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Contents

Table of Contents

Table of Contents

Table of Contents

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).

The Fourth Department noted that it can not consider an issue which was preserved for appeal but was not ruled upon by County Court. The matter was remitted:

Although defendant did preserve his contention concerning facial duplicity by seeking dismissal of the indictment on that ground in the pretrial omnibus motion … , we are unable to address that contention because County Court failed to rule on that part of defendant's omnibus motion (see CPL 470.15 [1] …).

The Court of Appeals "has construed CPL 470.15 (1) as a legislative restriction on the Appellate Division's power to review issues either decided in an appellant's favor, or not ruled upon, by the trial court" … , "and thus the court's failure to rule on the motion cannot be deemed a denial thereof" … . We therefore hold the case, reserve decision and remit the matter to County Court for a ruling on that part of defendant's omnibus motion. 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.

BATSON CHALLENGES.

THE TRIAL JUDGE SHOULD HAVE PROCEEDED WITH BATSON INQUIRIES FOR THREE BLACK PROSPECTIVE JURORS; BASED ON THE JUDGE'S REMARKS THE MATTER WAS REMITTED FOR A HEARING AND REPORT BEFORE A DIFFERENT JUDGE (SECOND DEPT).

The Second Department determined Supreme Court should have conducted a Batson inquiry with respect to the prosecutor's exercise of peremptory challenges to three black prospective jurors. The appeal was held in abeyance and the matter was sent back for a hearing and report before a different judge. The trial judge's remarks about the number of black jurors being representative of the community ("this is not the Bronx") and the fact that three black jurors served were deemed irrelevant:

Contrary to the trial court's finding that the number of black prospective jurors to actually serve on the jury (three in total) was fairly representative of the community, as represented by the court's remark that "[t]his is not the Bronx," such consideration is "irrelevant" to the issue of whether the People's exercise of peremptory challenges was discriminatory … . Similarly, to the extent the People emphasize that three black prospective jurors served on the jury, that fact does not obviate the defendant's prima facie showing of discrimination … .

Accordingly, we find that the defendant satisfied the first step of the Batson inquiry with respect to the prosecution's exercise of peremptory challenges to each of the three black prospective jurors at issue. Thus, the trial court should have proceeded with the second step and, if applicable, the third step with respect to each of the Batson challenges … . People v Brissett, 2021 NY Slip Op 04366, Second Dept 7-15-21

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).

The Fourth Department, reversing Supreme Court in this sex-offender Mental-Hygiene-Law proceeding, determined the court did not base its decision to discharge and release the petitioner on the expert evidence presented at the hearing. The matter was sent back for a new hearing before a different judge:

The State's expert here diagnosed petitioner with ASPD [antisocial personality disorder] with narcissistic features and the condition of psychopathy, and the expert testified that those diagnoses, together with petitioner's enduring hostility towards women, collectively constitute a mental abnormality within the meaning of Mental Hygiene Law § 10.03 (i). She acknowledged that the scientific community has been debating for decades whether psychopathy is a distinct condition from ASPD, but she opined that they were indeed separate conditions. Petitioner's expert, on the other hand, diagnosed petitioner with ASPD but testified that petitioner had no other conditions in addition to that diagnosis that would render him a sex offender within the meaning of Mental Hygiene Law article 10. He further testified that psychopathy was simply an extreme variant of ASPD and should not be considered a condition separate from ASPD.

The court determined that a diagnosis of psychopathy or psychopathic features is still only a diagnosis of ASPD alone and thus, under Donald DD. (24 NY3d at 190), could not constitute an "other condition" to provide a basis for a finding of a mental abnormality. … [I] so holding, the court did not resolve the conflict between the experts regarding ASPD and psychopathy by weighing their testimony but rather made a determination that, generally speaking and without regard to petitioner's specific case, a finding of ASPD and psychopathy can never provide a basis for a finding of mental abnormality. Contrary to the court's apparent conclusion, "the Court of Appeals in Donald DD. did not state that diagnosis of ASPD with

psychopathy is insufficient to support a finding of mental abnormality" … . When supported by expert testimony, a diagnosis of ASPD and psychopathy is legally sufficient to provide a basis for a finding of mental abnormality Inasmuch as there was conflicting expert opinion on the matter, the court should have weighed the testimony of the experts in rendering its determination whether petitioner suffers from a mental abnormality … . 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).

