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An Organized Compilation of Summaries of Selected Decisions Addressing Criminal Law Released in March 2021 by the First, Second, Third and Fourth Departments, as Well as the Court of Appeals. The Entries in the Table of Contents Link to the Summaries Which Link to the Decisions on the Official New York Courts Website. Click on “Table of Contents” in the Header on Any Page to Return There.

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Contents

APPEALS, ATTORNEYS, JUDGES, INEFFECTIVE ASSISTANCE, EVIDENCE. 8

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). 8

APPEALS, CONSTRUCTIVE POSSESSION. 9

THE PROOF OF CONSTRUCTIVE POSSESION OF WEAPONS WAS LEGALLY INSUFFICIENT (FOURTH DEPT). 9

APPEALS, ACCOMPLICE LIABILITY. 10

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). 10

APPEALS, PRESERVATION OF ERROR, CONTINUING CRIME. 12

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). 12

APPEALS, SENTENCING. 13

THE APPEAL WAIVER WAS INVALID AND THE SENTENCE WAS UNDULY HARSH (FOURTH DEPT). 13

APPEALS, SUPPRESSION HEARING. 14

THE PEOPLE WERE NOT GIVEN THE OPPORTUNITY TO RESPOND TO THE ISSUE WHETHER THE CHEMICAL BREATH TEST SHOULD BE SUPPRESSED; NEW SUPPRESSION HEARING ORDERED (FOURTH DEPT). 14

Table of Contents

APPEALS, TRIAL ORDER OF DISMISSAL. 15

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). 15

ATTORNEYS, INEFFECTIVE ASSISTANCE. 16

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). 16

ATTORNEYS, JUDGES. 17

THE TRIAL JUDGE DID NOT CONDUCT AN ADEQUATE INQUIRY BEFORE ALLOWING DEFENDANT TO REPRESENT HIMSELF (SECOND DEPT). 17

BRADY MATERIAL. 18

THE BRADY MATERIAL, A WITNESS STATEMENT REVEALED AFTER TRIAL, WOULD NOT HAVE ALTERED THE RESULT OF THE TRIAL; DEFENDANT'S CONVICTION SHOULD NOT HAVE BEEN REVERSED (CT APP). 18

CONFRONT WITNESSES, RIGHT TO, 710.30 NOTICE, MOLINEUX. 19

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). 19

DEFAMATION, REPORTING A CRIME. 20

REPORTING AN ALLEGED SEXUAL ASSAULT TO THE POLICE DOES NOT EVINCE MALICE SUFFICIENT TO OVERCOME THE QUALIFIED IMMUNITY ASSOCIATED WITH MAKING THE REPORT; THE DEFAMATION ACTION SHOULD HAVE BEEN DISMISSED (FIRST DEPT). 20

FAMILY LAW, SPEEDY TRIAL. 21

RESPONDENT JUVENILE WAS DENIED HER RIGHT TO A SPEEDY TRIAL IN THIS JUVENILE DELINQUENCY PROCEEDING (THIRD DEPT). 21

GUILTY PLEAS, DEPORTATION. 22

ALTHOUGH THE CO-DEFENDANT WAS SO INFORMED IN DEFENDANT'S PRESENCE, DEFENDANT WAS NOT DIRECTLY INFORMED OF THE POSSIBILITY OF DEPORTATION BY THE JUDGE; MATTER REMITTED TO GIVE DEFENDANT THE OPPORTUNITY TO MOVE TO WITHDRAW HIS GUILTY PLEA (SECOND DEPT)......... 22

GUILTY PLEAS. 23

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). 23

HUNTLEY HEARINGS, JUDGES.. 25

THE JUDGE'S REFUSAL TO HOLD A PRE-TRIAL HUNTLEY HEARING ON THE VOLUNTARINESS OF DEFENDANT'S STATEMENTS WAS REVERSIBLE ERROR (FOURTH DEPT)... 25

INCLUSORY CONCURRENT COUNT... 26

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)... 26

JURORS, BATSON, APPEALS. 27

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).. 27

JURORS.. 28

DEFENDANT'S FOR CAUSE CHALLENGE TO A JUROR IN THIS ARSON AND ANIMAL TORTURE CASE SHOULD HAVE BEEN GRANTED; THE JUROR EXPRESSED A HIGHLY EMOTIONAL RESPONSE TO INJURY TO ANIMALS AND THE COURT NEVER SPECIFICALLY ASKED IF SHOULD COULD BE FAIR AND IMPARTIAL (THIRD DEPT). 28

JURY NOTES, JUDGES. 29

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). 29

MENTAL HYGIENE LAW, JUROR MISCONDUCT, SET ASIDE VERDICT. 30

BASED UPON JUROR MISCONDUCT, THE TRIAL JUDGE SET ASIDE THE JURY VERDICT FINDING DEFENDANT SEX OFFENDER DID NOT SUFFER FROM A MENTAL ABNORMALITY AND ORDERED A NEW TRIAL; THE APPELLATE DIVISION REVERSED; THE COURT OF APPEALS REINSTATED THE TRIAL JUDGE’S RULING (CT APP). 30

MENTAL HYGIENE LAW. 31

THE EVIDENCE DEMONSTRATED RESPONDENT, WHO HAD ENTERED A PLEA OF NOT RESPONSIBLE BY REASON OF MENTAL DISEASE OR DEFECT TO RAPE, ASSAULT AND OTHER CHARGES, SUFFERED FROM A DANGEROUS MENTAL DISORDER REQUIRING CONTINUED PLACEMENT IN A SECURE FACILITY, SUPREME COURT REVERSED (THIRD DEPT). 31

MISSING WITNESS JURY INSTRUCTION. 32

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). 32

MOTION PAPERS, SUPPRESSION HEARING, APPPEALS. 33

DEFENDANT’S SUPPRESSION MOTION PAPERS RAISED A FACTUAL ISSUE REQUIRING A HEARING, MATTER REMITTED (FOURTH DEPT). 33

PEREMPTORY CHALLEGES, PROCURING THE ABSENCE OF A WITNESS. 34

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). 34

REMOVAL OF DEFENDANT FROM COURTROOM. 35

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). 35

RIGHT TO REMAIN SILENT. 36

THE PEOPLE USED DEFENDANT'S PRETRIAL SILENCE AGAINST HIM IN THEIR DIRECT CASE; ALTHOUGH THE ERROR WAS NOT PRESERVED, THE APPEAL WAS CONSIDERED IN THE INTEREST OF JUSTICE; NEW TRIAL ORDERED (SECOND DEPT). 36

SEARCHES, VEHICLES. 37

THE POLICE DID NOT DEMONSTRATE A LAWFUL BASIS FOR IMPOUNDING DEFENDANT'S VEHICLE AND CONDUCTING AN INVENTORY SEARCH; DEFENDANT'S MOTION TO SUPPRESS THE SEIZED EVIDENCE SHOULD HAVE BEEN GRANTED (SECOND DEPT). 37

SENTENCING, ENHANCED SENTENCE. 38

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). 38

SENTENCING, YOUTHFUL OFFENDERS. 39

COUNTY COURT DID NOT FOLLOW THE PROPER PROCEDURE FOR DETERMINING WHETHER DEFENDANT IS ELIGIBLE FOR YOUTHFUL OFFENDER STATUS; MATTER REMITTED (FOURTH DEPT). 39

SENTENCING. 40

SENTENCE DEEMED UNDULY HARSH (FOURTH DEPT). 40

SENTENCING. 41

SENTENCE DEEMED UNDULY HARSH (FOURTH DEPT). 41

SENTENCING. 42

SENTENCE DEEMED UNDULY HARSH (FOURTH DEPT). 42

SENTENCING. 43

THE FEDERAL CONSPIRACY-TO-DEAL-IN-FIREARMS STATUTE HAS DIFFERENT ELEMENTS THAN ITS NEW YORK EQUIVALENT AND THEREFORE CAN NOT BE THE BASIS OF A SECOND FELONY OFFENDER ADJUDICATION (SECOND DEPT). 43

SENTENCING. 43

THE SENTENCE FOR CRIMINAL POSSESSION OF A WEAPON SHOULD HAVE BEEN CONCURRENT WITH THE SENTENCE FOR MURDER (FOURTH DEPT). 43

SENTENCING. 44

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). 44

SPECIAL PROSECUTORS, CONSTITUTIONAL LAW. 45

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). 45

TRAFFIC STOPS, LEVEL TWO INQUIRY. 46

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). 46

TRAFFIC STOPS, SEARCHES. 47

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). 47

VACATE CONVICTION, MOTION TO, INEFFECTIVE ASSISTANCE, RECANTATION. 48

DEFENDANT PRESENTED SUFFICIENT EVIDENCE OF INEFFECTIVE ASSISTANCE OF COUNSEL AND RECANTATION TESTIMONY TO WARRANT A HEARING ON HIS MOTION TO VACATE HIS CONVICTION, COUNTY COURT REVERSED (THIRD DEPT). 48

WAIVER OF INDICTMENT 49

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). 49

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).

