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APPEALS, SORA RULING.

THE RECORD WAS NOT SUFFICIENT FOR THE APPEAL OF THE SORA RISK LEVEL CLASSIFICATION; MATTER REMITTED (THIRD DEPT).

The Third Department, reversing County Court, determined the appeal of the Sex Offender Registration Act (SORA) risk level classification could not be heard because the record was not sufficient. The matter was remitted:

"Although the short form order utilized by County Court contains the ordered language required to constitute an appealable paper, the written order fails to set forth the findings of fact and conclusions of law required by Correction Law § 168-n (3)" … . "The hearing transcript is similarly deficient as it does not contain clear and detailed oral findings to support County Court's risk level classification" … . The scant record before us is not sufficiently developed to enable this Court to make its own factual findings and legal conclusions — particularly with respect to the number of victims and the points assessed under risk factor three. Accordingly, County Court's order is reversed, and this matter is remitted for further proceedings. People v Kwiatkowski, 2021 NY Slip Op 04934, Third Dept 9-2-21

Practice Point: A court's SORA risk level assessment must be supported by findings of fact and conclusions of law in the order appealed from. If it isn't the appellate court cannot consider the appeal and will remit the matter to the SORA court.

APPEALS, YOUTHFUL OFFENDERS, JUDGES, ATTORNEYS.

APPELLATE COUNSEL SHOULD HAVE ARGUED THAT COUNTY COURT FAILED TO CONSIDER A YOUTHFUL OFFENDER ADJUDICATION; WRIT OF ERROR CORAM NOBIS GRANTED AND MATTER REMITTED (SECOND DEPT).

The Second Department granted the writ of error coram nobis and remitted the matter. Appellate counsel should have raised the argument that County Court failed to consider whether defendant should be adjudicated a youthful offender:

… [W]e grant the defendant's application for a writ of error coram nobis, based on former appellate counsel's failure to contend on appeal that the County Court failed to determine whether the defendant should be afforded youthful offender status. As held by the Court of Appeals in People v Rudolph (21 NY3d 497), CPL 720.20(1) requires "that there be a youthful offender determination in every case where the defendant is eligible, even where the defendant fails to request it, or agrees to forgo it as part of a plea bargain"… . Here, the record does not demonstrate that the court considered whether to adjudicate the defendant a youthful offender, even though the defendant was eligible … . Although we acknowledge that the Court of Appeals decided Rudolph only shortly before former appellate counsel filed the brief on the appeal, because the holding in Rudolph compels vacatur of the sentence, the standard of meaningful representation required former appellate counsel to argue that, pursuant to Rudolph, the sentence must be vacated and the matter remitted for determination of the defendant's youthful offender status … . People v Slide, 2021 NY Slip Op 04982, Second Dept 9-15-21

Practice Point: If appellate counsel does not argue the sentencing judge failed to determine a defendant's youthful offender status, the defendant has not been afforded effective assistance of counsel on appeal and a writ of coram nobis will be granted on that ground.

ATTORNEYS, RIGHT TO COUNSEL, JUDGES.

EVEN THOUGH DEFENDANT WAS A DISBARRED ATTORNEY, THE TRIAL JUDGE SHOULD HAVE CONDUCTED AN INQUIRY TO MAKE SURE THE DEFENDANT UNDERSTOOD THE RISKS OF REPRESENTING HIMSELF; CONVICTIONS REVERSED (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined the judge should have ensured defendant knew the risks of conducting the trial pro se before allowing defendant, a disbarred attorney, 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 the 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" … . Nonetheless, no specific litany is required and a reviewing court may look to the whole record, not simply to the questions asked and answers given during a waiver colloquy, in order to determine whether a defendant actually understood the dangers of self-representation … . Subsequent warnings, however, cannot cure a trial court's earlier error in not directing the defendant's attention to the dangers and disadvantages of self-representation … .

Here, although the record demonstrates that the Supreme Court was aware of the defendant's pedigree information, including his status as a disbarred attorney, the court failed to ascertain that the defendant was aware of the risks inherent in proceeding without a trial attorney and the benefits of having counsel represent him at trial … . Contrary to the People's contention, there is nothing in the record that demonstrates that the dangers and disadvantages of self-representation were known by the defendant … , as the court neither "tested defendant's understanding of

choosing self-representation nor provided a reliable basis for appellate review" … . People v Crispino, 2021 NY Slip Op 04918, Second Dept 9-1-21

Practice Point: Even where the defendant was an attorney, the trial judge must ensure the defendant understands the risks of proceeding without an attorney and the failure to do so is reversible error.