The Second Department, in a full-fledged opinion by Justice Rivera, reversed County Court's application of the Domestic Violence Survivor's Act (social Services Law 459-a) and significantly reduced the sentences for murder and possession of a weapon. Defendant shot and killed her husband. The jury rejected defendant's "battered women's syndrome" defense. But the Second Department found that the criteria for sentence reduction under the DV Survivor's Act had been met by the evidence:

… [W]e hold that the County Court did not properly apply the DV Survivor's Act when sentencing the defendant. Upon considering the plain language of the DV Survivor's Act, the legislative history of the statute, and the particular circumstances of this case, we modify the judgment, on the facts and as a matter of discretion in the interest of justice, by reducing (1) the term of imprisonment imposed on the

conviction of murder in the second degree from an indeterminate term of imprisonment of 19 years to life to a determinate term of imprisonment of 7½ years to be followed by 5 years of postrelease supervision, and (2) the term of imprisonment imposed on the conviction of criminal possession of a weapon in the second degree from a determinate term of imprisonment of 15 years to be followed by 5 years of postrelease supervision to a determinate term of imprisonment of 3½ years to be followed by 5 years of postrelease supervision, which terms shall run concurrently with each other. * * *

Upon consideration of the nature and circumstances of the crime, as well as the history, character, and condition of the defendant, we conclude that a sentence in accordance with the DV Survivor's Act is warranted. The defendant is a 32-year-old mother of two young children, and has no known prior arrests or convictions. The defendant testified that she was repeatedly physically and sexually abused by Grover, as well as by other men in her past, and reportedly was sexually assaulted at the age of five. However, our examination under this factor does not end there. We also consider, among other things, the details of the crimes, including that the defendant shot Grover in the head as he was lying on the couch. Grover's fatal injury was described as a hard contact wound in which the gun fired by the defendant was pressed against Grover's skin, leaving a muzzle imprint. 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).

The Second Department, on double-jeopardy grounds, reversed defendant's conviction by guilty plea in Nassau County because he had already pled guilty to the same conduct in Suffolk County:

The charges in Suffolk County and Nassau County related to the same alleged victim. The Suffolk County indictment alleged that the defendant committed acts constituting course of sexual conduct against a child in the first degree and course of sexual conduct against a child in the second degree between approximately April 2015 and March 1, 2016, whereas the Nassau County indictment alleged that the defendant committed acts constituting course of sexual conduct against a child in the second degree between approximately March 1, 2016, and September 1, 2016.

As the indictments in both counties, viewed together, alleged a single continuing and uninterrupted offense against the same alleged victim, constitutional double jeopardy principles precluded a second conviction, in Nassau County, after the Suffolk County criminal action terminated in a conviction by plea of guilty … . 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).

The Second Department, reversing defendant assault and criminal possession of a weapon convictions, determined the complainant's hearsay statement should not have been admitted as excited utterances:

… [T]he Supreme Court erred in permitting the People to elicit testimony from two police officers on the content of certain hearsay statements made to them by the complainant when they encountered her at a deli a few hours after the alleged assault. …

"An out-of-court statement is properly admissible under the excited utterance exception when made under the stress of excitement caused by an external event, and not the product of studied reflection and possible fabrication" … . "The essential element of this hearsay exception is that the declarant spoke while under the stress or influence of the excitement caused by the event, so that his [or her] reflective capacity was stilled" … . "[T]he time for reflection is not measured in minutes or seconds, but rather is measured by facts" … . …

… [I]n light of the amount of time that elapsed between the incident and the statements … , and the lack of evidence as to what transpired in the interim … , the People did not establish that the complainant's capacity for reflection and deliberation remained stilled by the time she spoke to the police officers at the deli … . 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.

GUILTY PLEAS.

THE MAJORITY DETERMINED DEFENDANT'S ARGUMENT HIS GUILTY PLEA WAS NOT VOLUNTARILY ENTERED WAS NOT PRESERVED; THE DISSENT ARGUED DEFENDANT WAS NOT ADEQUATELY INFORMED OF HIS BOYKIN RIGHTS AND THE CONVICTION SHOULD BE REVERSED IN THE INTEREST OF JUSTICE (THIRD DEPT).

