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A Succinct Compilation of the Salient Issues Raised in the Decisions Addressing Criminal Law Released by Our New York State Appellate Courts and Summarized on the New York Appellate Digest in October 2021. Right Click on the Citations to Keep Your Place in the Pamphlet.
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Criminal Law
Practice Newsletter
October 2021

ACCESSORIAL LIABILITY.

THE EVIDENCE DEFENDANT SHARED THE CO-DEFENDANT'S INTENT TO STAB THE VICTIM WAS LEGALLY INSUFFICIENT (FIRST DEPT).

People v Grosso, 2021 NY Slip Op 05640, First Dept 10-14-21

Practice Point: There was no evidence the defendant was aware the co-defendant had a knife and was planning to use it. Therefore the evidence of defendant's accessorial liability for the co-defendant's acts was legally insufficient.

APPEALS, TRIAL ORDER OF DISMISSAL.

SUPREME COURT MUST RULE ON DEFENDANT'S MOTION FOR A TRIAL ORDER OF DISMISSAL BEFORE THE APPELLATE COURT CAN CONSIDER THE ISSUE, MATTER REMITTED FOR A RULING; THE SENTENCE IN THIS DWI CASE WAS ILLEGAL (FOURTH DEPT).

People v Capitano, 2021 NY Slip Op 05225, Fourth Dept 10-1-21

Practice Point: If the trial judge does not rule on a motion for a trial order of dismissal, the related appeal cannot be considered and the matter must be remitted for a ruling.

DNA, FORENSIC STATISTICAL TOOL (FST), FRYE HEARING.

THE DNA TEST RESULT GENERATED USING THE FORENSIC STATISTICAL TOOL (FST) SHOULD NOT HAVE BEEN ADMITTED IN EVIDENCE WITHOUT FIRST HOLDING A FRYE HEARING (SECOND DEPT).

People v Adeyeye, 2021 NY Slip Op 05347, Second Dept 10-6-21

Practice Point: DNA testing results using the Forensic Statistical Tool (FST) should not have been admitted in the absence of a Frye hearing.

DOUBLE JEOPARDY.

RETRIAL VIOLATED THE PROTECTION AGAINST DOUBLE JEOPARDY; DEFENDANT HAD MADE A MOTION FOR A MISTRIAL WITH PREJUDICE AND DID NOT CONSENT TO THE DISCHARGE OF THE JURY (FIRST DEPT).

People v Lantigua, 2021 NY Slip Op 05671, First Dept 10-19-21

Practice Point: The defendant had made a motion for a mistrial with prejudice and did not thereafter consent to the discharge of the jury. The protection against double jeopardy precluded a second trial.

GUILTY PLEAS, MOTION TO WITHDRAW, INNOCENCE.

IN HIS MOTION TO WITHDRAW HIS PLEA TO CRIMINAL POSSESSION OF WEAPONS, DEFENDANT CLAIMED HE DID NOT KNOW THE WEAPONS, WHICH BELONGED TO SOMEONE ELSE, WERE STORED AT HIS MOTHER’S HOUSE, WHERE HE DID NOT RESIDE; THIS CLAIM OF INNOCENCE (POSSESSION WAS NOT “VOLUNTARY”) WAS SUFFICIENTLY SUPPORTED TO WARRANT A HEARING ON THE MOTION TO WITHDRAW THE PLEA (SECOND DEPT).

People v Amos, 2021 NY Slip Op 05577, Second Dept 10-13-21

Practice Point: An arguable claim of innocence requires a hearing on a motion to withdraw a guilty plea.

HEROIN, SALE OF, MANSLAUGHTER, CRIMINALLY NEGLIGENT HOMICIDE, GRAND JURY EVIDENCE INSUFFICIENT.

DEFENDANT WAS CHARGED WITH MANSLAUGHTER SECOND BASED ON THE DEATH OF A PERSON TO WHOM DEFENDANT SOLD HEROIN; THE GRAND JURY EVIDENCE DID NOT SUPPORT EITHER THE “RECKLESS” ELEMENT OF MANSLAUGHTER SECOND OR THE “CRIMINAL NEGLIGENCE” ELEMENT OF CRIMINALLY NEGLIGENT HOMICIDE (CT APP).