ATTORNEYS, RIGHT TO COUNSEL.

A PSYCHIATRIC EXAM IS A CRITICAL STAGE OF A PROSECUTION AT WHICH DEFENDANT HAS THE RIGHT TO COUNSEL; THE EXCLUSION OF DEFENSE COUNSEL FROM THE EXAM WAS NOT HARMLESS ERROR; CONVICTION REVERSED (CT APP).

The Court of Appeals, reversing defendant's manslaughter conviction, determined the exclusion of defense counsel from the psychiatric exam by the People's expert was not harmless error:

After defendant provided timely notice that he intended to present psychiatric evidence at trial, he was twice interviewed by a clinical psychologist engaged by the People (see CPL 250.10 [2], [3]). Although defense counsel was present at the first examination, the expert denied defense counsel admittance to the second examination. Over defense counsel's objection that defendant's right to counsel had been violated, the expert's testimony was admitted at trial. On defendant's appeal, the Appellate Division affirmed, holding that defendant's constitutional right to counsel had been violated but that the error was harmless … . …

In Matter of Lee v County Ct. of Erie County (27 NY2d 432 [1971]), we held that defendants' Sixth Amendment right to counsel applies at pre-trial psychiatric examinations "to make more effective [a defendant's] basic right of cross-examination" … In Lee, we cited to United States v Wade's (388 US 218 [1967]) definition of a critical stage of the prosecution as "'any stage of the prosecution, formal or informal, in court or out, where' 'the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective

assistance of counsel at the trial itself'" … . We thus held that pretrial psychiatric examinations are a critical stage of the prosecution.

… The People—not the defendant—bear the burden of showing that "there was no reasonable possibility that the trial court's admission" of that part of the expert's testimony based on the uncounseled examination "affected the jury's verdict" … . Under the circumstances of this case, the expert's testimony at trial was based in part on the examination undertaken in violation of defendant's constitutional right to counsel, and we cannot say that the error was harmless … . People v Guevara, 2021 NY Slip Op 04955, CtApp 9-9-21

Practice Point: The Court of Appeals has made it clear that a psychiatric exam is a critical stage of a criminal proceeding at which defendant has the right to counsel. On appeal the admission of testimony based on an uncounseled psychiatric examination is subject to a harmless error analysis requiring the People to demonstrate there was no reasonable possibility the testimony affected the jury's verdict.

GUILTY PLEA, MOTION TO WITHDRAW, APPEALS.

DEFENDANT SHOULD HAVE BEEN ALLOWED TO WITHDRAW HIS GUILITY PLEA; THE WAIVER OF APPEAL DID NOT PRECLUDE AN APPEAL ALLEGING THE GUILTY PLEA WAS INVALID (SECOND DEPT).

The Second Department, reversing County Court, over a dissent, determined defendant should have been allowed to withdraw his guilty plea. The court noted that the defendant's waiver of appeal did not preclude an appeal alleging the guilty plea was not valid:

… [T]he defendant secured new counsel and made a written motion to withdraw his plea a little more than four months after he pleaded guilty. The County Court denied the defendant's motion, without a hearing or any further inquiry into the defendant's claims. At the subsequent sentencing proceeding, the defendant again asserted his innocence and again asked the court to permit him to withdraw his plea based on his

attorneys' failure to provide meaningful representation. The defendant's application to withdraw his plea at the sentencing proceeding was based on his statements to the court and his prior evidentiary submissions, which tended to substantiate his contention that he had not understood the concept of constructive possession or the nature of the People's evidence at the time that he pleaded guilty. These submissions were sufficient to cast doubt on his guilt and the validity of his plea … . The People did not allege any prejudice that would have resulted had the court permitted the defendant to withdraw his plea of guilty at that time … . People v Gerald, 2021 NY Slip Op 05130, Second Dept 9-29-21

Practice Point: A waiver of appeal does not preclude an appellate court from considering the validity of a guilty plea.

JUSTIFICATION DEFENSE.

ALTHOUGH THE COMPLAINANT WAS USING ONLY HIS FISTS FIGHTING THE MUCH SMALLER DEFENDANT, THE DEFENDANT WAS ENTITLED TO THE DEADLY-FORCE-JUSTIFICATION-DEFENSE JURY INSTRUCTION (SECOND DEPT).