The Third Department, over a dissent, determined defendant's argument that his guilty plea was not knowingly, voluntarily and intelligently entered was rejected by the majority as unpreserved. The dissent agreed the issue was not preserved but argued the judge's failure to adequately inform defendant of the Boykin rights warranted reversal in the interest of justice:

From the Dissent:

Mindful that County Court was not required "to specifically enumerate all the rights to which . . . defendant was entitled".. , as defendant notes, the court nonetheless failed to explain, let alone refer to, any of the constitutional trial-related rights that he would forfeit by pleading guilty … . Rather, at the plea proceeding, the court focused almost exclusively on defendant's waiver of an intoxication defense, as well as any other potential defenses, and whether defendant understood the benefits and risks of going forward with a trial. The record also fails to disclose that the court "obtain[ed] any assurance that defendant had discussed with counsel the trial-related rights that are automatically forfeited by pleading guilty or the constitutional implications of a guilty plea" … . People v Simpson, 2021 NY Slip Op 04579, Third Dept 7-28-21

IDENTIFICATION.

THE VAGUE IDENTIFICATION EVIDENCE RENDERED THE CONVICTION AGAINST THE WEIGHT OF THE EVIDENCE (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined the identification evidence was too weak to support a conviction, i.e., the conviction was against the weight of the evidence. Witnesses saw a man toss a bag of drugs over a fence and run away:

Both women saw the man holding what appeared to be a white shopping bag with red circles on it, which he threw over a chain-link fence nearby. The man continued running through the parking lot toward Grand Street.

One of the women described the man she saw as a black man with short, dark hair, wearing a dark baseball cap, a T-shirt, jeans, and sneakers. The man was "a little taller, somewhat taller" than five feet, two inches, but she was not sure. She estimated his weight to be 175 to 185 pounds, but she was not sure. She did not remember if he wore glasses. She could not describe the color of his clothing or give any description of the sneakers he wore. The other woman described the man as a young black male, approximately five feet, seven inches tall, but she could not say for sure, and "guesstimat[ed]" that he may have weighed 170 pounds. She testified that he wore a baseball cap and might have been wearing dark pants and dark sneakers. Neither woman was able to identify the defendant as the man they saw. …

… [N]either of the police witnesses observed the defendant carrying a bag, neither of the bystander witnesses was able to identify the defendant as the man carrying the bag, and no forensic evidence linked the defendant to the bag. … [T]he rational inferences that can be drawn from the trial evidence do not support the convictions beyond a reasonable doubt. Although the vague description provided by the bystander witnesses was not inconsistent with the defendant's general appearance, we find that such evidence, coupled with nothing more than the defendant's proximity to the crime scene, is insufficient to establish, beyond a reasonable doubt, the defendant's identity as the perpetrator … . People v Hawkins, 2021 NY Slip Op 04238, Second Dept 7-7-21

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).

The Second Department, reversing defendant's conviction, determined it was reversible error to admit in evidence an inaudible tape recording and to provide the jury with a purported transcript of the recording:

Whether a tape recording should be admitted into evidence is within the discretion of the trial court after weighing the probative value of the evidence against the potential for prejudice" … . "An audiotape recording should be excluded from evidence if it is so inaudible and indistinct that a jury must speculate as to its contents" … . "Even where tape recordings are inaudible in part, so long as the conversations can be generally understood by the jury, such infirmities go to the weight of the evidence and not to its admissibility" … . "[I]n order to constitute competent proof, a tape should be at least sufficiently audible so that independent third parties can listen to it and produce a reasonable transcript" … .

… Supreme Court improvidently exercised its discretion in admitting the subject recording into evidence … . The first approximately 25 minutes of the conversation between the defendant and the complainant on the subject recording is almost completely inaudible, as all that can be heard are the background noises of a restaurant … . Further, some of the remaining portions of the subject recording were "so inaudible and indistinct" … that the jury would have had to speculate as to their contents … . The error was compounded when the jury was given what purported to be a transcript of portions of the largely inaudible recording … . 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).