People v Gaworecki, 2021 NY Slip Op 05392, Ct App 10-7-21

Practice Point: The grand jury evidence of recklessness and criminal negligence was not sufficient to support manslaughter and criminally negligent homicide charges based upon the sale of heroin to a person who died of an overdose.

IDENTIFICATION, RODRIGUEZ HEARING, APPEALS.

THE SUPPRESSION COURT SHOULD HAVE ORDERED A RODRIGUEZ HEARING; THE APPELLATE DIVISION SHOULD NOT HAVE RELIED ON TRIAL TESTIMONY TO OVERCOME THE SUPPRESSION COURT'S ERROR (CT APP).

People v Carmona, 2021 NY Slip Op 05390, Ct App 10-7-21

Practice Point: An appellate court cannot rely on trial evidence of identification to overcome the motion court's erroneous failure to hold a pre-trial Rodriguez hearing.

JUDGES, GUILTY PLEAS, CORECION, THREAT OF HEAVIER SENTENCE AFTER TRIAL.

DEFENDANT'S GUILTY PLEA WAS COERCED BY THE JUDGE'S THREAT TO IMPOSE A HEAVIER SENTENCE IF CONVICTED AFTER TRIAL; ALTHOUGH THE ISSUE WAS NOT PRESERVED, IT WAS CONSIDERED ON APPEAL IN THE INTEREST OF JUSTICE (FOURTH DEPT).

People v Thigpen-Williams, 2021 NY Slip Op 05429, Fourth Dept 10-8-21

Practice Point: A guilty plea induced by the judge's threat to impose a heavier sentence after trial is not voluntary.

JUDGES, PLEA DEAL WITH CO-DEFENDANT TO INDUCE TESTIMONY.

THE TRIAL JUDGE SHOULD NOT HAVE NEGOTIATED A PLEA DEAL WITH A CO-DEFENDANT REQUIRING TESTIMONY AGAINST THE DEFENDANT IN EXCHANGE FOR A MORE FAVORABLE SENTENCE; NEW TRIAL BEFORE A DIFFERENT JUDGE ORDERED (FOURTH DEPT).

People v Johnson, 2021 NY Slip Op 05217, Fourth Dept 10-1-21

Practice Point: A judge cannot negotiate a plea deal with a co-defendant which requires the co-defendant's testimony against the defendant.

JURY INSTRUCTIONS, UNPLED THEORY.

THE JURY SHOULD NOT HAVE BEEN ALLOWED TO CONSIDER A THEORY OF DEPRAVED INDIFFERENCE MURDER WHICH WAS NOT ALLEGED IN THE BILL OF PARTICULARS (FOURTH DEPT).

People v Faison, 2021 NY Slip Op 05184, Fourth Dept 10-1-21

Practice Point: A new trial will be ordered if the jury instructions allow the jury to consider a theory of prosecution that was not charged.

JURY NOTES.

THE TRIAL JUDGE DID NOT GIVE COUNSEL MEANINGFUL NOTICE OF A SUBSTANTIVE JURY NOTE; NEW TRIAL ORDERED (SECOND DEPT).

People v Carillo, 2021 NY Slip Op 05710, Second Dept 10-20-21

Practice Point: If the record does not demonstrate the trial judge informed counsel of a note from the jury, the conviction may be reversed without a reconstruction hearing (as it was here).

MOLINEUX EVIDENCE, STATE OF MIND.

BY ARGUING HE DID NOT KNOW THE WEAPON AND AMMUNITION WERE IN THE TRUCK HE WAS DRIVING, DEFENDANT PUT HIS STATE OF MIND IN ISSUE; THEREFORE THE EVIDENCE HE HAD TWICE BEFORE BEEN IN THE POSSESSION OF FIREARMS, ONCE ON A PLANE AND ONCE IN A VEHICLE, WAS ADMISSIBLE UNDER MOLINEUX (SECOND DEPT).

