NEW YORK APPELLATE DIGEST, LLC

Criminal Law
October 2021

An Organized Compilation of Summaries of Selected Decisions Addressing Criminal Law Released by Our New York State Appellate Courts and Posted on the New York Appellate Digest Website in October 2021. The Entries in the Table of Contents Link to the Summaries Which Link to the Decisions on the Official New York Courts Website. Click on "Table of Contents" in the Header on Any Page to Return There. Right Click on the Citations to Keep Your Place in the Pamphlet.

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ACCESSORIAL LIABILITY.

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

The First Department, reversing defendant's assault convictions, determined the evidence defendant shared the co-defendant's intent to stab the victim was insufficient:

Defendant's convictions of attempted assault in the first degree and assault in the second degree, charged under an acting in concert theory, were not supported by legally sufficient evidence … These charges required proof that when the codefendant stabbed the victim, defendant shared the codefendant's intent to do so; defendant was not convicted of any assault crimes where his liability was based on his intent to commit robbery. During a robbery attempt, the codefendant stabbed the victim from behind several times with a small knife. However, there was no evidence that defendant, who was standing in front of the victim and restraining him, knew that the codefendant had a knife or was planning to use it. "[T]he use of the knife was not open and obvious" … , and defendant released the victim within seconds of the stabbing. Under these circumstances, the record does not support a conclusion beyond a reasonable doubt that defendant was aware of the use of the knife but continued to participate in the assault … . Accordingly, the evidence did not establish defendant's accessorial liability (see Penal Law § 20.00) for these crimes. 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).

The Fourth Department, remitting the case to Supreme Court, determined the trial court must rule on the motion for a trial order of dismissal before the appeal of that issue can be considered. The Fourth Department noted that the sentence imposed in this DWI case was illegal:

… [W]e may not address defendant's contention because, "in accordance with People v Concepcion (17 NY3d 192, 197-198 [2011]) and People v LaFontaine (92 NY2d 470, 474 [1998] …), we cannot deem the court's failure to rule on the . . . motion as a denial thereof" … . We therefore hold the case, reserve decision, and remit the matter to Supreme Court for a ruling on defendant's motion … . …

… [W]e note … that the sentence is illegal insofar as the court directed that defendant serve a term of five years of probation, with an ignition interlock device for a period thereof, consecutive to the indeterminate term of imprisonment of 1 to 3 years on his conviction for violating Vehicle and Traffic Law § 1192 (4-a) … . 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).

The Second Department, reversing defendant conviction, determined the DNA test results using the Forensic Statistical Tool (FST) should not have been admitted without first holding a Frye hearing:

The defendant was convicted, after a jury trial, of murder in the second degree, assault in the first degree, and criminal possession of a weapon in the second degree. Prior to trial, the defendant moved, inter alia, to preclude the People from introducing at trial DNA testing results derived from the use of the Forensic Statistical Tool (hereinafter FST), or alternatively, to conduct a hearing pursuant to Frye v United States (293 F 1013 [DC Cir]) to determine the admissibility of the evidence generated by the FST. The Supreme Court denied that branch of the defendant's motion, finding that FST was generally accepted in the scientific community. We reverse.

The Supreme Court improvidently exercised its discretion in admitting FST evidence without first holding a Frye hearing … . 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).

The First Department, reversing defendant's conviction in the retrial and dismissing the indictment, determined the trial court's failure to procure defendant's consent to discharge the jury after defendant's motion for a mistrial with prejudice triggered the protection against double jeopardy:

Double jeopardy bars a retrial except as to a defendant who has requested or consented to the mistrial … . Here, the record does not show that either defendant consented to a mistrial without prejudice. Defendants initially made general motions for a mistrial, but on the next day they expressly limited their motions to requests for a mistrial with prejudice. Accordingly, when the court announced its ruling shortly afterwards, it should have obtained defendants' unequivocal consent before discharging the first jury or else have continued the trial with the same jury … . The retrial thus violated the constitutional prohibitions against double jeopardy, and these prohibitions require reversal of defendants' convictions and dismissal of the indictment … . Defendants' double jeopardy claim does not require preservation, although it may be expressly waived … . However, there was no such waiver here. 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).