The Fourth Department dismissed course of criminal conduct first degree and rape first degree counts as inclusory concurrent counts of predatory sexual assault against a child:

… [C]ounts two and four of the indictment, charging defendant with course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [b]) and rape in the first degree (§ 130.35 [4]), respectively, must be dismissed inasmuch as they are inclusory concurrent counts of counts one and three, respectively, charging defendant with predatory sexual assault against a child (§ 130.96) … . 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, APPEALS.

A SUPPRESSION MOTION CANNOT BE DENIED ON A GROUND NOT RAISED BY THE PEOPLE (FIRST DEPT).

The First Department, holding the appeal in abeyance, noted that a suppression motion may not be denied on a ground not raised by the People:

The motion to suppress should not have been denied on a ground not raised by the People. It is unclear to what extent the suppression court considered and credited the People's argument regarding probable cause or whether the search was outside of the Fourth Amendment's purview under the circumstances. Accordingly, we hold the appeal in abeyance and remand for determination, based on the hearing minutes, of the issues raised at the hearing, but not decided … . People v Hatchett, 2021 NY Slip Op 04282, First Dept 7-8-21

JUDGES.

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

The Third Department, vacating defendant's sentence, in a full-fledged opinion by Justice Lynch, determined the judge's racist remarks at the time of sentencing required vacation of the sentence, which the Third Department reduced from 15-years-to-life to five years:

The court, practically right out of the gate, stated, "[Defendant], I feel sorry for you. Because I know that if we were to look in your mind we would find that your brain, your frontal lobes, your decision making processes are probably retarded in growth." The court then inexplicably and shockingly reiterated, "Because we have learned through medicine, through science, that physical mental abuse especially at a young age will stunt the growth of the frontal lobes which prevents people from making decisions." The court finally reinforced its own beliefs when it stated, "[T]he sentence here is in a way to make you safe from hurting yourself or others, because I appreciate the fact that your brain is not developed, through no fault of your own."

In fashioning an appropriate sentence, the trial court is required to weigh and consider societal protection, rehabilitation and deterrence, as well as the circumstances that gave rise to the conviction" … . Factors that have zero role in this process are the skin color of the defendant and racist views — a premise that should not have to be explicitly stated. The commentary focusing on defendant's brain growth mimics 19th century polygenism, a racist ideology that focused on the claimed inferiority of black people based upon now debunked theories of reduced brain size … . It is shocking that any court, in 2018, would refer to this black defendant's brain, frontal lobes and retardation of growth in concluding that defendant's brain was not developed. Defendant is not a child or an adolescent, but was a 41-year-old grown black man at the time of sentencing. County Court's statements are textbook language that has been used since the late 19th century and even today to justify racist ideologies and beliefs that black people are an inferior race. We find the court's commentary dehumanizing and offensive. 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).

The Third Department, reversing defendant's conviction, determined County Court should not have denied defendant's request for a circumstantial evidence jury instruction:

… [T]here was no direct evidence identifying defendant as the shooter or as having possessed a loaded firearm. Indeed, there was no DNA or fingerprint evidence linking defendant to the Colt .45 caliber handgun that was recovered near the scene or the shell casing and projectiles that were found to have been fired from that gun … . Further, the surveillance footage — which only distantly captured the incident — did not depict defendant with a firearm. Nor was it possible to discern from the footage who shot the victim. …

Despite denying defendant's request for a circumstantial evidence charge, County Court nonetheless gave a modified version of the charge. This modified version, however, was wholly inadequate. Most importantly, the modified version failed to include a critical component of the circumstantial evidence charge — namely, "'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'" … . Given that County Court improperly denied defendant's request for a circumstantial evidence charge and that the modified charge was insufficient, "the jury could not have known of its duty to apply the circumstantial evidence standard to the prosecution's entire case" … . 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.