The Fourth Department, reversing defendant's convictions, dismissing the robbery counts, and ordering a new trial on the murder and criminal possession of a weapon counts, in a full-fledged opinion by Justice Troutman, determined: (1) conviction of felony murder based upon a confession requires only corroboration of the murder, not the underlying felony (robbery here); (2) the convictions on the two robbery counts were against the weight of the evidence; (3) the judge did not conduct the required "minimal inquiry" when defendant made specific factual complaints about his counsel and asked for new counsel–the error was not cured by the appointment of new counsel right before trial; and (4) defendant's counsel were ineffective because defendant's video statement was not redacted to remove reference to defendant's history of incarceration. The legal discussions are too detailed to fairly summarize here. The facts are:

On October 14, 2013, the victim stumbled home, a fatal knife wound in his back. He was pronounced dead that evening. Two days later, the police interviewed defendant, who provided a video-recorded statement. Defendant admitted that, on the evening of the crime, he was on South Salina Street in the City of Syracuse with three other young men—a cousin of his, a juvenile, and Tony Comer, Jr.—when the victim approached them for the purpose of buying drugs. Comer used the promise of drugs to lure the victim into a cut in the roadway and steal his wallet. When Comer and the victim came out of the cut, the victim was shirtless. Comer was smiling, holding the victim's torn, white T-shirt. The victim left, shouting that he would come back with

a gun and start shooting. Comer told the others that the victim still had $10 on his person, and the juvenile stated that he wanted the victim's last $10. About 10 or 15 minutes later, the victim returned wearing a sweatshirt, looking for his wallet. Defendant, his cousin, and the juvenile fought the victim. Defendant admitted that, by fighting the victim, he was helping the juvenile to acquire the victim's last $10 and that, during the fight, defendant stabbed the victim once in the back using a knife that he had concealed in his sleeve. 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 POSSESION OF WEAPONS WAS LEGALLY INSUFFICIENT (FOURTH DEPT).

The Fourth Department reversed defendant's convictions for criminal use of a firearm and criminal possession of weapon because the proof of constructive possession was legally insufficient:

… [T]he evidence is legally insufficient to support her conviction of the counts of criminal use of a firearm in the first degree, criminal possession of a weapon in the third degree, and criminal possession of a weapon in the fourth degree, and we therefore modify the judgment accordingly. Those counts were based on defendant's constructive possession of a rifle that was found in the house after the police entered. The People failed to establish that defendant "exercised dominion or control over [the rifle] by a sufficient level of control over the area in which [it was] found" to

establish that she had constructive possession of it … . 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 effect, 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).

The Fourth Department, reversing defendant's convictions and dismissing the indictment, determined the evidence of possession of a weapon and reckless endangerment (stemming from a robbery by the codefendant) was legally insufficient, and the conviction of another possession of a weapon charge (stemming from the codefendant's getting into defendant's car after the robbery) was against the weight of the evidence. Shots were fired by the codefendant during the robbery. The defendant was not with the codefendant during the robbery. Then the codefendant, still in possession of the firearm, got into defendant's car which was parked a couple of blocks away from the robbery scene and defendant drove away with the codefendant. There was no evidence the defendant shared the codefendant's intent to commit the robbery:

… [T]here is no evidence that defendant and the codefendant were together earlier on the day of the robbery and shooting, no evidence that defendant had prior knowledge either that the codefendant would be armed that day or that he was intending to rob someone, and no evidence that defendant and the codefendant had an ongoing relationship … . * * *

… [T]he evidence is legally insufficient to establish that defendant had any knowledge of the codefendant's possession of a firearm prior to the shooting or that defendant somehow "solicited, requested, commanded, importuned or intentionally aided [the codefendant] to engage in" the reckless shooting at the vehicle in which the victim was riding … . * * *

… [A]lthough the evidence that defendant knew who the codefendant was prior to the robbery provides a rational basis for questioning defendant's credibility, we conclude … that the People failed to prove beyond a reasonable doubt that defendant, finding himself in the presence of a man with a loaded weapon, willingly "solicited, requested, commanded, importuned or intentionally aided" the codefendant's possession of that weapon … , or that defendant "shared a 'community of purpose' with [the codefendant]" … . 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).

The Fourth Department determined statements made after defendant unequivocally asserted his right to remain silent should have been suppressed, but the error was harmless. In addition the Fourth Department dismissed three counts of criminal possession of a weapon because all four counts related to the uninterrupted possession of a single weapon at different times. The court also noted that if the trial court gives a curative instruction after an objection, another objection or a motion for a mistrial is necessary to preserve the issue for appeal:

… [D]efendant told the police three times that he did not wish to speak to them. We conclude that the court's determination that defendant did not unequivocally invoke his right to remain silent is supported by the record with respect to the first such instance, because in that instance he "did not clearly communicate a desire to cease all questioning indefinitely" … , "especially in light of his continued participation in the conversation" … . We further conclude, however, that the remainder of the court's determination is not supported by the record, inasmuch as, twice more during the questioning, "defendant said that he did not want to talk about [the crimes], thus unequivocally invoking his right to remain silent" … . Consequently, the court was required to suppress the statements that defendant made after invoking his right to remain silent for the second time. * * *

Defendant … contends in his main brief that the court erred in refusing to dismiss various counts of the indictment charging criminal possession of a weapon in the second degree under Penal Law § 265.03 (3) inasmuch as the indictment charged him with multiple counts of that crime based on his commission of a singular continuing offense. We agree. "An indictment cannot charge a defendant with more than one count of a crime that can be characterized as a continuing offense unless

there has been an interruption in the course of conduct" … . Here, the indictment charged defendant with four separate counts of criminal possession of a weapon in the second degree under Penal Law § 265.03 (3) for the uninterrupted possession of a single weapon at different times. We conclude that such possession "constituted a single offense for which he could be prosecuted only once" … . Consequently, we affirm that part of the judgment convicting defendant of criminal possession of a weapon in the second degree under Penal Law § 265.03 (3) in count 17 of the indictment, and we modify the judgment by reversing those parts convicting him of that crime under counts 8, 11, and 16 of the indictment and dismissing those counts of the indictment. 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).

The Fourth Department determined defendant's waiver of appeal was invalid and his sentence was unduly harsh. The sentences were modified to run concurrently, not consecutively:

We agree with defendant that the purported waiver of the right to appeal is not enforceable inasmuch as the totality of the circumstances fails to reveal that defendant "understood the nature of the appellate rights being waived" … . Here, County Court provided no oral explanation of the waiver of the right to appeal and the written waiver executed by defendant "mischaracterized the waiver of the right to appeal, portraying it in effect as an absolute bar to the taking of an appeal" … . We note that the better practice is for the court to use the Model Colloquy, which "neatly synthesizes . . . the governing principles" … . 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, SUPPRESSION HEARING.

THE PEOPLE WERE NOT GIVEN THE OPPORTUNITY TO RESPOND TO THE ISSUE WHETHER THE CHEMICAL BREATH TEST SHOULD BE SUPPRESSED; NEW SUPPRESSION HEARING ORDERED (FOURTH DEPT).

