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Criminal Law
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APPEALS.

ALTHOUGH THE ARGUMENT THAT THE INDICTMENT WAS DUPLICITOUS WAS PRESERVED FOR APPEAL, THE ISSUE WAS NOT RULED ON BY COUNTY COURT AND THEREFORE CAN NOT BE CONSIDERED ON APPEAL; MATTER REMITTED FOR A RULING (FOURTH DEPT).

People v Baek, 2021 NY Slip Op 04424, Fourth Dept 7-16-21

Practice Point: Even if the issue is preserved for appeal, the appellate court cannot consider it unless it is ruled on by the trial court.

CIVIL COMMITMENT, MENTAL HYGIENE LAW, EXPERT EVIDENCE.

SUPREME COURT DID NOT WEIGH THE CONFLICTING EXPERT TESTIMONY ABOUT WHETHER PETITIONER SEX-OFFENDER SUFFERED FROM A MENTAL ABNORMALITY REQUIRING CONFINEMENT PURSUANT TO THE MENTAL HYGIENE LAW; MATTER SENT BACK FOR A NEW HEARING BEFORE A DIFFERENT JUDGE (FOURTH DEPT).

Matter of Application for Discharge of Doy S. v State of New York. 2021 NY Slip Op 04456, Fourth Dept 7-16-21

Practice Point: In a civil commitment proceeding for a sex offender, the judge as fact-finder must resolve any conflict between opposing experts. Here the judge made a general finding that anti-social personality disorder and psychopathy can never provide a basis for a finding of mental abnormality without specifically considering the relevant expert evidence presented on the issue.

DOMESTIC VIOLENCE SURVIVOR’S ACT, SENTENCING.

IN A MATTER OF FIRST IMPRESSION, THE APPELLATE COURT DETERMINED COUNTY COURT DID NOT CORRECTLY APPLY THE DOMESTIC-VIOLENCE-SURVIVOR’S-ACT CRITERIA IN SENTENCING DEFENDANT FOR THE MURDER OF HER ABUSIVE HUSBAND; SENTENCES SIGNIFICANTLY REDUCED (SECOND DEPT).

People v Addimando, 2021 NY Slip Op 04364, Second Dept 7-15-21

Practice Point: The Domestic Violence Survivor’s Act authorizes a reduced sentence even where the jury has rejected the “battered women’s syndrome” defense to the defendant’s murder of an abusive partner.

DOUBLE JEOPARDY.

INDICTMENTS IN TWO COUNTIES RELATED TO THE SAME CONTINUOUS CONDUCT AND THE SAME VICTIM; DEFENDANT’S CONVICTION BY GUILTY PLEA IN NASSAU COUNTY AFTER A GUILTY PLEA IN SUFFOLK COUNTY VIOLATED THE DOUBLE JEOPARDY CLAUSE (SECOND DEPT).

People v Kattis, 2021 NY Slip Op 04240, Second Dept 7-7-21

Practice Point: Where a continuing and uninterrupted offense involving the same victim occurs in two counties, a guilty plea in one county, pursuant to the double-jeopardy doctrine, precludes prosecution in the second county.

EXCITED UTTERANCES.

STATEMENTS MADE BY THE COMPLAINANT TO POLICE OFFICERS HOURS AFTER THE ALLEGED INCIDENT SHOULD NOT HAVE BEEN ADMITTED AS EXCITED UTTERANCES (SECOND DEPT).

People v Germosen, 2021 NY Slip Op 04237, Second Dept 7-7-21

Practice Points: A complainant's statements made hours after the incident are not admissible as excited utterances.

INAUDIBLE RECORDINGS, TRANSCRIPTS.

IT WAS REVERSIBLE ERROR TO ADMIT AN INAUDIBLE RECORDING AND TO PROVIDE THE JURY WITH A PURPORTED TRANSCRIPT OF THE RECORDING (SECOND DEPT).

People v Melendez, 2021 NY Slip Op 04497, Second Dept 7-21-21

Practice Point: Allowing an inaudible recording in evidence here was reversible error. The error was compounded by giving the jury a purported transcript of the recording. Obviously an inaudible recording forces the jury to speculate about its contents. Speculation is the exact opposite of evidence.

INCLUSORY CONCURRENT COUNTS.

INCLUSORY CONCURRENT COUNTS DISMISSED (FOURTH DEPT).

People v Feliciano, 2021 NY Slip Op 04289, Fourth Dept 7-9-21

Practice Point: Sexual conduct against a child and rape first degree are inclusory concurrent counts of predatory sexual assault against a child.

JUDGES.

THE SENTENCING JUDGE’S REMARKS ABOUT THE DEFENDANT MIMICKED 19TH CENTURY POLYGENISM, A DEBUNKED RACIST IDEOLOGY; SENTENCE VACATED AND REDUCED (THIRD DEPT).