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

The Third Department determined the statements defendant made while handcuffed were admissible because the statements were made in response to questions posed for safety reasons and not to elicit an incriminating response:

County Court also properly denied defendant's motion to suppress the statement that he made to law enforcement while being patted down. Although defendant was handcuffed, in custody and had not been advised of his Miranda rights when he was asked by Haven whether the handgun that was retrieved from his back pocket was loaded, said inquiry was not made to elicit an incriminating response, but was made for the purpose of alleviating the inherent risk of securing a potentially loaded weapon and protecting the safety of defendant, responding officers and those other individuals present during the execution of the warrant … . Accordingly, [the] question fell squarely within the public safety exception to the Miranda requirement and, therefore, suppression of defendant's statement was appropriately denied … . 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.

PHYSICAL INJURY, ASSAULT.

THE EVIDENCE OF "PHYSICAL INJURY" WAS LEGALLY INSUFFICIENT, ASSAULT 2ND CONVICTION REVERSED (SECOND DEPT).

The Second Department, reversing defendant's Assault 2nd conviction, determined the evidence of "physical injury" was legally insufficient:

… [T]he evidence, when viewed in the light most favorable to the prosecution … , was legally insufficient to establish, beyond a reasonable doubt, that the complainant sustained a physical injury within the meaning of Penal Law § 10.00(9). Physical injury is defined as "impairment of physical condition or substantial pain" … . At the time of the incident, the complainant did not seek medical attention and proceeded on his way. He testified at trial that he continued to have pain in his back and neck for approximately three weeks, had pain when he lifted "something" when working in construction, without specifying what "something" was, and was unable to use a pillow to sleep. However, he never sought medical treatment after the incident, claiming that he did not need it, and he used only a topical pain relief cream to relieve pain. Under these circumstances, there was insufficient evidence from which a jury could rationally infer that the complainant suffered substantial pain or impairment of his physical condition … . People v Bowen, 2021 NY Slip Op 04236, Second Dept 7-7-21

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).

The Fourth Department determined plaintiff's medical (psychiatric) malpractice action properly survived a motion to dismiss. Plaintiff was treated by defendants after he was brought to the hospital by the police pursuant to Mental Hygiene Law 9.41. Plaintiff had threatened family members and killed a dog. Plaintiff was released the same day and shortly thereafter killed the three family members he had threatened. Ultimately plaintiff entered a plea of not responsible by reason of mental illness or defect. The courts refused to apply the rule prohibiting a plaintiff from taking advantage of his own wrong because plaintiff was not responsible for his conduct:

With respect to the ground for dismissal asserted here, "as a matter of public policy, . . . where a plaintiff has engaged in unlawful conduct, the courts will not entertain suit if the plaintiff's conduct constitutes a serious violation of the law and the injuries for which the plaintiff seeks recovery are the direct result of that violation" … . The rule derives from the maxim that "[n]o one shall be permitted to profit by his [or her] own fraud, or to take advantage of his [or her] own wrong, or to found any claim upon his [or her] own iniquity, or to acquire property by his [or her] own crime" … . In cases in which the doctrine applies, "recovery is precluded 'at the very threshold of the plaintiff's application for judicial relief' " … . Notably, the Court of Appeals has applied the doctrine with caution to avoid overextending it inasmuch as the rule "embodies a narrow application of public policy imperatives under limited circumstances" … . * * *

… [A]ccepting the facts as alleged in the complaint as true, we conclude that the criminal court's acceptance of plaintiff's plea of not responsible by reason of mental disease or defect demonstrates that, at the time of his conduct constituting a serious violation of the law, plaintiff lacked substantial capacity to know or appreciate either the nature and consequences of his conduct or that such conduct was wrong … . Thus, unlike cases applying the rule to preclude recovery, the record here establishes that plaintiff's illegal conduct was not knowing, willful, intentional, or otherwise sufficiently culpable to warrant application of the rule … . 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).

The Fourth Department, reversing (modifying) Supreme Court, determined some of the conditions of probation prohibiting defendant from possessing a computer and cell phone were not warranted. Defendant pled guilty to attempted sexual abuse first degree:

In addition to prohibiting defendant from maintaining an account on a social networking site, condition 34 also prohibits defendant from purchasing, possessing, controlling, or having access to any computer or device with internet capabilities and from maintaining any "internet account," including email, without permission from his probation officer. Condition 35 prohibits defendant from owning, renting, or possessing a cell phone with picture taking capabilities or cameras or video recorders for capturing images. In light of defendant's lack of a prior criminal history and the lack of evidence in the record linking defendant's use of technology to the

underlying offense, we conclude that those parts of condition 34 and the entirety of condition 35 do not relate to the goals of probation and thus are not enforceable on that ground … . 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).