People v Telfair, 2021 NY Slip Op 05355, Second Dept 10-6-21

Practice Point: Defendant claimed he did not know weapons were in the truck he was driving. Two prior possession-of-a-weapon incidents, more than a decade old, were allowed in evidence to show defendant's "intent" under Molineux.

PEREMPTORY CHALLENGES, SIROIS HEARINGS.

THE PEOPLE DID NOT DEMONSTRATE DEFENDANT WAS RESPONSIBLE FOR INTIMIDATING WITNESSES SUCH THAT OUT-OF-COURT STATEMENTS BY THOSE WITNESSES WERE ADMISSIBLE; THE PEOPLE SHOULD NOT HAVE BEEN ALLOWED TO EXERCISE PEREMPTORY CHALLENGES TO JURORS ALREADY ACCEPTED BY THE DEFENSE (SECOND DEPT).

People v Burgess, 2021 NY Slip Op 05580, Second Dept 10-13-21

Practice Point: The People cannot exercise peremptory challenges after the defense has exercised its peremptory challenges to the same panel.

RIGHT OF WAY LAW (NYC).

NYC'S RIGHT OF WAY LAW CRIMINALIZES ORDINARY NEGLIGENCE WHEN A VEHICLE STRIKES A PEDESTRIAN OR A BICYCLIST WHO HAS THE RIGHT OF WAY; THE LAW IS NOT VOID FOR VAGUENESS, PROPERLY IMPOSES ORDINARY NEGLIGENCE AS THE MENS REA, AND IS NOT PREEMPTED BY OTHER LAWS (CT APP).

People v Torres, 2021 NY Slip Op 05448, CtApp 10-12-21

Practice Point: New York City's right-of-way law, which criminalizes striking a pedestrian or a bicyclist who has the right of way, is valid even though negligence is the mens rea.

RIGHT TO COUNSEL FORFEITURE OF, WAIVER OF APPEAL.

DEFENDANT’S WAIVER OF APPEAL WAS UNENFORCEABLE; “DIFFICULTIES” BETWEEN DEFENDANT AND TWO ATTORNEYS ASSIGNED TO REPRESENT HIM DID NOT AMOUNT TO DEFENDANT’S FORFEITURE OF HIS RIGHT TO COUNSEL, AS THE TRIAL JUDGE HAD RULED (CT APP).

[People v Shanks, 2021 NY Slip Op 05450, CtApp 10-12-21](#)

Practice Point: The “difficulties” defendant had with his attorneys did not justify the trial court’s determination defendant had forfeited his right to counsel.

RIGHT TO COUNSEL, WAIVER OF.

DEFENDANT WAS NOT ADEQUATELY INFORMED ABOUT HIS SENTENCING EXPOSURE, THE NATURE OF THE CHARGES AND THE RISKS OF REPRESENTING HIMSELF; NEW TRIAL ORDERED (FIRST DEPT).

[People v Perry, 2021 NY Slip Op 05826, First Dept 10-26-21](#)

Practice Point: When deciding whether defendant has voluntarily and intelligently waived his right to counsel, a judge must make sure the defendant is aware of his/her sentencing exposure.

SEARCH AND SEIZURE, TRAFFIC STOPS.

THE PAT DOWN SEARCH OF DEFENDANT TRAFFIC OFFENDER WAS NOT SUPPORTED BY REASONABLE SUSPICION (FOURTH DEPT).

People v Santy, 2021 NY Slip Op 05439, Fourth Dept 10-8-21

Practice Point: A pat-down search after a traffic stop must be justified by reasonable suspicion the defendant is armed or poses a threat to the officer's safety.

SEARCHES AND SEIZURES, STANDING TO CONTEST.

DEFENDANT WAS A DINNER GUEST IN HIS FRIEND'S APARTMENT WHEN THE POLICE RAIDED IT; OBSERVATIONS MADE DURING THE RAID LED TO A SEARCH WARRANT FOR THE APARTMENT; DEFENDANT ALLEGED HE RECEIVED MAIL AT THE APARTMENT; THE MAJORITY CONCLUDED DEFENDANT'S MOTION TO SUPPRESS DID NOT SUFFICIENTLY ALLEGE STANDING TO CONTEST THE SEARCH AND THE MOTION WAS PROPERLY DENIED WITHOUT A HEARING (CT APP).