The Second Department, reversing Supreme Court, determined defendant was entitled to a hearing on his motion to withdraw his guilty plea. Defendant was charged with possession of weapons found in his mother's house. In his motion to withdraw his plea he explained he did not reside in his mother's house and the weapons, which belonged to someone else, were stored in the house without his knowledge or consent:

The defendant contended, in essence, that he did not voluntarily possess the weapons at issue. * * *

… [T]he defendant's claim of innocence was "supported" by evidentiary submissions … , which "raised the possibility of a . . . defense" … . The defendant's submissions provided "tenable support" … for his assertion that he did not voluntarily possess the weapons at issue because he was not "aware of his physical possession or control thereof for a sufficient period to have been able to terminate it" (Penal Law § 15.00[2]). * * *

Regardless of … the strength of the People's case, the defendant was not required to affirmatively demonstrate his actual innocence in this procedural posture … . It is clear that "an arguable claim of innocence" … may alone provide a basis for granting a presentence motion to withdraw a plea, even where the evidence of innocence is "far from conclusive" … . 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).

The Court of Appeals, reversing the Appellate Division, in a full-fledged opinion by Judge Fahey, determined the grand jury evidence did not support the "reckless" element of manslaughter second degree or the "criminal negligence" element of criminally negligent homicide. The charges arose from defendant's sale of heroin to the decedent, who died of an overdose:

Both recklessness and criminal negligence "require that there be a 'substantial and unjustifiable risk' that death or injury will occur; that the defendant engage in some blameworthy conduct contributing to that risk; and that the defendant's conduct amount to a 'gross deviation' from how a reasonable person would act" … . "The only distinction between the two mental states is that recklessness requires that the defendant be 'aware of' and 'consciously disregard' the risk while criminal negligence is met when the defendant negligently fails to perceive the risk" … . … [T]he underlying conduct for both offenses is the same and involves some degree of risk creation … . … [T]he " 'nonperception' of a risk, even if death results, is not enough"—rather, the defendant must have "engaged in some blameworthy conduct creating or contributing to a substantial and unjustifiable risk of death" … . * * *

The evidence demonstrated that defendant knew that the heroin he sold the decedent was strong and required caution. That the heroin was potent, however, does not equate to a substantial and unjustifiable risk that death would result from the use of the heroin. The coroner, the decedent's ex-girlfriend, and the other individual who

purchased heroin from defendant all testified that it was common knowledge among heroin users that different samples or preparations of heroin had different potencies and that the strength of heroin could vary a great deal among samples. The People's evidence demonstrated that the decedent, his ex-girlfriend, and the other individual all used the same sample of heroin purchased from defendant before July 22 and survived those encounters. 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).

The Court of Appeals, reversing (modifying) the Appellate Division, determined defendant was entitled to a Rodriguez hearing on whether a witness's identification of the defendant was confirmatory. The Court of Appeals noted that the Appellate Division should not have relied on trial testimony to overcome the suppression court's error:

Supreme Court erred in denying defendant's pretrial request for a hearing pursuant to People v Rodriguez (79 NY2d 445 [1992]), as the prosecutor here offered only bare assurances that the witness was familiar with defendant. Further, the Appellate Division erroneously relied on testimony adduced at trial to overcome the suppression court's error.

"Thus, the case should be remitted to Supreme Court for a hearing to determine whether the [photographic] identification procedure was confirmatory. If, after that hearing, the court concludes that the People have not sustained their burden, a Wade hearing should be held and further proceedings, including a new trial, should be had

as the circumstances may warrant. If the court concludes that a Wade hearing is not required, the judgment[] should be amended to reflect that result" … . 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).

The Fourth Department, vacating defendant's guilty plea, determined defendant was induced to enter the plea by a threat to impose a heavier sentence after trial. The defendant did not preserve the issue for appeal by a motion to withdraw the plea or vacate the judgment, but the appeal was heard in the interest of justice:

… [D]efendant contends that his plea was rendered involuntary due to statements made by County Court during the plea colloquy indicating that the court would impose the maximum sentence and direct that it run consecutively to a previously imposed sentence if he were convicted at trial. * * *

… [I]t is well settled that a defendant "may not be induced to plead guilty by the threat of a heavier sentence" if he or she decides to proceed to trial … . … [T]he court's comments about sentencing were not merely a description of the range of the potential sentences; instead, they conveyed to defendant the court's intent to impose the maximum punishment at sentencing if he proceeded to trial and lost. That constitutes coercion, rendering the plea involuntary … . 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-DFENDANT 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 (F0URTH DEPT).

The Fourth Department, reversing defendant's conviction and ordering a new trial, determined the trial judge assumed the function of an interested party when he negotiated and entered into a plea agreement with a co-defendant requiring the co-defendant to testify against the defendant in exchange for a more favorable sentence:

… [T]he court committed reversible error when it "negotiated and entered into a [plea] agreement with a codefendant[,] requiring that individual to testify against defendant in exchange for a more favorable sentence" … . We conclude that, "by assuming the function of an interested party and deviating from its own role as a neutral arbiter, the trial court denied defendant his due process right to '[a] fair trial in a fair tribunal' " … . We therefore reverse the judgment and grant a new trial before a different justice … . 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).