The Fourth Department, on an appeal by the People, determined County Court should not have suppressed the chemical breath test evidence in this DWI case because the People were not given an opportunity to respond to that suppression issue. The matter was remitted for a new suppression hearing:

… [T]he court erred in granting that part of defendant’s omnibus motion seeking to suppress evidence because the court failed to notify the People of its intention to consider that issue and failed to give the People an opportunity to present evidence at the hearing on that issue … . At the Huntley hearing, the issues of the officer’s compliance with Vehicle and Traffic Law § 1194 and defendant’s limited right to counsel were merely ancillary. Moreover, we reject defendant’s contention that the limited evidence that was admitted at the hearing supports the court’s determination to suppress the chemical breath test results. The evidence at the hearing established that the police administered a field breath test and then a chemical breath test at the jail, only the latter of which is the subject of section 1194 (2) (a) and would be admissible at trial … , but the court conflated the administration of both tests in determining that suppression was warranted. On this record, it is unclear whether the officer complied with section 1194 (2) (b) by warning defendant of the consequences of refusal in ” ‘clear and unequivocal language’ ” before administering the chemical test … . The record is also unclear whether defendant, who made a request to speak with his attorney, was afforded the opportunity to do so prior to deciding whether to

submit to the chemical breath test … . People v Williams, 2021 NY Slip Op 01570, Fourth Dept 3-19-21

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).

The Fourth Department remitted the case for a ruling on defendant's motion for a trial order of dismissal. An appellate court cannot consider a motion not ruled upon:

Defendant … contends that the evidence is legally insufficient to support the conviction with respect to all counts. At the close of proof, defendant moved for a trial order of dismissal, and the court reserved decision. There is no indication in the record that the court ruled on defendant's motion (cf. CPL 290.10 [1]). Thus, we may not address defendant's contention because, "in accordance with People v Concepcion (17 NY3d 192, 197-198 [2011]) and People v LaFontaine (92 NY2d 470, 474 [1998], rearg denied 93 NY2d 849 [1999]), we cannot deem the court's failure to rule on the . . . motion as a denial thereof" … . We therefore hold the case, reserve decision, and remit the matter to Supreme Court for a ruling on defendant's motion … . 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).

The Second Department, remitting the matter for a report on defendant's motion to withdraw his guilty plea, determined defense counsel, by stating to the court that defendant's motion was frivolous, had taken a position adverse to the client:

The defendant pleaded guilty to assault in the first degree, but at sentencing, the defendant stated that he wished to withdraw his plea, which he claimed had been coerced by his counsel. The County Court relieved defense counsel, and assigned new counsel to represent the defendant. Subsequently, the defendant's new counsel advised the court that after evaluating the evidence, the defendant's allocution, and after speaking to the defendant and his prior attorney, a motion to withdraw the plea of guilty would be frivolous. The court granted the defendant a number of adjournments to permit him to retain private counsel to pursue his motion to withdraw his plea, but when the defendant failed to do so, the court ultimately sentenced him, while he was still represented by the second assigned counsel. …

We agree with the defendant that his right to counsel was adversely affected, and he received ineffective assistance of counsel, when his counsel took a position adverse to his … . The County Court should have appointed new counsel to represent the defendant with respect to the motion to withdraw his plea of guilty … . 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.

ATTORNEYS, JUDGES.

THE TRIAL JUDGE DID NOT CONDUCT AN ADEQUATE INQUIRY BEFORE ALLOWING DEFENDANT TO REPRESENT HIMSELF (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined the trial judge did not conduct an adequate inquiry before allowing defendant to represent himself:

A court must determine that the defendant's waiver of the right to counsel is made competently, intelligently, and voluntarily before allowing that defendant to represent himself or herself … . In order to make that evaluation, the court "must undertake a 'searching inquiry' designed to 'insur[e] that a defendant [is] aware of the dangers and disadvantages of proceeding without counsel'" … . The court's inquiry "must accomplish the goals of adequately warning a defendant of the risks inherent in proceeding pro se, and apprising a defendant of the singular importance of the lawyer in the adversarial system of adjudication" … . "The record should also disclose 'that a trial court has delved into a defendant's age, education, occupation, previous exposure to legal procedures and other relevant factors bearing on a competent, intelligent, voluntary waiver' of the right to counsel" … . Here, although the court obtained certain pedigree information from the defendant, it failed to ascertain that the defendant was aware of the risks inherent in proceeding without an attorney and the benefits of having counsel represent him at trial … . Moreover, the court failed to discuss the potential sentence that could be imposed … . Thus, the court's inquiry was insufficient to ensure that the defendant understood the dangers and disadvantages of self-representation. People v Lemmo, 2021 NY Slip Op 01997, Second Dept 3-31-21

BRADY MATERIAL.

THE BRADY MATERIAL, A WITNESS STATEMENT REVEALED AFTER TRIAL, WOULD NOT HAVE ALTERED THE RESULT OF THE TRIAL; DEFENDANT'S CONVICTION SHOULD NOT HAVE BEEN REVERSED (CT APP).

The Court of Appeals, reversing the Appellate Division, determined the Brady material, a witness statement, revealed after trial would not have altered the result of the trial and therefore reversal of the conviction was not warranted:

"To make out a successful Brady claim, 'a defendant must show that (1) the evidence is favorable to the defendant because it is either exculpatory or impeaching in nature; (2) the evidence was suppressed by the prosecution; and (3) prejudice arose because the suppressed evidence was material'" … . Where, as here, the defendant made a specific request for the evidence in question, "[w]e must examine the trial record, evaluat[e] the withheld evidence in the context of the entire record, and determine in light of that examination whether there is a reasonable possibility that the result of the trial would have been different if the evidence had been disclosed" … . …

The undisclosed witness's description of the shooter and his flight path did not differ in any material respect from that of the eyewitness who identified defendant in court as the perpetrator. Moreover, the jury's verdict was supported by considerable other evidence, including the testimony of a cooperating witness who planned the crime with defendant, provided a weapon and cellphone for defendant's use, observed defendant approach and leave the site of the shooting at the time it occurred, and described the manner in which the weapon was destroyed after the shooting; testimony by the spouse of the cooperating witness confirming defendant's involvement; the testimony of additional witnesses who described the perpetrator's clothing and his movements following the shooting; telephone records; and surveillance videos showing defendant's proximity, clothing, and behavior immediately after the crime. People v McGhee, 2021 NY Slip Op 01836, CtApp 3-25-21

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).

The Second Department, reversing defendant's conviction, determined: (1) based upon his right to confront and cross-examine the witnesses against him, the defendant should have been present during the judge's in camera interview with the complainant in this statutory rape case to determine the relevance of her psychiatric history (a material stage of this proceeding); (2) the defendant's statement for which no CPL 710.30 notice was provided should not have been admitted on that ground; and (3) that same statement should not have been admitted as "Molineux" evidence of intent, motive or lack of mistake because such evidence is not relevant to statutory rape:

The right of an accused to confront the witnesses against him or her through cross-examination is a fundamental right of constitutional dimension … . The right of cross-examination is an essential safeguard of fact-finding accuracy and "the principal means by which the believability of a witness and the truth of his testimony are tested" … .

Where a primary prosecution witness is shown to suffer from a psychiatric condition, the defense is entitled to show that the witness's capacity to perceive and recall events was impaired by that condition … .

In this case, the defendant's absence during the Supreme Court's in camera interview with the complainant to determine if her psychiatric history was relevant had a substantial effect on his ability to defend the charges against him, and thus, the interview constituted a material stage of the trial for which the defendant should have been present … . Where, as here, the "defendant was absent during a material

part of his trial, harmless error analysis is not appropriate," and a new trial is required … . Moreover, while the scope of cross-examination generally rests within the trial court's discretion … , here, the court improvidently exercised its discretion in striking the complainant's testimony adduced during cross-examination with respect to her psychiatric history. 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.

DEFAMATION, REPORTING A CRIME.

REPORTING AN ALLEGED SEXUAL ASSAULT TO THE POLICE DOES NOT EVINCE MALICE SUFFICIENT TO OVERCOME THE QUALIFIED IMMUNITY ASSOCIATED WITH MAKING THE REPORT; THE DEFAMATION ACTION SHOULD HAVE BEEN DISMISSED (FIRST DEPT).