People v Ibarquen, 2021 NY Slip Op 05617, CtApp 10-14-21

Practice Point: Here the Court of Appeals determined defendant, who was a social guest having dinner in the subject apartment when the police entered, did not demonstrate standing to contest the search. The dissent argued the allegations defendant received his mail there and had been at dinner in his friend's house "all night" sufficiently alleged standing.

SEX OFFENDER REGISTRATION ACT (SORA), CHILD PORNOGRAPHY.

DEFENDANT IN THIS CHILD PORNOGRAPHY CASE DEMONSTRATED MITIGATING FACTORS WARRANTING A DOWNWARD DEPARTURE TO SORA RISK LEVEL ONE (FOURTH DEPT).

People v Morana, 2021 NY Slip Op 05188, Fourth Dept 10-1-21

Practice Point: Courts may be willing to grant a downward departure from the Sex Offender Registration Act (SORA) risk level in child pornography cases where the defendant will be supervised by the probation department.

SHACKLES.

ALTHOUGH DEEMED HARMLESS, IT WAS ERROR TO HAVE THE DEFENDANT SHACKLED DURING A PORTION OF THE TRIAL (THIRD DEPT).

People v Banch, 2021 NY Slip Op 05894, Third Dept 10-28-21

Practice Point: It is error to shackle a defendant during trial in the absence of sufficient findings by the trial judge. Here the nature of crime, the corrections officers' recommendations and defendant's verbal outbursts were deemed insufficient. The issue is subject to the harmless error analysis on appeal.

STREET STOPS, DE BOUR.

THE POLICE OFFICERS DID NOT HAVE AN OBJECTIVE, CREDIBLE REASON TO APPROACH DEFENDANT AND REQUEST INFORMATION; THE MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED (SECOND DEPT).

[People v Brown, 2021 NY Slip Op 05579, Second Dept 10-13-21](#)

Practice Point: The defendant’s “tensing up” and “nervousness” upon seeing the police may have justified approaching the defendant (credible-reason standard) but did not justify immediately inquiring about his ownership of a bag and its contents.

TRAFFIC STOPS, PRETEXTUAL GROUNDS, CANINE SNIFF.

THE TRAFFIC STOP WAS PRETEXTUAL, OSTENSIBLY BASED ON A BURNED-OUT LICENSE-PLATE LIGHT; BUT THERE WAS SUPPORT IN THE RECORD FOR THE CANINE SNIFF BASED UPON A FOUNDED SUSPICION OF CRIMINAL ACTIVITY; THEREFORE THE MATTER WAS BEYOND REVIEW BY THE COURT OF APPEALS (CT APP).

[People v Blandford, 2021 NY Slip Op 05619, CtApp 10-14-21](#)

Practice Point: If the Court of Appeals is asked to review a mixed question of law and fact it will affirm the lower court if there is any support for the court’s ruling in the record. Here the issue was whether there was a founded suspicion of criminal activity after a traffic stop such that a canine sniff-search of the vehicle was warranted. The majority found support for the canine sniff in the record. Three judges dissented.

TRAFFIC STOPS, PRETEXTUAL GROUNDS.

EVEN A UBIQUITOUS “DE MINIMUS” VIOLATION OF THE VEHICLE AND TRAFFIC LAW IS VALID JUSTIFICATION FOR A PRETEXTUAL TRAFFIC STOP; HERE THE LICENSE PLATE FRAME OBSCURED “GARDEN STATE” ON THE NEW JERSEY LICENSE PLATE (FIRST DEPT).

People v Dula, 2021 NY Slip Op 05465, First Dept 10-12-21

Practice Point: Even the most trivial Vehicle and Traffic Law violation justifies a traffic stop. Here the license-plate frame obscured New Jersey’s nickname on the plate.

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