The Fourth Department, reversing defendant's murder conviction and ordering a new trial, determined the jury instructions allowed the jury to consider a theory of

prosecution that was not alleged in the bill of particulars. The defendant was charged with hitting and shaking the child victim, but the jury was allowed to consider defendant's alleged inaction after the alleged assault:

"A defendant has a right to be tried only for the crimes charged in the indictment" … . " 'Where the prosecution is limited by the indictment or bill of particulars to a certain theory or theories, the court must hold the prosecution to such narrower theory or theories' " … . We agree with defendant that the People's theory of depraved indifference, as outlined in the bill of particulars, was limited to defendant's assaultive conduct, i.e., his infliction of head injuries by shaking or hitting the child, and that the court's instruction allowed the jury to consider, in addition to the specifically delineated assaultive conduct, defendant's "inaction" after the assault ended. … [D]efendant objected during the charge conference to a modification of the depraved indifference charge. The charge, as modified, allowed the jury to … consider "the defendant's later inaction as a factor when considering the brutal, prolonged and ultimately fatal course of conduct," and defendant objected on the ground that such proof was outside the scope of the bill of particulars. 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).

The Second Department, ordering a new trial, determined the trial judge did not give counsel meaningful notice of a substantive jury note:

Pursuant to CPL 310.30, when a trial court receives a substantive jury inquiry, the court has two separate duties: "the duty to notify counsel and the duty to respond"… . With regard to the former duty, the court must provide counsel "notice of the actual specific content of the jurors' request" … . A "trial court's failure to provide counsel

with meaningful notice of a substantive jury note is a mode of proceedings error that requires reversal" … .

Here, although marked as a court exhibit, the trial transcript does not reflect that the Supreme Court showed or read verbatim to counsel a jury note, which stated: "We would like the DNA results in regards to the blood smear on the banister." 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).

The Second Department determined evidence of two prior incidents (more than a decade before defendant's arrest) in which defendant had a firearm in his possession was admissible Molineux evidence in this prosecution for weapons and ammunition possession. Defendant argued at trial that he did not know the weapons and ammunition were in the truck he was driving. A strong dissent argued the Molineux evidence should not have been admitted because it was too remote, too prejudicial, and did not fit the state-of-mind exception to the Molineux rule:

"When [the] defendant's criminal intent cannot be inferred from the commission of the act or when [the] defendant's intent or mental state in doing the act is placed in issue, . . . proof of other crimes may be admissible under the intent exception to the Molineux rule" … .

Here, the Supreme Court providently exercised its discretion in admitting the proferred Molineux evidence. The evidence was directly relevant and probative of a

material element of the crimes charged, namely, the defendant's knowing possession of the guns … .

Our dissenting colleague's assertion that the defendant's criminal intent could be easily inferred from the circumstances of the incident, thus rendering the Molineux evidence unnecessary, ignores the fact that the defendant asserted a lack of criminal intent theory at trial. Contrary to our dissenting colleague's assertion, the defendant placed his state of mind squarely in issue in his opening statement and throughout the trial, by pursuing the defense that "[h]e didn't know" the guns were in the truck, and that the People would be unable to prove his intent to possess the guns beyond a reasonable doubt. 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).

The Second Department, reversing defendant's conviction and ordering a new trial, determined (1) the People did not demonstrate the defendant was responsible for the intimidation of witnesses by others; and (2), the People should not have been allowed to exercise peremptory challenges to jurors after those jurors had been accepted by the defense:

"The purpose of a Sirois hearing is to determine whether the defendant has procured a witness's absence or unavailability through his own misconduct, and thereby forfeited any hearsay or Confrontation Clause objections to admitting the witness's

out-of-court statements" … . The People must "present legally sufficient evidence of circumstances and events from which a court may properly infer that the defendant, or those at defendant's direction or acting with defendant's knowing acquiescence, threatened the witness" … . "At a Sirois hearing, the People bear the burden of establishing, by clear and convincing evidence, that the defendant has procured the witness's absence or unavailability" … .

… [T]he People's evidence did not establish that the defendant controlled the individuals who threatened the witness or that the defendant influenced or persuaded any individual to threaten the witness or his family … . …

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

RESTITUTION.

THE JUDGE SHOULD HAVE HELD A HEARING TO DETERMINE THE AMOUNT OF RESTITUTION, MATTER REMITTED (FOURTH DEPT).

