COUNTS (FOURTH DEPT).

People v Stackhouse, 2021 NY Slip Op 01883, Fourth Dept 3-26-21

Practice Point: The defendant was charged with felony murder based upon his confession to stabbing the victim during the commission of a robbery. The evidence of defendant's participation in the robbery was based entirely on his confession, but that aspect of the confession was not corroborated. So the robbery convictions were against the weight of the evidence. But defendant's confession to the murder was corroborated by the stabbing death of the victim. So, despite the dismissal of the underlying robbery (felony) counts, the felony murder count remains and will be the subject of defendant's new trial.

APPEALS, CONSTRUCTIVE POSSESSION.

THE PROOF OF CONSTRUCTIVE POSSESSION OF WEAPONS WAS LEGALLY INSUFFICIENT (FOURTH DEPT).

[People v Lora, 2021 NY Slip Op 01597, Fourth Dept 3-19-21](#)

Practice Point: A defendant's constructive possession of a weapon requires proof the defendant exercised dominion and control over area where the weapon was found. For instance, proof defendant lived in the house, i.e., keys, personal effects, mail, etc., may be sufficient. But proof of the defendant's presence in the house where the weapon is found is not enough.

APPEALS, ACCOMPLICE LIABILITY.

DEFENDANT'S CONVICTIONS RELATING TO THE CODEFENDANT'S POSSESSION AND FIRING OF A WEAPON DURING A ROBBERY AT WHICH DEFENDANT WAS NOT PRESENT WERE BASED UPON LEGALLY INSUFFICIENT EVIDENCE; DEFENDANT'S CONVICTION OF POSSESSION OF A WEAPON BASED UPON THE CODEFENDANT'S GETTING INTO DEFENDANT'S CAR WITH THE WEAPON WAS AGAINST THE WEIGHT OF THE EVIDENCE (FOURTH DEPT).

[People v Hawkins, 2021 NY Slip Op 01882, Fourth Dept 3-26-21](#)

Practice Point: Defendant's presence in his car two blocks from where the co-defendant committed a robbery during which shots were fired, without any other evidence of defendant's sharing of the co-defendant's intent, was not legally sufficient evidence of reckless endangerment under an accomplice theory. The reckless endangerment charge, therefore, should not have been sent to the jury. The evidence of criminal possession of a weapon, based upon the co-defendant's getting into the defendant's car with the weapon after the robbery, was deemed legally sufficient to support criminal possession of a weapon under an accomplice theory, but, in the absence of any other evidence of shared intent, the criminal possession of a weapon conviction was deemed against the weight of the evidence. The distinction

is hard to understand. The court is saying the evidence was strong enough to allow the criminal possession of a weapon charge to go to the jury, but not strong enough to support a conviction (?)

APPEALS, PRESERVATION OF ERROR, CONTINUING CRIME.

STATEMENTS MADE AFTER DEFENDANT ASSERTED HIS RIGHT TO REMAIN SILENT SHOULD HAVE BEEN SUPPRESSED, BUT THE ERROR WAS HARMLESS; CRIMINAL POSSESSION OF A WEAPON WAS A CONTINUING CRIME AND SHOULD HAVE BEEN CHARGED AS A SINGLE COUNT, NOT FOUR COUNTS; AN OBJECTION OR A MOTION FOR A MISTRIAL IS NECESSARY TO PRESERVE AN ERROR AFTER A CURATIVE INSTRUCTION HAS BEEN GIVEN (FOURTH DEPT).

[People v Johnston, 2021 NY Slip Op 01632, Fourth Dept 3-19-21](#)

Practice Point: If, in response to an objection, the court issues a curative jury instruction which is not deemed sufficient, another objection or a mistrial motion must be made to preserve the issue for appeal.

APPEALS, SENTENCING.

THE APPEAL WAIVER WAS INVALID AND THE SENTENCE WAS UNDULY HARSH (FOURTH DEPT).