The Second Department, over a strong dissent, reversing defendant's conviction, determined defendant's request for a deadly-force-justification-defense jury instruction should have been granted. The person with whom defendant was fighting, Gibson, was five inches taller and 66 pounds heavier than defendant. Gibson testified the defendant struck him with a hammer and a meat cleaver. Although Gibson was using only his fists during the fight, he eventually rendered defendant unconscious with a single punch. The medical evidence did not support Gibson's claim he had been struck with a hammer and a meat cleaver:

The jury acquitted the defendant of attempted murder in the second degree and criminal possession of a weapon in the third degree, and convicted him of assault in the second degree. …

… [B]ased on the differences in size and strength between Gibson and the defendant … , the complainant's own testimony that he held the defendant down and punched

him in the face, the significant injuries suffered by the defendant, including a fractured ankle, Hall's [a roommate's] statement during the 911 call that "they're killing each other," and the significant factual questions presented regarding what weapons were used and by whom, a rational jury could have found that the defendant reasonably believed that deadly physical force was necessary to defend himself … against the use or imminent use of deadly physical force by Gibson … . … [B]ased on the evidence viewed in the light most favorable to the defendant, a rational jury could have determined that Gibson, not the defendant, was the first person to use or threaten the imminent use of deadly physical force … . Under these circumstances, the failure to charge the defense constituted reversible error … . * * *

… Supreme Court failed to view the evidence in the light most favorable to the defendant. The court credited Gibson's testimony despite evidence which … significantly called into question the credibility of Gibson's story. … A criminal defendant has no burden to present evidence at trial to prove his innocence, including by showing that his conduct was justified and therefore lawful … . Instead, the burden to disprove justification falls on the People. People v Singh, 2021 NY Slip Op 05134, Second Dept 9-29-21

Practice Point: Although the complainant used only his fists, the fact that the complainant was much taller and heavier than the defendant, and was able to knock the defendant unconscious with a single punch, was sufficient to demonstrate defendant was entitled to the deadly-force-justification-defense jury instruction.

SECURITY GUARDS, EXERCISE OF POLICE POWERS.

DEFENDANT WAS ENTITLED TO A HEARING TO DETERMINE WHETHER THE SECURITY GUARD WHO RECOVERED STOLEN PROPERTY FROM HIM WAS LICENSED TO EXERCISE POLICE POWERS OR WAS ACTING AS AN AGENT OF THE POLICE (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Renwick, determined defendant was entitled to a hearing on whether the store security guard who detained him was licensed to exercise police powers or was acting as an agent of the police.

Although the defendant had already pled guilty and was sentenced, the information available to the defendant did not identify the person who detained him and, therefore, defendant could hot have subpoenaed employment records to ascertain the security guard's employment status:

Under People v Mendoza (82 NY2d 415, 425, 433—434 [1993]), defendant is entitled to a hearing on the purely factual issue of whether or not the security guard involved in his detention was licensed to exercise police powers, or acting as an agent of the police. * * *

… [T]he felony complaint provided no information regarding defendant's arrest, and the VDF simply indicated that the arrest took place on "May 27, 2027," at "9:04 PM," "Inside Bergdorf Goodman at 754 Fifth Avenue." The individual who allegedly recovered the stolen material from defendant's handbag was neither identified by name nor as an employee of Bergdorf.

This information could not have helped defendant further investigate whether the security guard was a private or state actor status. People v Sneed, 2021 NY Slip Op 05095, First Dept 9-28-21

Practice Point: If a security guard is a private person, detention and search by the guard does not raise suppression issues. But if the security guard is licensed to exercise police powers or acts as an agent of the police, detention and search by the guard raises suppression issues. Therefore a defendant who was detained and searched by a security guard is entitled to discovery to determine the nature of the guard's employment.

SENTENCING, LESS THAN STATUTORILY REQUIRED.

THE SENTENCE AGREED TO IN THE PLEA BARGAIN AND IMPOSED BY THE COURT WAS ILLEGAL BECAUSE IT WAS LESS THAN STATUTORILY REQUIRED; THE SENTENCE WAS VACATED AND THE MATTER REMITTED TO GIVE DEFENDANT THE OPPORTUNITY TO WITHDRAW THE PLEA (THIRD DEPT).

The Third Department determined defendant's sentence was illegal because it was less than statutorily required. Because the plea agreement included the illegal sentence, the sentence was vacated and the matter was remitted to give the defendant the opportunity to withdraw his plea:

Defendant had previously been convicted of driving while intoxicated in violation of Vehicle and Traffic Law § 1192 (3) in 2019. Inasmuch as that conviction was within five years of the instant plea of guilty to driving while intoxicated, Vehicle and Traffic Law § 1193 (1-a) (a) requires the additional penalty of either five days in jail or 30 days of community service. As no such penalty was imposed by the court, the sentence imposed is less than is statutorily required and, therefore, is illegal.