The Second Department, reversing defendant's conviction, determined prosecutorial misconduct deprived defendant of a fair trial. The errors were not preserved by objections, but the appeal was considered in the interest of justice. The prosecutor's remarks are detailed in the decision and are too numerous to include here:

The prosecutor denigrated any possible defense, invoked the jury's sympathy for the complainants based upon irrelevant evidence, vouched for the credibility of the People's witnesses, and misstated the law on circumstantial evidence … . 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).

The Second Department, reversing Supreme Court in this resentencing proceeding, determined the sentencing judge could consider defendant's conduct after the original sentence was imposed and should have ordered an updated presentence report, including an interview with the defendant. Defendant had been sentenced in 1998 and 1999 to 125 years of imprisonment. In 2019 defendant moved to set aside his sentence on the ground that is was vindictive and the People consented to setting the sentence aside:

The Supreme Court erred in determining that it had no discretion to consider the defendant's conduct after the original sentence was imposed. In People v Kuey (83 NY2d 278, 282), the Court of Appeals noted that when a defendant comes before the court for resentencing, "the proper focus of the inquiry is on the defendant's record prior to the commission of the crime." However, the Court of Appeals did not purport to limit the sentencing court's discretion. Indeed, in Kuey, the Court of Appeals further noted that the defendant was "afforded the opportunity to supply information about his subsequent conduct," and that the court had discretion to order an updated presentence report regarding the defendant's subsequent conduct, if it determined that such was necessary … .

Critically, unlike the resentencing proceeding in Kuey, the resentencing proceeding here was held because the original sentence was claimed to be vindictive, which is not merely a technical defect in the original sentence … , but implicates the original sentencing court's failure to have observed sentencing principles before imposing sentence. Given the context under which the resentence was directed, the resentencing court must exercise discretion and give due consideration "to, among other things, the crime charged, the particular circumstances of the individual before the [resentencing] court and the purpose of a penal sanction, i.e., societal protection,

rehabilitation and deterrence" … . 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).

The Second Department, in an extensive, comprehensive opinion by Justice Miller, over two concurrences and a two-justice dissent, reversing defendant's conviction, determined the warrantless search of the vehicle in which cocaine was found was not demonstrated to be valid under the fellow officer rule, was not demonstrated to be valid pursuant to the automobile exception, and was not demonstrated to be based on a valid inventory search. In a nutshell, the claimed exceptions to the warrant requirement were rejected because they were not supported by the evidence at the suppression hearing. The detailed factual and legal analyses cannot be fairly summarized here. The opinion should be consulted on the issues addressed, including the propriety of the stop of the vehicle, because of the extraordinary depth of the discussions. County Court's denial of suppression was based on the following findings. All except the reason for the stop (an observed traffic violation) were rejected on appeal:

The [county] court first concluded that the State Troopers had probable cause to stop the vehicle by virtue of "the fellow-officer rule." … [T]he court cited to testimony

that law enforcement officials had intercepted approximately 89,000 communications, and that some of these communications indicated that there would be a quantity of narcotics in the vehicle on the night in question.

… [T]he [county] court credited the testimony of one of the State Troopers who testified that he observed the subject vehicle exceed the maximum speed limit and fail to maintain its lane.

…[T]he [county] court concluded that the intercepted communications and the application of the fellow officer rule provided a lawful basis for the search of the vehicle at the outset of the traffic stop.

The [county court] concluded that the State Troopers were authorized to search the subject vehicle under the "automobile exception" to the Fourth Amendment. In this regard, the court noted that one of the State Troopers had reportedly detected the odor of marihuana when he initially approached the vehicle after it was pulled over.

Finally, the County Court determined, as a third alternative ground, that the cocaine was properly recovered pursuant to a valid inventory search. 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).