[People v Smith, 2021 NY Slip Op 01666, Fourth Dept 3-19-21](#)

Practice Point: If the waiver of appeal gives the defendant the impression the waiver is an absolute bar to appeal, the waiver is invalid. For example, the Model Colloquy states: “Among the limited number of claims that will survive the waiver of the right to appeal are: the voluntariness of this plea, the validity and voluntariness of this waiver, the legality of the sentence, the jurisdiction of this Court, a defendant's competency to stand trial, and a defendant's constitutional right to a speedy trial.”

APPEALS, TRIAL ORDER OF DISMISSAL.

AN APPELLATE COURT CANNOT CONSIDER A MOTION NOT RULED UPON BELOW; MATTER REMITTED FOR A RULING ON DEFENDANT’S MOTION FOR A TRIAL ORDER OF DISMISSAL (FOURTH DEPT).

People v Johnson, 2021 NY Slip Op 01675, Fourth Dept 3-19-21

Practice Point: An appellate court cannot consider an issue that was not ruled upon below. Increasingly, the appellate courts are putting the appeal on hold and sending the case back for the required hearing or ruling.

ATTORNEYS, INEFFECTIVE ASSISTANCE.

DEFENSE COUNSEL’S STATING TO THE COURT THAT DEFENDANT’S MOTION TO WITHDRAW HIS GUILTY PLEA WAS FRIVOLOUS DEPRIVED DEFENDANT OF HIS RIGHT TO EFFECTIVE COUNSEL (SECOND DEPT).

People v Fellows, 2021 NY Slip Op 01269, Second Dept 3-3-21

Practice Point: Telling the judge that your client’s pro se motion to withdraw his or her guilty plea is meritless constitutes ineffective assistance.

CONFRONT WITNESSES, RIGHT TO, 710.30 NOTICE, MOLINEUX.

BASED UPON THE RIGHT TO CONFRONT AND CROSS-EXAMINE THE WITNESSES AGAINST HIM, DEFENDANT SHOULD HAVE BEEN PRESENT AT THE IN CAMERA INTERVIEW OF THE STATUTORY-RAPE COMPLAINANT TO DETERMINE THE RELEVANCE OF HER PSYCHIATRIC HISTORY (A MATERIAL STAGE OF THIS PROCEEDING); DEFENDANT’S STATEMENT FOR WHICH NO 710.30 NOTICE WAS PROVIDED SHOULD NOT HAVE BEEN ADMITTED; THE MOLINEUX EVIDENCE OF INTENT, MOTIVE, OR LACK OF MISTAKE WAS NOT RELEVANT TO STATUTORY RAPE (SECOND DEPT).

People v King, 2021 NY Slip Op 01996, Second Dept 3-31-21

Practice Point: In this statutory rape case, the judge’s in camera interview with the complainant to determine the relevancy of her psychiatric history was a material stage of the proceedings at which defendant had a right to be present. His absence requires a new trial. With respect to Molineux evidence, uncharged crimes or bad acts to demonstrate intent, motive, or an absence of mistake are irrelevant when the charge is statutory rape.

FAMILY LAW, SPEEDY TRIAL.

RESPONDENT JUVENILE WAS DENIED HER RIGHT TO A SPEEDY TRIAL IN THIS JUVENILE DELINQUENCY PROCEEDING (THIRD DEPT).

Matter of Erika UU., 2021 NY Slip Op 01543, Third Dept 3-18-21

Practice Point: This juvenile delinquency case demonstrates that the waiver of the right to a speedy trial in Family Court can expire if the purpose for the waiver is no longer relevant. Here the waiver was to allow a diagnostic evaluation but the juvenile was transferred to a facility where the evaluation could not be completed. The speedy trial waiver ended at that point.

GUILTY PLEAS.