"Where the plea bargain includes a sentence which is illegal because the minimum imposed is less than that required by law, . . . the proper remedy is to vacate the sentence and afford the defendant, having been denied the benefit of the bargain, the opportunity to withdraw the plea" … . Accordingly, the matter must be remitted to County Court for resentencing in accordance with the governing sentencing statute, with the opportunity for defendant to withdraw from the plea agreement … . People v Gary, 2021 NY Slip Op 05052, Third Dept 9-23-21

Practice Point: A sentence which is less than statutorily required is illegal and will not withstand scrutiny by an appellate court.

SUPPRESSION HEARING, PEOPLE'S BURDEN OF PROOF.

THE PEOPLE DID NOT DEMONSTRATE PROBABLE CAUSE FOR THE TRAFFIC STOP; THE 911 CALL WAS NOT PUT IN EVIDENCE AND THE RELIABILITY OF THE CALLER AND THE BASIS FOR THE CALLER'S KNOWLEDGE WERE NOT DEMONSTRATED; THE FACT THAT THE RELEVANT EVIDENCE WAS PRESENTED AT TRIAL WAS IRRELEVANT (CT APP).

The Court of Appeals, reversing the Appellate Division, determined the People did not present sufficient evidence at the suppression hearing. Probable cause for the traffic stop was based on a 911 call. But no evidence was presented to demonstrate the reliability of the caller or the basis for the caller's knowledge. The fact that the relevant evidence was presented at trial did not matter. The appeal focuses on the evidence presented at the suppression hearing:

… [T]he officer's only justification for the stop was the dispatcher's report that a 911 caller had asserted that one of the vehicle's occupants possessed a "long gun." Initially, defendant claims that the stop was invalid because possession of a "long gun" is lawful in New York. We reject that claim as meritless (see Penal Law 265.00 [22]). However, the People failed to introduce the 911 recording, failed to introduce any evidence indicating whether the 911 caller was an identified citizen informant or an anonymous tipster, and failed to offer any explanation of the basis of the caller's knowledge. In sum, the People put forward no relevant information concerning the circumstances surrounding the call at the hearing. Contrary to the People's suggestion that an appellate court can consider evidence subsequently admitted at trial to justify affirmance of an order denying suppression, "the propriety of the denial must be judged on the evidence before the suppression court" … . Therefore, on the record of the suppression hearing, "whether evaluated in light of the totality of the circumstances or under the Aguilar-Spinelli framework, the reliability of the tip was not established" … . People v Walls, 2021 NY Slip Op 04949, CtApp 9-2-21

Practice Point: The Court of Appeals held that the People did not meet their burden of proof at the suppression hearing. The police stopped the defendant's vehicle based

solely upon a 911 call. But the People did not introduce a recording of the call, did not indicate whether the caller was an identified citizen informant or an anonymous tipster, and did not present any evidence of the basis of the caller's knowledge---the traditional evidence required by the Aguilar-Spinelli test was not introduced.

SUPPRESSION HEARING, RELIANCE ON HEARSAY.

THE PEOPLE PROPERLY RELIED ON HEARSAY TO DEMONSTRATE PROBABLE CAUSE AT THE SUPPRESSION HEARING; THE DEFENDANT DID NOT PRESENT ANY EVIDENCE TO CALL THE RELIABILITY OF THE HEARSAY INTO QUESTION (FIRST DEPT).

The First Department explained the People's burden of proof when relying on hearsay evidence at a suppression hearing. Here the transit officers who witnessed defendant commit "farebeating" (providing probable cause) were not called to testify. The hearsay was deemed admissible under Aguilar-Spinelli and the defendant did not call the accuracy or reliability of the hearsay into question by cross-examination or the presentation of evidence:

Defendant's main argument on appeal is that the People failed to meet their burden of coming forward with evidence demonstrating probable cause with respect to the underlying theft of services arrest — which created the circumstances for the testifying officer's discovery of defendant — because they did not present any testimony from the Transit Bureau officers who had firsthand knowledge of the farebeating offense. …

Probable cause may properly be established based on hearsay testimony … , such as the officer's testimony about what he was told by the transit officers, so long as, under the Aguilar-Spinelli test, the People establish that there was "some basis" of knowledge for the underlying statement and that it was "reliable"… . The "some basis" requirement is satisfied where, as here, the information is based on personal knowledge … .