People v Johnson, 2021 NY Slip Op 04162, Third Dept 7-1-21

Practice Point: The sentencing judge’s reference to a racist theory required the vacation of the sentence and resentencing by a different judge.

JURY INSTRUCTIONS, CIRCUMSTANTIAL EVIDENCE.

THE DENIAL OF DEFENDANT’S REQUEST FOR A CIRCUMSTANTIAL EVIDENCE JURY INSTRUCTION REQUIRED REVERSAL (THIRD DEPT).

People v Taylor, 2021 NY Slip Op 04258, Third Dept 7-8-21

Practice Point: Although the judge gave a modified circumstantial evidence jury instruction, it was deemed inadequate because it did not state that “it must appear that the inference of guilt is the only one that can fairly and reasonably be drawn from the facts, and that the evidence excludes beyond a reasonable doubt every reasonable hypothesis of innocence.”

MIRANDA, PUBLIC SAFETY EXCEPTION.

DEFENDANT'S STATEMENTS WERE ADMISSIBLE PURSUANT TO THE PUBLIC SAFETY EXCEPTION TO THE MIRANDA REQUIREMENT (THIRD DEPT).

People v Rashid, 2021 NY Slip Op 04390, Second Dept 7-15-21

Practice Point: Although the defendant was handcuffed and in custody when he was asked whether the handgun taken from his pocket was loaded, the unwarned answer was admissible under the public safety exception to the Miranda requirement.

PLEA OF NOT RESPONSIBLE BY REASON OF MENTAL ILLNESS, MEDICAL MALPRACTICE.

PLAINTIFF WAS BROUGHT TO THE HOSPITAL PURSUANT TO THE MENTAL HYGIENE LAW AFTER THREATENING FAMILY MEMBERS AND KILLING A DOG; DEFENDANTS RELEASED PLAINTIFF THE SAME DAY AND PLAINTIFF KILLED THE FAMILY MEMBERS; PLAINTIFF ENTERED A PLEA OF NOT RESPONSIBLE BY REASON OF MENTAL ILLNESS; THE RULE PROHIBITING A PLAINTIFF FROM TAKING ADVANTAGE OF HIS OWN WRONG DID NOT APPLY AND DEFENDANTS' MOTION TO DISMISS THIS MEDICAL MALPRACTICE WAS PROPERLY DENIED (FOURTH DEPT).

Bumbolo v Faxton St. Luke's Healthcare, 2021 NY Slip Op 04429, Fourth Dept 7-16-21

Practice Point: The rule that a defendant cannot seek recovery in a civil action based upon a criminal act does not apply to a plea of not responsible by reason of mental illness. Here plaintiff was released from psychiatric care and then killed three family members. His medical malpractice action was allowed to proceed.

PROBATION CONDITIONS, SEX OFFENDERS.

PROBATION CONDITIONS PROHIBITING POSSESSION OF A COMPUTER AND A CELL PHONE WERE NOT ENFORCEABLE UNDER THE FACTS OF THE CASE; DEFENDANT HAD PLED GUILTY TO ATTEMPTED SEXUAL ABUSE FIRST DEGREE (FOURTH DEPT).

People v Blanco-Ortiz, 2021 NY Slip Op 04447, Fourth Dept 7-16-21

Practice Point: Conditions of probation must be justified by the criminal history of the defendant. Here defendant had pled guilty to attempted sexual assault and there was nothing in his criminal history about illegal or improper use of computers, the Internet, or cell phones. The technology-related probation conditions therefore did not relate to the goals of probation.

PROSECUTORIAL MISCONDUCT, APPEALS.

ALTHOUGH NO OBJECTIONS WERE MADE TO THE PROSECUTOR'S NUMEROUS INAPPROPRIATE REMARKS, THE APPEAL WAS CONSIDERED IN THE INTEREST OF JUSTICE AND A NEW TRIAL WAS ORDERED (SECOND DEPT).

People v Beck, 2021 NY Slip Op 04556, Second Dept 7-28-21

Practice Point: If, as here, the errors were not preserved by objections, make the argument on appeal anyway. As it did here, the appellate court may consider the argument in the interest of justice.

RESENTENCING.

IN THIS RESENTENCING PROCEEDING, THE JUDGE SHOULD HAVE CONSIDERED DEFENDANT’S CONDUCT SINCE THE ORIGINAL SENTENCE WAS IMPOSED IN 1998-99 AND SHOULD HAVE ORDERED AN UPDATED PRESENTENCE REPORT WHICH INCLUDED AN INTERVIEW WITH DEFENDANT (SECOND DEPT).

[People v Garcia, 2021 NY Slip Op 04558, Second Dept 7-28-21](#)

Practice Point: In a resentencing proceeding after the vacation of the original sentence, the judge should consider a defendant’s conduct in prison since the original sentence. Here, a new presentence investigation report based on a new interview should have been ordered.