DEFENDANT’S MOTION TO WITHDRAW HIS PLEA, AND THE CIRCUMSTANCES SURROUNDING HIS ACCEPTANCE OF THE PLEA OFFER, RAISED THE POSSIBILITY THAT DEFENDANT ACCEPTED THE PLEA OFFER TO MAKE SURE HIS BAIL WOULD NOT BE INCREASED; DEFENDANT WAS WORRIED ABOUT BEING ABLE TO FIND CARE FOR HIS THREE-YEAR-OLD SON; BAIL SHOULD NOT BE A CONSIDERATION IN PLEA NEGOTIATIONS; THE MOTION TO WITHDRAW THE PLEA SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING (FIRST DEPT).

People v Swain, 2021 NY Slip Op 01430, Second Dept 3-10-21

Practice Point: The defendant’s decision to plead guilty cannot be based in part on concerns about bail status. In such a case the guilty plea would not be voluntary.

HUNTLEY HEARINGS, JUDGES.

THE JUDGE’S REFUSAL TO HOLD A PRE-TRIAL HUNTLEY HEARING ON THE VOLUNTARINESS OF DEFENDANT’S STATEMENTS WAS REVERSIBLE ERROR (FOURTH DEPT).

People v Coffie, 2021 NY Slip Op 01884, Fourth Dept 3-26-21

Practice Point: It was reversible error for the judge to refuse to hold the Huntley hearing prior to trial, and then hold the hearing after some witnesses testified.

INCLUSORY CONCURRENT COUNT.

HERE THE ASSAULT SECOND DEGREE COUNT WAS AN INCLUSORY CONCURRENT COUNT OF ASSAULT ON A POLICE OFFICER; THE ASSAULT SECOND CONVICTION WAS REVERSED AND THE COUNT DISMISSED; THE TERM “INCLUSORY CONCURRENT COUNT” WAS EXPLAINED (FOURTH DEPT).

People v Felong, 2021 NY Slip Op 01901, Fourth Dept 3-26-21

Practice Point: A conviction of an inclusory concurrent count will be reversed. Two counts are concurrent when the sentences imposed for those counts must run concurrently. The counts are inclusory where the lesser count is included in the greater.

JURORS, BATSON, APPEALS.

THE THREE-STEP BATSON PROCEDURE WAS NOT FOLLOWED WHEN THE DEFENDANT OBJECTED TO THE PEOPLE’S PEREMPTORY CHALLENGE TO AN AFRICAN-AMERICAN PROSPECTIVE JUROR, MATTER REMITTED FOR FURTHER PROCEEDINGS TO SATISFY BATSON (FOURTH DEPT).

People v Singleton, 2021 NY Slip Op 01638, Fourth Dept 3-19-21

Practice Point: If a judge does not follow the mandated procedure for handling a Batson inquiry into a juror challenge, the appellate courts may hold the appeal and send the matter back for a Batson ruling employing the correct analysis.

JURY NOTES, JUDGES.

THE JURY NOTE INDICATED THE REQUEST WAS FOR THE TRANSCRIPT OF THE PHONE CALL, BUT THE JUDGE DESCRIBED THE NOTE AS A REQUEST FOR THE PHONE CALL AND PROVIDED THE JURY WITH THE RECORDING OF THE CALL; NEW TRIAL ORDERED (SECOND DEPT).

People v Dennis, 2021 NY Slip Op 01994, Second Dept 3-31-21

Practice Point: The judge must make counsel aware of all of the contents of a jury note. Otherwise counsel cannot make an informed argument about how to respond, depriving defendant of a fair trial.

MISSING WITNESS JURY INSTRUCTION.