The First Department, reversing Supreme Court, in a full-fledged opinion by Justice Manzanet-Daniels, determined the defamation action based upon defendant's filing a sexual assault complaint with the police was protected by qualified immunity and the nature of the complaint did not evince the malice required to overcome the qualified immunity. The sexual assault trial ended in a hung jury and defendant agreed to an adjournment in contemplation of dismissal as the disposition of her charges against plaintiff. Plaintiff was formerly an assistant district attorney and defendant was a reporter for the Daily News:

The doctrine of qualified immunity shields individuals who, like defendant, act "in the discharge of some public or private duty, legal or moral, or in the conduct of [her] own affairs, in a matter where h[er] interest is concerned" … . To overcome the qualified privilege protecting defendant's statements to the police, plaintiff was

required to sufficiently allege that she published the statements with actual malice, i.e., that defendant “acted out of personal spite or ill will, with reckless disregard for the statement’s truth or falsity, or with a high degree belief that [her] statements were probably false” … . * * *

Plaintiff’s allegations fall short of alleging actual malice sufficient to overcome the qualified privilege attaching to defendant’s statements to the police. Even as alleged in the complaint, the statements are a straightforward rendition of the incident that defendant claims occurred during a car ride with plaintiff. There was nothing excessive or “vituperative” in the character of the reported statements that would support an inference of actual malice … . Indeed, it is difficult to see how defendant could have been more succinct or restrained in her description of the events while accomplishing her purpose: to report to the police that she had been the victim of sexual assault. Sagaille v Carrega, 2021 NY Slip Op 01369, First Dept 3-9-21

FAMILY LAW, SPEEDY TRIAL.

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

The Third Department, reversing Family Court, determined respondent juvenile was denied her right to a speedy trial in this juvenile delinquency proceeding. The respondent initially waived her speedy trial rights to allow a diagnostic evaluation, which would take 90 days. Before the evaluation was complete, in response to allegations that respondent was acting aggressively in the nonsecure facility where she was detained, Family Court ordered respondent to a secure facility, thereby making the diagnostic evaluation impossible. At that point respondent rescinded her speedy trial waiver:

… [A]lthough respondent waived her right to a speedy fact-finding hearing during the first appearance held on April 4, 2019, the waiver was expressly limited to the time necessary to complete the diagnostic evaluation. By entering an order on June 26, 2019 directing respondent’s transfer from Elmcrest Children’s Center to a secure facility, Family Court knowingly eliminated the possibility that the diagnostic

evaluation would be continued and completed. Under such circumstances, respondent's waiver of her speedy trial rights effectively expired on June 26, 2019. Consequently, Family Court should have commenced a fact-finding hearing within three days of June 26, 2019 or, alternatively, brought the parties before it and either obtained a further waiver of respondent's speedy trial rights or set forth on the record its reasons for adjourning the fact-finding hearing beyond the prescribed three-day period ... . Inasmuch as Family Court failed to do any of the foregoing and instead did not commence the fact-finding hearing until August 15, 2019, some 50 days after the expiration of respondent's speedy trial waiver, we find that Family Court violated respondent's right to a speedy fact-finding hearing ... . 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, DEPORTATION.

ALTHOUGH THE CO-DEFENDANT WAS SO INFORMED IN DEFENDANT'S PRESENCE, DEFENDANT WAS NOT DIRECTLY INFORMED OF THE POSSIBILITY OF DEPORTATION BY THE JUDGE; MATTER REMITTED TO GIVE DEFENDANT THE OPPORTUNITY TO MOVE TO WITHDRAW HIS GUILTY PLEA (SECOND DEPT).

The Second Department, remitting the matter to allow defendant to move to withdraw his guilty plea, determined, although the co-defendant, in defendant's presence, was informed of the possibility of deportation based upon the plea, the defendant, who did not speak English, was not directly so informed by the judge:

During that proceeding, the court posed a question directly to "Mr. Vidalis," asking if the codefendant understood that he could be deported if he entered a plea of guilty, to which the codefendant answered in the affirmative. The court then stated to the defendant, "Mr. Tapia; do you understand that?" The defendant answered in the

affirmative. The court then individually asked the codefendant and the defendant if they had fully discussed “the immigration consequences of this case with your attorney,” to which the defendant answered in the affirmative. However, the court did not specifically instruct the defendant, who required a Spanish interpreter to understand the court and had only a sixth-grade education, that he could be deported if he entered a plea of guilty, nor did the court use the words “deported” or “deportation” in any statement posed directly to the defendant. * * *

… [W]hile the plea record demonstrates that the Supreme Court specifically advised the codefendant of the possibility that he could be deported as a consequence of his plea, the court, in addressing the defendant, simply asked, “Mr. Tapia; do you understand that?” … . In light of the defendant’s limited education and need for a Spanish interpreter to understand the court’s remarks, the court’s limited inquiry as to whether the defendant understood “that” did not ensure the defendant’s understanding that he could be deported as a consequence of his own plea, as opposed to his mere recognition that the codefendant faced deportation consequences … . People v Tapia, 2021 NY Slip Op 01274, Second Dept 3-3-21

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).

The Second Department, reversing County Court, determined it was an abuse of discretion to deny defendant’s motion to withdraw his plea without holding a hearing. The matter was remitted for a hearing. The defendant was given a “last chance” to accept a plea offer just before the suppression hearing began. Defense counsel asked about bail at that time and then defendant met with defense counsel

before deciding to take the plea offer. In his motion to withdraw the plea, defendant alleged that, based upon his discussion with defense counsel, he thought his bail would be substantially increased if he didn't take the plea offer and was concerned about taking care of his three-year-old son. He had brought his son to court because he couldn't find a babysitter:

Bail status "has no legitimate connection to the mutuality of advantage underlying plea bargaining because it does not relate either to the more lenient sentence for which the defendant is negotiating or to the waiver of trial and the certainty of conviction the prosecution is seeking" … . Accordingly, "[t]he prospect of an immediate change in bail status, therefore, is an inappropriate consideration in plea negotiations" … .

Here, the plea bargaining process and the defendant's affidavit raise a legitimate question as to the voluntariness of the defendant's plea and, therefore, the defendant's motion should not have been denied without a hearing … . The County Court's response to defense counsel's questions regarding bail, which included a statement that this was the defendant's "last chance" to accept the offer, raise a legitimate question as to whether the defendant understood that the court's purportedly forthcoming bail decision was contingent on acceptance of the offer. Notably, after the defendant accepted the plea, the court never brought up the issue of changing the defendant's bail status, effectively continuing his release on cash bail without any changes … . 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).

The Fourth Department, reversing defendant’s conviction, determined the judge’s refusal to hold a Huntley hearing to determine the voluntariness of defendant’s statements until several witnesses testified at trial was reversible error:

“When [a] motion [to suppress evidence] is made before trial, the trial may not be commenced until determination of the motion” (CPL 710.40 [3] …). Here, defendant moved to suppress his statements to the police on the ground that they were involuntarily made (see CPL 710.20 [3]), but the court did not rule on the motion prior to trial and repeatedly refused to conduct a pretrial Huntley hearing, even after the People requested a Huntley hearing at the outset of the trial. Instead, the court granted the People’s request for a Huntley hearing over defendant’s objection after nine of the ten prosecution witnesses had already testified. Following that hearing, the court found the statements to be voluntary and thus admissible.

The error is not harmless. It is well established that, “unless the proof of the defendant’s guilt, without reference to the error, is overwhelming, there is no occasion for consideration of any doctrine of harmless error” … . Here, the evidence was not overwhelming … . The central factual question in this case was identity. The evidence of identity was that defendant was apprehended coming out of a building located on the block towards which the culprit had been seen running, he fit the description of the culprit, and he was identified by three eyewitnesses after a showup procedure. On the other hand, defendant did not have in his possession the fruits of the crime or the firearm used in the crime, nor was he dressed like the culprit. Moreover, showup identification procedures are inherently suggestive … , and the culprit had been wearing a partial face covering at the time of the crime, which further undermined the reliability of the identifications … . 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).

The Fourth Department noted that assault in the second degree is an inclusory concurrent count of assault on a police officer and the assault second conviction must therefore be reversed and the count dismissed:

Counts are concurrent when "concurrent sentences only may be imposed in case of conviction thereon," and such counts "are 'inclusory' when the offense charged in one is greater than any of those charged in the others and when the latter are all lesser offenses included within the greater" (CPL 300.30 [3], [4]). Here, concurrent sentencing was required inasmuch as the same conduct formed the basis of each count … and, as charged here, assault in the second degree is a lesser included offense of assault on a police officer … . 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).