The Third Department, reversing the Tax Appeals Tribunal, determined the search of petitioner's truck which led to the discovery of cigarettes with no tax stamp was not supported by probable cause. Therefore the determination that petitioner owed a $1,259, 250 penalty was annulled:

Petitioner is a member of the Seneca Nation of Indians, a Native American tribe recognized by the US Bureau of Indian Affairs. ERW Wholesale is petitioner's tobacco wholesale business, licensed by the Seneca Nation of Indians operating on the Cattaraugus Reservation. In December 2012, ERW sold 150 cases (9,000 cartons) of Native American brand cigarettes to Oien'Kwa Trading, a Native American-owned business located on the St. Regis Mohawk Reservation. Oien'Kwa Trading immediately sold the cigarettes to Saihwahenteh, a Native American-owned business located on the Ganienkeh territory. Oien'Kwa Trading hired ERW to deliver the cigarettes directly to Saihwahenteh. Sean Snyder, an ERW employee, was employed as the truck driver. * * *

… [T]he validity of a search is subject to a two-prong test — arrest and probable cause — neither of which is satisfied here. As to the first prong, the record reveals that Snyder, the driver and sole occupant of the truck that was searched, was never arrested. With respect to probable cause, the record demonstrates a complete lack thereof. When Snyder was stopped, he was completely cooperative with the trooper and forthrightly explained that he was transporting cigarettes from a Native American reservation to a Native American territory, and he immediately gave the trooper an envelope containing the pertinent documents, namely the registration, invoices and bill of lading. Although the trooper testified that Snyder appeared nervous when he was initially pulled over, this conduct in and of itself is insufficient to justify a search … . Once back at the vehicle inspection checkpoint, Snyder readily

exited his vehicle and turned his keys over to the trooper; he was never asked if the cigarettes were stamped. When the trooper employed the bolt cutters and the investigator entered the cargo area, the investigator found that the cargo was exactly as Snyder had told them — cases of cigarettes. The investigator's search of the cargo area, including opening a case and then a carton, in order to inspect a single pack of cigarettes for a tax stamp was not precipitated by a complaint, tip, investigation or statements from Snyder, any of which might have provided probable cause. On the contrary, the investigator testified that the search proceeded only after he conferred with the trooper who believed that the cigarettes were Native American brand and, as such, were not stamped. The transportation of cigarettes from a Native American reservation to a Native American territory does not, in and of itself, give rise to a reasonable inference of criminality … . 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).

The Second Department, reversing County Court, determined defendant was entitled to a downward departure in this statutory-rape SORA risk level proceeding. The issue was not preserved because defendant did not request a downward departure but the appeal was considered in the interest of justice:

"In cases of statutory rape, the Board has long recognized that strict application of the Guidelines may in some instances result in overassessment of the offender's risk to public safety" … . The Guidelines provide that a downward departure may be

appropriate where "(i) the victim's lack of consent is due only to inability to consent by virtue of age and (ii) scoring 25 points [for risk factor 2, sexual contact with the victim,] results in an over-assessment of the offender's risk to public safety" … .

Since the defendant did not request a downward departure from his presumptive risk level in the County Court, his contentions on appeal regarding a downward departure are unpreserved for appellate review … . However, under the circumstances of this case, we address those contentions in the interest of justice … .

Considering all of the circumstances presented here, including that the subject offense is the only sex-related crime in the defendant's history, and that the defendant accepted responsibility for his crime, the assessment of 25 points under risk factor 2 resulted in an overassessment of the defendant's risk to public safety … . Accordingly, a downward departure is warranted, and the defendant should be designated a level one sex offender. 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.

SPEEDY TRIAL.

THE FOUR-YEAR PRE-INDICTMENT DELAY IN THIS RAPE CASE DID NOT VIOLATE DEFENDANT'S CONSTITUTIONAL SPEEDY-TRIAL RIGHTS; TWO JUSTICE DISSENT (SECOND DEPT).