THE ALLEGED VICTIM IN THIS RAPE PROSECUTION TESTIFIED SHE PROMPTLY NOTIFIED HER BOYFRIEND OF THE RAPE AND, A FEW HOURS LATER, NOTIFIED HER MOTHER; HER MOTHER TESTIFIED BUT THE BOYFRIEND WAS NOT CALLED; THE DEFENSE REQUEST FOR A MISSING WITNESS JURY INSTRUCTION SHOULD NOT HAVE BEEN DENIED ON THE GROUND THE TESTIMONY WOULD BE CUMULATIVE; THE CONCEPT OF “CUMULATIVE” EXPLAINED IN SOME DEPTH (FOURTH DEPT).

People v Garcia, 2021 NY Slip Op 01571, Fourth Dept 3-19-21

Practice Point: When a missing witness jury instruction is requested, the burden is on the party opposing the instruction to show the testimony would be cumulative, meaning the party must demonstrate that the witness’s testimony would offer nothing other than the evidence already in the record.

MOTION PAPERS, SUPPRESSION HEARING, APPEALS.

DEFENDANT’S SUPPRESSION MOTION PAPERS RAISED A FACTUAL ISSUE REQUIRING A HEARING, MATTER REMITTED (FOURTH DEPT).

People v White, 2021 NY Slip Op 01639, Fourth Dept 3-19-21

Practice Point: Here the appellate court determined the defendant’s motion papers raised a question of fact requiring a suppression hearing. In what is becoming a common practice, the appeal was held and the matter was sent back for the hearing.

PEREMPTORY CHALLENGES, PROCURING THE ABSENCE OF A WITNESS.

THE PEOPLE DID NOT DEMONSTRATE DEFENDANT PROCURED THE ABSENCE OF A WITNESS; THEREFORE THE WITNESS’S STATEMENT SHOULD NOT HAVE BEEN ADMITTED IN EVIDENCE; ALLOWING THE PEOPLE TO MAKE PEREMPTORY CHALLENGES AFTER THE DEFENSE WAS REVERSIBLE ERROR (SECOND DEPT).

People v Burgess, 2021 NY Slip Op 01993, Second Dept 3-31-21

People v Taylor, 2021 NY Slip Op 01998, Second Dept 3-31-21

Practice Point: Allowing the People to exercise peremptory challenges to jurors after the defense is reversible error.

REMOVAL OF DEFENDANT FROM COURTROOM.

WHEN DEFENDANT BECAME DISRUPTIVE JUST BEFORE THE PROSPECTIVE JURORS WERE BROUGHT IN THE JUDGE HAD HIM REMOVED FROM THE COURTROOM WITHOUT FIRST WARNING HIM AS REQUIRED BY STATUTE; NEW TRIAL ORDERED (FOURTH DEPT).

People v Brown, 2021 NY Slip Op 01668, Fourth Dept 3-19-21

Practice Point: If a judge removes a defendant from the courtroom for disruptive behavior without first warning the defendant he/she will be removed if he/she continues to disrupt the proceedings a new trial will be ordered.

SENTENCING, ENHANCED SENTENCE.

COUNTY COURT'S TELLING DEFENDANT HIS SENTENCE WOULD BE ENHANCED IF HE DID NOT COOPERATE WITH THE PROBATION DEPARTMENT DID NOT ADEQUATELY INFORM DEFENDANT HIS STATEMENT IN THE PROBATION INTERVIEW THAT HE DID NOT REMEMBER THE BURGLARY WOULD TRIGGER AN ENHANCED SENTENCE; SENTENCE VACATED (THIRD DEPT).

People v Ackley, 2021 NY Slip Op 01293, Third Dept 3-4-21

Practice Point: A promised sentence cannot be enhanced or increased unless the defendant was informed of the specific behavior which would trigger the enhancement. Telling the defendant to cooperate with the probation department did not inform the defendant his sentence would be enhanced if he said he didn't recall the charged offense (burglary) during the probation interview.

SENTENCING.

THERE WAS NO EVIDENCE DEFENDANT POSSESSED THE FIREARM BEFORE FORMING THE INTENT TO SHOOT; THE POSSESSION OF A WEAPON SENTENCE MUST RUN CONCURRENTLY WITH THE SENTENCES FOR THE SHOOTING-RELATED OFFENSES (FOURTH DEPT).