The Fourth Department, remitting the matter, determined the three-step Batson procedure was not followed when the defense objected to the People's peremptory challenge to an African-American prospective juror:

After defendant made a prima facie showing of discrimination in step one, the prosecutor offered a race-neutral explanation for the peremptory challenge … , namely, that the prospective juror had a sister who was incarcerated for assaulting someone with a gun and that the prospective juror said that the criminal justice system could have treated her sister better. When defense counsel attempted to respond, the court interrupted him and stated, "I ruled. There is no Batson issue." Defense counsel timely objected to the court's ruling. In our view, defense counsel should have been "given the opportunity to argue that the prosecutor's explanation[was] a pretext for discrimination" … . * * *

… [W]hen it interrupted defense counsel, "the court improperly rushed and compressed the Batson inquiry," precluding defendant from meeting "his burden of establishing an equal protection violation" … . To be distinguished are situations in which defense counsel does not make "any attempt to respond or protest[ ]" … or in which the court implicitly rejects the pretext argument by letting the challenge stand after hearing a defense counsel's arguments concerning pretext … . 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.

JURORS.

DEFENDANT'S FOR CAUSE CHALLENGE TO A JUROR IN THIS ARSON AND ANIMAL TORTURE CASE SHOULD HAVE BEEN GRANTED; THE JUROR EXPRESSED A HIGHLY EMOTIONAL RESPONSE TO INJURY TO ANIMALS AND THE COURT NEVER SPECIFICALLY ASKED IF SHOULD COULD BE FAIR AND IMPARTIAL (THIRD DEPT).

The Third Department, reversing defendant's convictions of arson and torturing animals, determined defendant's for cause challenge to a juror who expressed her highly emotional reaction to the injury of animals should have been granted:

Defendant challenged this prospective juror for cause on the ground that "because of the animals, she couldn't be fair and impartial." County Court denied this challenge noting that prospective juror No. 16 had indicated that "it would be very difficult" and that "she would cry," not that she had stated she could not be impartial. Defendant then exercised a peremptory challenge to remove prospective juror No. 16, and later exhausted his peremptory challenges. Relative to the ability of prospective juror No. 16 to be fair and impartial due to her affinity for animals, despite being asked twice, she never unequivocally stated that she could be … . Thus, the court should have posed questions to rehabilitate the prospective juror "by obtaining such assurances or, if rehabilitation was not possible," excuse her … . By failing to do so, the court committed reversible error, considering that defendant exercised a peremptory challenge to remove this prospective juror and exhausted such challenges … . People v Rios, 2021 NY Slip Op 01530, Third Dept 3-18-21

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).

The Second Department, reversing defendant's conviction and ordering a new trial, determined that the judge did not inform counsel of the full nature of a note from the jury. The jury note indicated the request was for the transcript of a phone call, but the judge said the note was asking for the phone call:

At trial, a recording of one of the defendant's jail phone calls was introduced into evidence and played for the jury. In addition, the jury was provided with a purported transcript of the call, which was described merely as an aid and was not itself in evidence, and which the Supreme Court instructed should not control in the event of any discrepancy between the recording and the transcript. During deliberations, the jury sent the court a note, marked as court exhibit number 4, which the court stated on the record as "asking for [the defendant's] phone call from jail." This description, however, omitted the word "transcript," which was included at the end of the note in parentheses. The court then stated to the jury that it would play the call again, but would not provide a copy of the transcript.

Contrary to the People's contention, the jury's request did not only implicate the court's ministerial function, as the request can be interpreted as seeking the transcript of the phone call, rather than the call itself. Notably, there was a discrepancy between the transcript and the phone call, and to the extent that the jury's request implied that the transcript left an impression on the jury, despite the court's instructions … ,counsel for the defendant should have been made aware of the verbatim contents of the request … . Failure to disclose the precise contents of the note deprived the defense of the opportunity to "analyze the jury's deliberations" given the note's ambiguous meaning, "and frame intelligent suggestions for the court's response" … . 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.

MENTAL HYGIENE LAW, JUROR MISCONDUCT, SET ASIDE VERDICT.

BASED UPON JUROR MISCONDUCT, THE TRIAL JUDGE SET ASIDE THE JURY VERDICT FINDING DEFENDANT SEX OFFENDER DID NOT SUFFER FROM A MENTAL ABNORMALITY AND ORDERED A NEW TRIAL; THE APPELLATE DIVISION REVERSED; THE COURT OF APPEALS REINSTATED THE TRIAL JUDGE'S RULING (CT APP).

The Court of Appeals, without any discussion of the facts or the law, reversed the Appellate Division (Matter of State of New York v Donald G., 2020 NY Slip Op 04716, Fourth Dept 8-20-20) and reinstated the trial court's setting aside the verdict based on juror misconduct. The jury had decided defendant, a sex offender, did not suffer from a mental abnormality requiring civil commitment and should be released. The trial judge set aside that verdict and ordered a new trial. The trial judge's ruling was here reinstated by the Court of Appeals:

Under these circumstances, Supreme Court did not abuse its discretion as a matter of law in ordering a new trial in the interest of justice on the ground of juror misconduct. Respondent's remaining contentions have been considered and are without merit. Matter of State of New York v Donald G., 2021 NY Slip Op 01935, CtApp 3-30-21

MENTAL HYGIENE LAW.

THE EVIDENCE DEMONSTRATED RESPONDENT, WHO HAD ENTERED A PLEA OF NOT RESPONSIBLE BY REASON OF MENTAL DISEASE OR DEFECT TO RAPE, ASSAULT AND OTHER CHARGES, SUFFERED FROM A DANGEROUS MENTAL DISORDER REQUIRING CONTINUED PLACEMENT IN A SECURE FACILITY, SUPREME COURT REVERSED (THIRD DEPT).

The Third Department, reversing Supreme Court, determined respondent constituted a danger to himself and others and should remain in a secure facility. Respondent had entered a plea of not responsible by reason of mental disease or defect to rape, assault, criminal possession of a weapon and endangering the welfare of a child. Supreme Court had found that respondent was no longer suffering from a dangerous mental disorder and placed him in a nonsecure facility:

To establish that a person suffers from a dangerous mental disorder requiring commitment in a secure facility, the petitioner bears the burden of demonstrating, by a fair preponderance of the evidence, that the person suffers from a "mental illness," as that term is statutorily defined (see Mental Hygiene Law § 1.03 [20]), and "that because of such condition he [or she] constitutes a physical danger to himself [or herself] or others" (CPL 330.20 [1] [c]). * * *

Supreme Court rejected petitioner's evidence and instead concluded that respondent no longer suffered from a dangerous mental disorder, implicitly crediting the opinion of respondent's expert. However, the court's factual findings were self-contradictory. Supreme Court credited petitioner's expert's diagnoses of respondent, finding, among other things, that respondent has bipolar disorder and a traumatic brain injury. These diagnoses, which cause impaired judgment and impulse control, contributed to the opinion of petitioner's expert that respondent constituted a present danger to himself and to his female peers. Without explanation, respondent's expert omitted the diagnoses of bipolar disorder and traumatic brain injury. In concluding that respondent no longer suffers from a dangerous mental disorder, Supreme Court relied upon an opinion that did not account for diagnoses that the court found respondent to have. Thus, the court never considered the impact that the diagnoses

have on respondent's behavior and present dangerousness. Matter of James Q., 2021 NY Slip Op 01545, Third Dept 3-18-21

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).

The Fourth Department, reversing defendant's conviction, determined the defense request for the missing witness jury instruction should have been granted. The alleged victim in this rape case testified she promptly reported the rape to her boyfriend and, a few hours later, told her mother. The People called her mother as a witness, but not her boyfriend. The trial judge denied the missing witness charge on the ground that the testimony would be cumulative:

In People v Smith (33 NY3d 454 [2019]), the Court of Appeals held that the proponent of a missing witness charge has no initial burden to show that the missing testimony would not be cumulative of the remaining testimony, and that the concept of cumulativeness in this context functions only as a tool for defeating an otherwise-meritorious request for a missing witness instruction (id. at 458-460). Thus, the Court of Appeals explained, the opponent of the missing witness instruction has the burden of showing that the missing testimony would be cumulative in order to defeat the requested instruction on that ground (id.).