The Third Department, over a two-justice dissent, determined the four-year pre-indictment delay in this rape case did not violate defendant's constitutional speedy trial rights. The dissent disagreed:

… [T]he preindictment delay of four years was lengthy and the reasons for the delay proffered by the People certainly left something to be desired. However, the People's

submissions established that the investigation was ongoing, that they were acting in good faith and that there were valid reasons for portions of the delay. Additionally, the charge of rape in the first degree can only be characterized as serious … . Furthermore, there was no period of pretrial incarceration and there is no indication that the defense was prejudiced by the delay. In fact, defendant became aware of the accusations against him shortly after the offense occurred. In our view, the seriousness of the offense, the fact that defendant was not incarcerated pretrial and the absence of any demonstrated prejudice outweigh the four-year delay and the shortcomings in the People's reasons therefor … . People v Regan, 2021 NY Slip Op 04161, Second Dept 7-1-21

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).

The Fourth Department, reversing Supreme Court, determined the statements made by defendant to a Child Protective Services (CPS) caseworker should have been suppressed because, under the facts, she was acting as an agent of law enforcement at the time of the interview:

… [T]he CPS caseworker testified at the Huntley hearing that, at the time she interviewed defendant, she was aware that defendant was being held on criminal charges and that he was represented by counsel. She further testified that she worked on a multidisciplinary task force composed of social services and law enforcement agencies, through which she received training on interviewing individuals accused of committing sexual offenses. Additionally, in keeping with task force protocol directing her to report to law enforcement any inculpatory statements made during CPS interviews, the CPS caseworker called the investigating officer immediately following the interview with defendant and promptly went to his office to report defendant's statements. Under the circumstances of this case as reflected at the hearing, although the police did not specifically direct the CPS caseworker to conduct the interview on a specific date or time or accompany her to the interview

… , we conclude that the CPS caseworker here had a "cooperative working arrangement" with police such that she was acting as an agent of the police when she interviewed defendant and relayed his incriminatory statements … . The statements were thus obtained in violation of defendant's right to counsel, and the court erred in refusing to suppress them … . Further, because defendant's statements to the CPS caseworker were the only statements in which he admitted to having sexual contact with the victim, we cannot say that there is "no reasonable possibility that the error contributed to the plea" … . People v Desjardins, 2021 NY Slip Op 04465, Fourth Dept 7-16-21

Practice Point: Here, under the facts, the Child Protect 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).

The Second Department, dismissing the indictment, determined the People did not demonstrate the level three encounter with the defendant in the street stop was justified by reasonable suspicion. Some of the police officers' testimony was rejected as incredible:

Officer Washington's pursuit of the defendant and her attempt to grab him with her right hand were both level three actions requiring reasonable suspicion … . Setting aside those portions of Officer Washington's account the Supreme Court properly disregarded as incredible, her testimony indicates that she began chasing and grabbing at the defendant in response to his flight. She did not, however, credibly describe anything more than equivocal circumstances in conjunction with the defendant's flight, meaning her testimony was insufficient to justify police pursuit … . Officer Montano testified that the defendant dropped the gun before he fled,

which in turn could justify Officer Washington's pursuit … . But he also testified that Officer Washington was "trying to take her shield out as she [was] approaching [the defendant] to try to grab him" before the defendant dropped the gun or started to run. Officer Montano thus observed the defendant drop the gun and flee as a result of Officer Washington's attempt to grab him before she had the reasonable suspicion necessary to do so. "Since this level three intrusion was not justified, it cannot be validated by the officer's subsequent observation of the firearm" … . People v Rhames, 2021 NY Slip Op 04242, Second Dept 7-7-21

Practice Point: Here the street stop and level three intrusion was 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).

The Second Department, modifying Supreme Court, determined the statutory amendments which went into effect while the appeal was pending were remedial and therefore should be applied retroactively. The amendments repealed the imposition of mandatory surcharges and crime victim assistance fees for youthful offenders:

Permitting juveniles whose direct appeals were pending when the amendments were enacted to benefit from them would further the legislative purpose of removing unreasonable financial burdens placed on juveniles and enhancing their chances for successful rehabilitation and reintegration. … [P]rospective application would undermine the legislative goals by continuing the recognized inequity created by imposition of the surcharges and fees and leaving youth at risk for future "devastating" consequences should they be unable to pay. Indeed, the Legislature conveyed "a sense of urgency" in correcting these problems by providing that the amendments would take effect immediately … .

… [R]etroactive application of the amendments would not result in unfairness or impair substantive rights … . The subject surcharges and fees, which are "nonpunitive," were enacted strictly as a revenue raising measure … . 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.