People v Boyd, 2021 NY Slip Op 01897, Fourth Dept 3-26-21

Practice Point: Where a defendant is convicted of criminal possession of the weapon which was used in a shooting-related offense, the sentence for criminal possession of a weapon must be concurrent with the sentence for the shooting-related offense unless there is proof the weapon was possessed before the intent to shoot was formed.

SPECIAL PROSECUTORS, CONSTITUTIONAL LAW.

EXECUTIVE LAW 552 (PART OF THE PROTECTION OF PEOPLE WITH SPECIAL NEEDS ACT), WHICH CREATED A SPECIAL PROSECUTOR TO PROSECUTE CRIMES OF ABUSE AND NEGLECT OF VULNERABLE PERSONS IN STATE FACILITIES, IS UNCONSTITUTIONAL TO THE EXTENT IT ALLOWS THE PROSECUTION OF CRIMES BY AN UNELECTED APPOINTEE OF THE GOVERNOR (CT APP).

People v Viviani, 2021 NY Slip Op 01934, CtApp 3-30-21

Practice Point: Under the New York State Constitution, an unelected appointee of the governor cannot prosecute crimes.

TRAFFIC STOPS, LEVEL TWO INQUIRY.

THE DRIVER BEING VISIBLY NERVOUS, COUPLED WITH THE VEHICLE HAVING OUT-OF-STATE PLATES AND BEING IN A HIGH CRIME AREA, DID NOT PROVIDE A FOUNDED SUSPICION OF CRIMINALITY; THEREFORE THE POLICE OFFICER WAS NOT JUSTIFIED IN ASKING WHETHER THERE WERE ANY WEAPONS IN THE CAR, A LEVEL TWO INQUIRY (FIRST DEPT).

[People v Jonathas, 2021 NY Slip Op 01954, First Dept 3-30-21](#)

Practice Point: The presence of an out-of-state vehicle in a high-crime area, together with the nervousness of the driver during the traffic stop, did not give rise to a founded suspicion of criminality. The police officer's asking whether there were any weapons in the vehicle was an unjustified level two inquiry.

TRAFFIC STOPS, SEARCHES.

THE POLICE DID NOT HAVE PROBABLE CAUSE TO SEARCH THE VEHICLE IN WHICH DEFENDANT WAS A PASSENGER WHEN AN OFFICER ENTERED THE VEHICLE TO RETRIEVE THE REGISTRATION AND SAW A HANDGUN; THE DEFENDANT HAD STANDING TO CONTEST THE SEIZURE BECAUSE OF THE PEOPLE'S RELIANCE ON THE STATUTORY AUTOMOBILE PRESUMPTION; THE HANDGUN SHOULD HAVE BEEN SUPPRESSED (FOURTH DEPT).

[People v Lawrence, 2021 NY Slip Op 01921, Fourth Dept 3-26-21](#)

Practice Point: The police officer, after a traffic accident, when the driver was standing outside the car, entered the car to retrieve the registration without first asking the driver's permission. The officer saw a handgun which had been hidden from view by the deployed air bag. The handgun should have been suppressed.

WAIVER OF INDICTMENT.

THE WAIVER OF INDICTMENT WAS JURISDICTIONALLY DEFECTIVE BECAUSE IT DID NOT PRECISELY IDENTIFY WHICH OF TWO UNDERLYING OFFENSES IT DESCRIBED AND DID NOT PROTECT AGAINST DOUBLE JEOPARDY (FOURTH DEPT).

People v Meeks, 2021 NY Slip Op 01925, Fourth Dept 3-26-21

Practice Point: Where the waiver of indictment did not clearly identify which of two rapes it referred to, and did not indicate the guilty plea will be entered in full satisfaction of all charges, the waiver was jurisdictionally defective.

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