Applying the standard set forth in Smith, we conclude that the People failed to show that the boyfriend's testimony would have been cumulative of the mother's testimony. The respective accounts would concern different outcries, separated by several hours and many blocks. The boyfriend could not have duplicated the mother's account of the complainant's outcry, because the boyfriend was not present

during that particular event. Conversely, the mother could not have duplicated the boyfriend's account of the complainant's outcry, because the mother was not present during that particular event. 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, APPPEALS.

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

The Fourth Department, remitting the matter, determined defendant had raised a factual issue requiring a suppression hearing:

"When made before trial, suppression motions must be in writing, state the legal ground of the motion and contain sworn allegations of fact made by defendant or another person" … . A hearing may be denied "unless the papers submitted raise a factual dispute on a material point which must be resolved before the court can decide the legal issue" … .

Here, defendant specifically alleged that officers "responded to [the scene] after . . . defendant, or someone at his behest, called 911" and that defendant, upon their arrival, told them that he "found [the victim] on the stairs bleeding and was trying to help him." Defendant alleged that, based on that information, "[t]he police removed [him] from the scene and placed him in the back of a police vehicle, and took his personal cell phone from him" without reasonable suspicion or probable cause justifying the intrusion. Although the People contended that defendant made other statements to the officers that heightened their level of suspicion and justified the intrusion, defendant's motion papers disputed this assertion, alleging instead that, at the time of the intrusion, "the police knew nothing more than [that the victim]

appeared to have been shot, and [that defendant] . . . had discovered him and summoned help while trying to give assistance at the scene.” Indeed, at oral argument on the motion, defendant further explained that he specifically disputed what information the police had at the time of the intrusion. We conclude that, under these circumstances, defendant sufficiently raised a factual issue necessitating a hearing … . 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 CHALLEGES, 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).

The Second Department, reversing defendant’s conviction and ordering a new trial, determined a witness’s out-of-count statement should not have been admitted because the People did not demonstrate defendant procured the witness’s absence and the failure to follow proper procedure in jury selection was reversible error:

“The purpose of a Sirois hearing is to determine whether the defendant has procured a witness’s absence or unavailability through his own misconduct, and thereby forfeited any hearsay or Confrontation Clause objections to admitting the witness’s out-of-court statements” … . The People must “present legally sufficient evidence of circumstances and events from which a court may properly infer that the defendant, or those at defendant’s direction or acting with defendant’s knowing acquiescence, threatened the witness” … . “At a Sirois hearing, the People bear the burden of establishing, by clear and convincing evidence, that the defendant has procured the witness’s absence or unavailability” … .

Here, the People failed to establish by clear and convincing evidence that the defendant was responsible for procuring a certain witness's refusal to testify at trial … . Specifically, the People's evidence did not establish that the defendant controlled the individuals who threatened the witness or that the defendant influenced or persuaded any individual to threaten the witness or his family … .

The Supreme Court committed reversible error when it permitted the People to exercise peremptory challenges to prospective jurors after the defendant and his codefendant exercised peremptory challenges to that same panel of prospective jurors (see CPL 270.15[2] … . This procedure violated "the one persistently protected and enunciated rule of jury selection—that the People make peremptory challenges first, and that they never be permitted to go back and challenge a juror accepted by the defense" … . People v Burgess, 2021 NY Slip Op 01993, Second Dept 3-31-21

The same peremptory challenge issue required reversal in 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).

The Fourth Department, reversing defendant's conviction, determined the failure to warn defendant before removing him from the courtroom during jury selection required a new trial:

On the morning that jury selection was scheduled to begin, but before the prospective jurors had been brought into the courtroom, defendant began shouting, insisting that the court was calling him by the wrong name and that he could not wear the clothes

provided to him. The court immediately had defendant removed from the courtroom, stating that it deemed defendant to have waived his right to be present based on his "outburst and behavior." After defendant had been removed, the court stated that defendant's "voice was raised to a level of almost deafening proportions, and it was very clear that it was imminent he was going to turn violent." Defendant was absent for the selection of the first 11 jurors, but returned to the courtroom at the next recess and did not cause any further disruption.

A defendant has a fundamental right to be present at all material stages of trial, and that right is "violated by his or her absence during the questioning of prospective jurors during the impaneling of the jury" … . However, "[a] defendant's right to be present during trial is not absolute" … . CPL 260.20 provides, in relevant part, "that a defendant who conducts himself in so disorderly and disruptive a manner that his trial cannot be carried on with him in the courtroom may be removed from the courtroom if, after he has been warned by the court that he will be removed if he continues such conduct, he continues to engage in such conduct" … . 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.

RIGHT TO REMAIN SILENT.

THE PEOPLE USED DEFENDANT'S PRETRIAL SILENCE AGAINST HIM IN THEIR DIRECT CASE; ALTHOUGH THE ERROR WAS NOT PRESERVED, THE APPEAL WAS CONSIDERED IN THE INTEREST OF JUSTICE; NEW TRIAL ORDERED (SECOND DEPT).

The Second Department reversed defendant's conviction and ordered a new trial because the People "improperly used [defendant's] pretrial silence against him in their direct case." The decision does not explain the facts. Although the error was not preserved, the appeal was considered in the interest of justice:

“[I]t is a well-established principle of state evidentiary law that evidence of a defendant’s pretrial silence is generally inadmissible” … . Here, as the defendant correctly contends, the People improperly used his pretrial silence against him on their direct case … . Since this evidence was used by the People on their direct case, their reliance upon cases in which “conspicuous omissions from the defendants’ statements to police” had properly been used during cross-examination of the defendants to impeach the credibility of their exculpatory trial testimony is misplaced … . Contrary to the People’s contention, the error in admitting evidence of the defendant’s pretrial silence during their direct case was not harmless … . Although this issue is unpreserved for appellate review … , we reach it in the exercise of our interest of justice jurisdiction, and on that basis, reverse the judgment and remit the matter … for a new trial. People v DeLaCruz, 2021 NY Slip Op 01785, Second Dept 3-24-21

SEARCHES, VEHICLES.

THE POLICE DID NOT DEMONSTRATE A LAWFUL BASIS FOR IMPOUNDING DEFENDANT’S VEHICLE AND CONDUCTING AN INVENTORY SEARCH; DEFENDANT’S MOTION TO SUPPRESS THE SEIZED EVIDENCE SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant’s motion to suppress evidence seized from his vehicle should have been granted. The police did not demonstrate a lawful bas for impounding the vehicle and conducting an inventory search:

… [T]he People failed to establish the lawfulness of the impoundment of the defendant’s vehicle and subsequent inventory search … . Although, at the suppression hearing, a police officer testified that the defendant’s vehicle was “parked on the corner” at the time of the defendant’s arrest, there was no testimony that the vehicle was parked illegally or that there were any posted time limits pertaining to the space where the vehicle was parked. The People presented no evidence demonstrating any history of burglary or vandalism in the area where the defendant had parked his vehicle, and the officer testified that the vehicle was driven to the precinct because it was used in the commission of a crime. Thus, the People

failed to establish that the impoundment of the defendant's vehicle was in the interests of public safety or part of the police's community caretaking function … . Moreover, although the officer who performed the inventory search of the defendant's vehicle testified that the policy for conducting such searches was located in the Patrol Guide, the People presented no evidence demonstrating the requirements of the policy for impounding and searching a vehicle, or whether the officer complied with that policy when she conducted the inventory search of the defendant's vehicle … . People v Rivera, 2021 NY Slip Op 08256, Second Dept 3-17-21

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).

The Third Department, vacating defendant's sentence, determined that County Court's telling defendant he would enhance defendant's sentence if defendant did not cooperate with the Probation Department did not adequately inform defendant his sentence would be enhanced if he told the Probation Department he did not remember the burglary to which he entered a plea:

Prior to adjourning the matter for sentencing, County Court stated to defendant, "It's important that you cooperate with the Probation Department . . ., because if you . . . didn't cooperate with the presentence investigation report, then I could enhance the sentence and sentence you to more time." County Court did not, however, expressly advise defendant (and defendant, in turn, did not agree) that he must provide truthful answers to the Probation Department, refrain from making statements that were inconsistent with his sworn statements during the plea colloquy and/or avoid any attempt to minimize his conduct in the underlying burglary … . Further, County Court summarily denied defendant's oral motion to withdraw his plea upon this ground and, despite defendant's request for a hearing, County Court made no further

inquiry as to defendant's allegedly inconsistent statements; rather, County Court simply concluded that defendant's stated inability to recall the burglary at the time of his interview with the Probation Department constituted a failure to "cooperate" in the preparation of the presentence investigation report. Given the subjective nature of the court's requirement that defendant "cooperate" with the Probation Department and the court's corresponding lack of further inquiry, County Court erred in imposing an enhanced sentence without first affording defendant an opportunity to withdraw his plea … . 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, YOUTHFUL OFFENDERS.