Although the People will fail to meet their burden at a suppression hearing where they rely exclusively on hearsay evidence and "the defense challenges the

sufficiency of the evidence, whether by cross-examining the People's witness or putting on a defense case" … , that is not the situation here, because defendant did not present any evidence, identify anything in the People's case, or elicit any statements on cross-examination that undercut the veracity of the transit officers' account of a farebeating, as relayed by the testifying officer … . The unsupported assertion in defendant's moving papers that he was seized without reason was not sufficient to necessitate calling the transit officers as witnesses. People v Gerard, 2021 NY Slip Op 05089, First Dept 9-28-21

Practice Point: At a suppression hearing, the People may rely entirely on hearsay as long as it meets the Auguilar-Spinelli tests. The suppression court's ruling will be upheld on appeal if the defendant, at the hearing, does not present any evidence or elicit any testimony on cross which calls into question the veracity of the hearsay.

VACATE CONVICTION, MOTION TO, ATTORNEYS.

GENERAL CRITERIA FOR DENYING, WITHOUT HOLDING A HEARING, A MOTION TO VACATE A CONVICTION ON INEFFECTIVE-ASSISTANCE GROUNDS (CT APP).

The Court of Appeals, without discussing the facts, laid out the criteria for denying a motion to vacate a conviction on ineffective-assistance grounds without holding a hearing:

… [A] court may deny a CPL 440.10 motion without conducting a hearing if "[t]he motion is based upon the existence or occurrence of facts and the moving papers do not contain sworn allegations substantiating or tending to substantiate all the essential facts" … . Here, County Court did not abuse its discretion in denying defendant's CPL 440.10 motion without a hearing because, under the circumstances presented, defendant failed to sufficiently allege "'a reasonable probability that, but for counsel's [alleged] errors, he would not have pleaded guilty and would have insisted on going to trial'" … . Moreover, defendant failed to otherwise "show that the nonrecord facts sought to be established . . . would entitle him to relief" … . People v Dogan, 2021 NY Slip Op 04956, CtApp 9-14-21

Practice Point: Although the Court of Appeals did not describe the facts of the case, the court laid out the general criteria for granting a hearing on a motion to vacate a conviction. To warrant a hearing, a defendant must demonstrate a "reasonable probability" he or she would not have pled guilty and would have insisted on going to trial absent defense counsel's errors.

YOUTHFUL OFFENDERS, VACATE CONVICTION, MOTION TO.

THE 2012 SENTENCE IMPOSED WITHOUT CONSIDERING WHETHER DEFENDANT SHOULD BE AFFORDED YOUTHFUL OFFENDER STATUS WAS NOT ILLEGAL OR UNAUTHORIZED UNDER THE LAW IN EFFECT AT THE TIME; THEREFORE A MOTION TO VACATE THE SENTENCE ON THAT GROUND IS NOT AVAILABLE (THIRD DEPT).

The Third Department, reversing Supreme Court, in a full-fledged opinion by Justice Aarons, determined the defendant's motion to vacate his 2012 conviction because the sentencing court did not consider whether he should be afforded youthful offender status should not have been granted. At the time the law was changed to require consideration of youthful offender status the defendant's case was not on appeal and the law-change was not made retroactive such that it could be considered in a collateral proceeding (motion to vacate):

… [T]his appeal does not concern the legality of the sentence imposed after a determination had been made whether a defendant should or should not be accorded youthful offender status or, indeed, the legality of any aspect of defendant's 2012 sentence. Rather, the appeal centers on the failure to determine, in 2012, whether defendant should have been given youthful offender status — a finding that ultimately goes to the judgment of conviction. Accordingly, … CPL 440.20 — a statute that empowers a court to set aside an unauthorized, illegal or invalid sentence — does not authorize the relief granted by Supreme Court … . …

… [I]n limiting the application of the new interpretation of CPL 720.20 (1) to "cases still on direct review," the Court of Appeals expressly indicated that it was not available to permit "collateral attacks on sentences that have already become final" (People v Rudolph, 21 NY3d at 502). Thus, as a result of the Rudolph decision,

convicted defendants gained the right to argue on direct appeal their entitlement to a resentencing at which the court will make a youthful offender determination. The Rudolph decision, however, did not authorize that relief in a collateral proceeding pursuant to CPL 440.20. In foreclosing retroactive application of the new rule announced in Rudolph to collateral proceedings, the Court of Appeals necessarily rejected the view that sentences imposed under its prior precedent were illegal, unauthorized or invalid. People v Vanderhorst, 2021 NY Slip Op 05141, Third Dept 9-30-21

Practice Point: The failure to consider a defendant's youthful offender status is a ground for appeal if the defendant's sentence was not final when the law was changed by the Court of Appeals in People v Rudolph (2013). But it is not a ground for a motion to vacate a conviction after the sentence becomes final.