SEARCH AND SEIZURE, TRAFFIC STOPS.

IN A COMPREHENSIVE OPINION WITH DETAILED DISCUSSIONS OF THE FELLOW OFFICER RULE, THE STOP OF A VEHICLE BASED ON AN OBSERVED TRAFFIC VIOLATION, THE AUTOMOBILE EXCEPTION TO THE WARRANT REQUIREMENT, AND THE VALIDITY OF AN INVENTORY SEARCH, COUNTY COURT’S DENIAL OF THE MOTION TO SUPPRESS THE COCAINE FOUND IN THE VEHICLE IS REVERSED OVER TWO CONCURRENCES AND A TWO-JUSTICE DISSENT (SECOND DEPT).

[People v Mortel, 2021 NY Slip Op 04498, Second Dept 7-21-21](#)

Practice Point: With the exception of finding the traffic stop valid, all the other rulings by County Court justifying the search for and seizure of cocaine were rejected on appeal. The decision includes useful discussions of the “fellow-officer rule,” the “automobile exception” to the warrant requirement, and the criteria for a valid inventory search.

SEARCH AND SEIZURE.

THE OPENING OF A CARTON OF CIGARETTES AS PART OF A SEARCH OF THE CARGO IN PETITIONER’S TRUCK WAS NOT SUPPORTED BY PROBABLE CAUSE; THE TAX TRIBUNAL’S ASSESSMENT OF A \$1,259,250 PENALTY FOR POSSESSION OF CIGARETTES WITHOUT TAX STAMPS ANNULLED (THIRD DEPT).

Matter of White v State of N.Y. Tax Appeals Trib., 2021 NY Slip Op 04394, Third Dept 7-15-21

Practice Point: The trooper’s opening of a box in the back of defendant’s truck to examine a pack of cigarettes (looking for a tax stamp) was not justified. The transport of unstamped cigarettes from a Native American reservation to a Native American territory does not give rise to an inference of criminality.

SEX OFFENDER REGISTRATION ACT (SORA).

DEFENDANT WAS ENTITLED TO A DOWNWARD DEPARTURE FROM LEVEL TWO TO LEVEL ONE IN THIS STATUTORY RAPE CASE; ALTHOUGH NOT PRESERVED BY A REQUEST FOR A DOWNWARD DEPARTURE, THE APPEAL WAS CONSIDERED IN THE INTEREST OF JUSTICE (SECOND DEPT).

People v Maldonado-Escobar, 2021 NY Slip Op 04502, Second Dept 7-2-21

Practice Point: If the issue has not been preserved, make the argument on appeal anyway. In this statutory rape case, the defendant did not preserve the issue by moving for a downward departure from the Sex Offender Registration Act (SORA) risk level. The appellate court considered the issue in the interest of justice and ordered a downward departure.

STATEMENTS MADE TO AN AGENT OF LAW ENFORCEMENT.

THE DEFENDANT’S STATEMENTS MADE TO A CHILD PROTECTIVE SERVICES CASEWORKER SHOULD HAVE BEEN SUPPRESSED; THE CASEWORKER, UNDER THE FACTS, ACTED AS AN AGENT OF LAW ENFORCEMENT DURING THE INTERVIEW (FOURTH DEPT).

People v Desjardins, 2021 NY Slip Op 04465, Fourth Dept 7-16-21

Practice Point: Here, under the facts, the Child Protective Services caseworker was deemed to have been acting as an agent of law enforcement when she interviewed the defendant, even though she was not directed to conduct the interview. The statements were therefore made in violation of defendant’s right to counsel.

STREET STOPS.

IN THIS STREET STOP CASE, SOME OF THE POLICE OFFICERS’ TESTIMONY WAS REJECTED AS INCREDIBLE; THE PEOPLE DID NOT DEMONSTRATE THE LEVEL THREE ENCOUNTER WAS JUSTIFIED BY REASONABLE SUSPICION (SECOND DEPT).

People v Rhames, 2021 NY Slip Op 04242, Second Dept 7-7-21

Practice Point: Here the street stop and level three intrusion were deemed invalid after a portion of a police officer’s testimony at the suppression hearing was rejected as incredible.

YOUTHFUL OFFENDERS, STATUTORY INTERPRETATION.

STATUTORY AMENDMENTS REPEALING MANDATORY SURCHARGES AND CRIME VICTIM ASSISTANCE FEES FOR YOUTHFUL OFFENDERS WERE REMEDIAL IN NATURE AND THEREFORE SHOULD BE APPLIED RETROACTIVELY (SECOND DEPT).

People v Dyshawn B., 2021 NY Slip Op 04487, Second Dept 7-21-21

Practice Point: When a statute is enacted to correct a problem, here the unfairness of assessing surcharges and fees against youthful offenders who may not be able to pay, the statute should apply retroactively.

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