COUNTY COURT DID NOT FOLLOW THE PROPER PROCEDURE FOR DETERMINING WHETHER DEFENDANT IS ELIGIBLE FOR YOUTHFUL OFFENDER STATUS; MATTER REMITTED (FOURTH DEPT).

The Fourth Department, remitted the mater for a determination whether defendant is eligible for youthful offender status:

Because defendant was convicted of an armed felony offense … , he is ineligible to receive a youthful offender adjudication unless the court determines that one of two mitigating factors is present … . If the court, in its discretion, determines that neither of the mitigating factors is present and states the reason for its determination on the record, then no further determination on the youthful offender application is required … . If, however, the court determines that one or more of those mitigating factors are present, and that defendant is therefore an eligible youth, it must then determine whether defendant is a youthful offender … .

Here, the court did not follow the procedure set forth in Middlebrooks [25 NY3d 516], inasmuch as it made no on-the-record determination of defendant's eligibility for a youthful offender adjudication at sentencing … . People v Reed, 2021 NY Slip Op 01590, Fourth Dept 3-19-21

SENTENCING.

SENTENCE DEEMED UNDULY HARSH (FOURTH DEPT).

The Fourth Department determined defendant's sentence was unduly harsh and directed that all but one of the sentences run concurrently:

For the kidnapping and murder counts, defendant was sentenced to concurrent terms of incarceration of 25 years to life. For the burglary and robbery counts, related to the crimes committed at the victim's residence, defendant received determinate terms of incarceration of 15 years. Although those sentences run concurrently with each other, they were directed to run consecutively to the kidnapping and murder sentences. In addition, defendant received an indeterminate term of incarceration of 1⅓ to 4 years for the count of tampering with physical evidence, which was to run consecutively to all other counts.

It is well settled that this Court's "sentence-review power may be exercised, if the interest of justice warrants, without deference to the sentencing court" … and that "we may 'substitute our own discretion for that of a trial court which has not abused its discretion in the imposition of a sentence' " … . Here, the record establishes that defendant, who was 22 years old and gainfully employed at the time of the crimes, had no prior criminal history. In addition, although she was an accessory to the crimes committed at the victim's residence, the evidence establishes that she was one block away during that incident and did not physically participate in those crimes. There is also evidence suggesting that defendant was the victim of repeated acts of domestic abuse perpetrated by one of the codefendants.

Under the circumstances, we conclude that the sentence imposed is unduly harsh and severe. We therefore modify the judgment as a matter of discretion in the interest of justice by directing that all sentences except the sentence imposed on the count of

tampering with physical evidence run concurrently with each other … . People v Colon, 2021 NY Slip Op 01652, Fourth Dept 3-18-21

SENTENCING.

SENTENCE DEEMED UNDULY HARSH (FOURTH DEPT).

The Fourth Department reduced defendant's sentence, finding it unduly harsh. The defendant was several hours late in surrendering to the jail and the sentence initially promised was increased. The Fourth Department imposed the lesser sentence initially promised:

… [T]his Court "has broad, plenary power to modify a sentence that is unduly harsh or severe under the circumstances, even though the sentence may be within the permissible statutory range," and we may exercise that power, "if the interest of justice warrants, without deference to the sentencing court" … . Here, the court initially promised to sentence defendant to a concurrent eight-year determinate term of imprisonment on each count of the indictment and agreed to release him until 9:00 a.m. on the ensuing Monday to allow him to attend his mother's wedding on the intervening weekend. Defendant accepted the plea offer and was released as promised but did not surrender himself to the jail until 5:30 p.m. on the appointed date. Nevertheless, the record establishes that he surrendered voluntarily and that he called the jail prior to the appointed time and reported that he was having transportation difficulties. In addition, the record establishes that defendant has a lengthy record, but no violent felonies, and that he had not been arrested in the 10 years preceding these incidents, which involve sale and possession of small amounts of cocaine. Under these circumstances, as a matter of discretion in the interest of justice, we modify the judgment by reducing the sentence of imprisonment imposed under each count of the indictment to a determinate term of eight years, to be followed by the three years of postrelease supervision imposed by the court, and directing that the sentences run concurrently with each other. People v Brinson, 2021 NY Slip Op 01648, Fourth Dept 3-19-21

SENTENCING.

SENTENCE DEEMED UNDULY HARSH (FOURTH DEPT).

The Fourth Department determined the defendant's sentence (12 years) was unduly harsh and imposed a sentence (eight years) close to that promised before defendant rejected the offer and went to trial:

The charges arose from defendant's unsuccessful attempt to rob a cab driver at knifepoint. Sitting behind the victim, defendant pulled out a knife and put it to the victim's neck. The victim grabbed the knife and a struggle ensued during which the vehicle, which had been stopped, started moving and crashed into a tree. During the struggle, the victim sustained a wound to his hand (from grabbing the knife) and a cut on his neck that was not life threatening. Both men then exited the vehicle. …

After realizing that the victim had been injured, defendant yelled for help and said, "I did it." Defendant took off his sweatshirt and offered it to the victim to staunch the bleeding. When neighbors and others arrived at the scene, they saw defendant crying and pleading with them to help the victim. Although no one prevented him from fleeing, defendant remained at the scene until the police arrived and was taken into custody without incident. When approached by the responding officer, defendant said, "Officer, I stabbed him. I was trying to rob him." While in custody, defendant repeatedly asked whether the victim was going to be all right. The victim was given stitches for his wounds and released from the hospital later that night.

We agree with defendant that, under the unique circumstances of this case, the sentence is unduly harsh and severe. Defendant was 41 years old when he committed the crimes in this case, and he had previously been convicted of only one other crime, a misdemeanor in 2001 for which he was sentenced to probation. The presentence report indicates that defendant has an extensive history of mental illness and no prior incidents of violence. People v Zdatny, 2021 NY Slip Op 01659, Fourth Dept 3-19-21

SENTENCING.

THE FEDERAL CONSPIRACY-TO-DEAL-IN-FIREARMS STATUTE HAS DIFFERENT ELEMENTS THAN ITS NEW YORK EQUIVALENT AND THEREFORE CAN NOT BE THE BASIS OF A SECOND FELONY OFFENDER ADJUDICATION (SECOND DEPT).

The Second Department vacated defendant's second felony offender adjudication because the predicate federal felony did not have the same elements as the New York equivalent:

… [T]he defendant's federal conviction of conspiracy to deal in firearms under section 371 of title 18 of the United States Code is not a "predicate felony conviction" .. , because the federal conspiracy statute contains different elements than its equivalent in New York such that it is possible to violate the federal statute without engaging in conduct that is a felony in New York … . People v Mohabir, 2021 NY Slip Op 01789, Second Dept 3-24-21

SENTENCING.

THE SENTENCE FOR CRIMINAL POSSESSION OF A WEAPON SHOULD HAVE BEEN CONCURRENT WITH THE SENTENCE FOR MURDER (FOURTH DEPT).

The Fourth Department determined the sentence for criminal possession of a weapon should not have been imposed consecutively to the sentence for murder:

… [T]he court erred in directing that the sentence imposed on count three of the indictment, charging criminal possession of a weapon in the second degree under Penal Law § 265.03 (3), run consecutively to the sentence imposed on count one, i.e., murder in the second degree. The People had the burden of establishing that the consecutive sentences were legal, i.e., that the crimes were committed through separate acts or omissions … , and they failed to meet that burden. The People failed to present evidence at trial that defendant's act of possessing the loaded firearm 'was

separate and distinct from' his act of shooting the victim … . **People v Alligood, 2021 NY Slip Op 01628, Fourth Dept 3-19-21**

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).

The Fourth Department, directing that the sentences run concurrently, noted there was no evidence defendant possessed the loaded firearm before he formed the intent to shoot the victim:

Defendant appeals from a judgment convicting him upon his plea of guilty of three counts of robbery in the first degree (Penal Law § 160.15 [1], [4]), two counts each of burglary in the first degree (§ 140.30 [2], [4]) and criminal possession of a weapon in the second degree (§ 265.03 [3]), and one count each of assault in the first degree (§ 120.10 [4]), attempted murder in the second degree (§§ 110.00, 125.25 [1]), and criminal possession of stolen property in the fourth degree (§ 165.45 [5]). … . * * *

Where a defendant is charged with both criminal possession of a weapon in violation of Penal Law § 265.03 (3) and a different crime that has an element involving the use of that weapon, consecutive sentencing is permissible if "[the] defendant knowingly unlawfully possesses a loaded firearm before forming the intent to cause a crime with that weapon" such that the possessory crime has already been completed … . The People have the burden of establishing that consecutive sentences are legal, i.e., that the two crimes were committed through separate and distinct acts … . …

The People failed to meet their burden inasmuch as there are no facts alleged in the counts of the indictment to which defendant pleaded guilty or in the plea allocution that would establish that defendant possessed the loaded firearm prior to forming his intent to shoot the victim … or that the act of possessing the loaded firearm "was

separate and distinct from" his act of shooting the victim … . 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).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over two concurring opinions, determined Executive Law 552 (part of the Protection of People with Special Needs Act), which created a special prosecutor to prosecute crimes of abuse or neglect of vulnerable persons in facilities operated by the state, is unconstitutional to the extent it allows an unelected appointee of the governor to prosecute crimes. The portions of the statute which do not relate to the prosecution of crimes, however, remain viable:

Given that the purpose of enacting the Special Needs Act was to "bolster the ability of the state to respond more effectively to abuse and neglect of vulnerable persons" … , it is apparent that the Legislature would wish that as much of Executive Law § 552 aimed at protecting that class of victims as can be preserved remain in effect. Nor would excising the offending provisions leave the remainder without any beneficial impact. Therefore, while the subdivisions of the statute that provide the special prosecutor with the discretionary authority to bring criminal cases … must be struck as unconstitutional … , the portion of Executive Law § 552 (1) that provides the special prosecutor with non-prosecutorial functions should remain in

force. Likewise, we leave intact Executive Law § 552 (2) (a) (ii), which empowers the special prosecutor "to cooperate with and assist district attorneys and other local law enforcement officials in their efforts against . . . abuse or neglect of vulnerable persons," without interfering with those efforts (emphasis added). Cooperation with the local District Attorney furthers the overarching goal of the Legislature—providing resources to address crimes of abuse and neglect committed against vulnerable persons—without infringing on that constitutional officer's essential authority. 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).

The First Department, reversing defendant's conviction of attempted criminal possession of a weapon and dismissing the indictment, determined the police officer did not have a founded suspicion of criminality when he asked whether any weapons were in the vehicle:

Defendant was a passenger in a car, bearing a Massachusetts license plate, that was stopped for driving through a red light in a "high crime" neighborhood. The driver of the car complied with the demands of one of the officers for his driver's license and that he get out of the car, but was "visibly nervous," breathing heavily, and stammering in his responses to the officer's questions. Moments later, one of the other officers asked whether there were any weapons in the car. This ultimately led to the recovery of a pistol from defendant.

These circumstances did not give rise to the founded suspicion of criminality that was required to authorize this level two inquiry … . Contrary to the People's contention, neither occurrence of the stop for a traffic violation in a "high crime" area, nor the unproven perception of one of the officers that in general out-of-state license plates are more highly correlated with criminality than New York license plates, elevated the suspicion to the level required to authorize a common-law inquiry. 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 un 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).

The Fourth Department, reversing County Court, determined the handgun seized from the vehicle in which defendant was a passenger should have been suppressed. The police arrived after an accident and defendant was standing outside the car. When an officer asked for the vehicle registration, defendant offered to retrieve it, but a police officer standing near the car said he would retrieve it. The officer then saw a handgun that had been hidden from view by the deployed air bag. The court noted defendant had standing to contest the search and seizure because of the People's reliance on the statutory automobile presumption:

As an initial matter, there is no dispute that defendant has standing as a passenger of the vehicle to challenge its search by virtue of the People's reliance on the statutory automobile presumption … . … [U]nder the circumstances of this case, we agree

with defendant that the officer who conducted the search lacked probable cause to do so … . In reaching that conclusion, we reject the People's assertion that, based on the holdings of People v Branigan (67 NY2d 860 [1986]) and People v Philbert (270 AD2d 210 [1st Dept 2000] …), the officer was entitled to enter the vehicle for the purpose of obtaining the vehicle's registration certificate. Unlike in Branigan, there were no " 'safety reasons' " in this case preventing the officer from allowing defendant to retrieve the registration himself … . and, here, defendant did not initially fail to produce the registration when prompted to do so by law enforcement (cf. id. at 861-862). Unlike in Philbert … , the officer here, as he confirmed at the suppression hearing, lacked probable cause to search the vehicle and had no reason to believe that the vehicle contained evidence of a crime. 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.

VACATE CONVICTION, MOTION TO, INEFFECTIVE ASSISTANCE, RECANTATION.

DEFENDANT PRESENTED SUFFICIENT EVIDENCE OF INEFFECTIVE ASSISTANCE OF COUNSEL AND RECANTATION TESTIMONY TO WARRANT A HEARING ON HIS MOTION TO VACATE HIS CONVICTION, COUNTY COURT REVERSED (THIRD DEPT).

The Third Department, reversing County Court, determined defendant's motion to vacate his conviction should not have been denied without a hearing. The defendant presented sufficient evidence of ineffective assistance of counsel and newly discovered evidence (recantation testimony), as well as evidence of actual innocence, to warrant a hearing on all three issues:

Defendant avers, in his sworn affidavit, that he repeatedly advised his trial counsel that the victim's allegation that defendant did not live with her at the time of the incident was false and that this false claim could be easily disproven, but trial counsel

"was not interested and did nothing." Defendant supported this claim with four sworn affidavits of witnesses who all stated that defendant lived with the victim at the time of the incident. These affidavits were not merely conclusory, but rather contained factual allegations based upon firsthand observations by the witnesses … . * * *

… [D]efendant proffered three separate affidavits from witnesses, as well as text messages purportedly from the victim, asserting that they established that the victim had fabricated the allegations against him. * * *

Although we are mindful that recantation testimony is "inherently unreliable" … , the "totality of the circumstances" presented here demonstrates that a hearing is required to scrutinize the circumstances regarding the recantations as well as the credibility of the witnesses, and to create a record … . People v Stetin, 2021 NY Slip Op 01529, Third Dept 3-18-21

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).

The Fourth Department, vacating defendant's guilty plea and the waiver of indictment, determined the waiver of indictment was jurisdictionally defective because it was not clear which of two charged rapes it referred to and there was no language that the plea would be in full satisfaction of all charges:

… [T]he underlying felony complaint alleged four offenses predicated on defendant's purported violation of three Penal Law provisions: two separate acts of rape in the first degree that occurred in September and October 2016, respectively (Penal Law § 130.35 [4]), an act of criminal sexual act in the first degree that occurred in November 2016 (§ 130.50 [4]), and acts that constituted endangering the welfare of a child (§ 260.10 [1]). In contrast, the waiver of indictment listed only a single count to be charged in the SCI [superior court information]: a count of rape

in the first degree that allegedly occurred sometime between July and November 2016. Inasmuch as the sole charge in the waiver of indictment and SCI could plausibly refer to either of the acts of rape in the first degree alleged in the felony complaint, the waiver of indictment failed to put defendant on notice of the precise crime for which he was waiving prosecution by indictment and was thus jurisdictionally defective. …

In addition to impeding defendant's ability to prepare a defense … , the defect in the waiver of indictment—i.e., the indeterminancy of the precise rape offense for which defendant was agreeing to waive indictment—implicates double jeopardy concerns because there was no language in the waiver form, SCI, or at the plea colloquy informing defendant that his plea to one count of rape in the first degree would be in full satisfaction of the offenses alleged in the felony complaint. Consequently, defendant could potentially be subjected to a subsequent prosecution for the offenses not identified in the waiver of indictment or charged in the SCI … . 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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