The Fourth Department determined County Court should have held a hearing on the amount of restitution and remitted the matter:

Penal Law § 60.27 (2) provides in relevant part that, when a court requires restitution to be made, "[i]f the record does not contain sufficient evidence to support such finding or upon request by the defendant, the court must conduct a hearing" … . Here, contrary to the assertion of the People, defendant made a timely request for a restitution hearing inasmuch as he requested a hearing before the court made its

determination on restitution. The court never ordered a specific amount of restitution at sentencing, and the People did not prepare the order of restitution setting forth the amount requested until the following week. Defendant raised issues with the amount and requested a hearing. Upon defendant's request, the court was required to conduct a hearing "irrespective of the level of evidence in the record" to support the amount of restitution … . People v Osborn, 2021 NY Slip Op 05426, Fourth Deptp 10-8-21

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).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over a concurring opinion, determined New York City's "Right of Way Law," which criminalizes ordinary negligence when a vehicle strikes a pedestrian or bicyclist who has the right of way, is constitutional and is not preempted by other laws. Both defendants were convicted under the Right of Way Law (NYC Administrative Code 19-190), a misdemeanor. The defendants unsuccessfully argued (1) the law is void for vagueness; (2) ordinary negligence cannot constitute the mens rea for a criminal act; and (3) the law is preempted by the Penal Law and the Vehicle and Traffic Law:

Article 15 of the Penal Law lists and defines four "culpable mental states"—"intentionally," "knowingly," "recklessly," and "criminal negligence" … . However, strict liability is also contemplated by article 15: "[t]he minimal requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or the omission to perform an act which [such person] is physically capable of performing," and, "[i]f such conduct is all that is required for commission of a particular offense, . . . such offense is one of 'strict liability'" … . * * *

The provisions of the Penal Law "govern the construction of and punishment for any offense defined outside" of the Penal Law, "[u]nless otherwise expressly provided, or unless the context otherwise requires" (Penal Law § 5.05 [2]). The two key

provisions at issue, Penal Law § 15.00 (Culpability; definitions of terms) and § 15.05 (Culpability; definitions of culpable mental states), expressly provide otherwise by making clear that they are "applicable to this chapter" only. Further contradicting defendants' interpretation of article 15 is the legislature's own use of an ordinary negligence mens rea for offenses defined outside the Penal Law. For example … Vehicle and Traffic Law § 1146 and Agriculture and Markets Law § 370—which were enacted after the relevant provisions in article 15 of the Penal Law—both employ an ordinary negligence standard for imposing criminal liability. 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).

The Court of Appeals, in a full-fledged opinion by Judge Fahey, reversing the Appellate Division, determined defendant's waiver of appeal was not valid and the trial judge had violated defendant's right to counsel by essentially forcing defendant to represent himself after several attorneys had withdrawn. Of all the attorneys who had withdrawn, only two cited difficulties with the defendant. The cited "difficulties" were defendant's "raised voice" and "lack of cooperation." There were no allegations of threats or abusive conduct. The other attorneys had withdrawn citing a conflict of interest, illness and leaving the state:

… [D]efendant's waiver in the case before us did not contain "clarifying language . . . that appellate review remained available for certain issues" … . Indeed, the written appeal waiver and the colloquy utterly failed to indicate that some rights to appeal would survive the waiver. Moreover, the written waiver implied that defendant was

completely waiving his right "to prosecute [an] appeal as a poor person, and to have an attorney assigned" if indigent.

Defendant's appeal waiver thus mischaracterized the nature of the waiver of appeal by suggesting that the waiver included an absolute bar to the taking of a first-tier direct appeal and the loss of attendant rights to counsel and poor person relief … . * * *

There may be circumstances where a defendant who refuses to cooperate with successive assigned attorneys is ultimately deemed to have forfeited the right to assigned counsel, although such an individual must be afforded the opportunity to retain counsel. … There is record evidence of only two attorneys who asked to be relieved due to difficulties with defendant. … County Court's own orders relieving Miosek, Taylor, Carlson, and Scott cited conflict of interest, illness, or departure from the state, not attorney-client animosity. Such factors were beyond defendant's control. 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).

The First Department, reversing defendant's conviction and ordering a new trial, determined defendant was not adequately warned about the risks of representing himself:

The record "does not sufficiently demonstrate that defendant was aware of his actual sentencing exposure" … , including the potential for his sentences in two pending cases, arising from unrelated incidents, to run consecutively. The court also failed to inquire into defendant's understanding of "the nature of the charges" … . This despite defendant's admission that he did "[n]ot necessarily" understand the charges

in one case and was "still coming to grips with the charges" in the other case. The court's statement during the waiver colloquy that defendant was "facing felony charges" was inadequate for that purpose.

Moreover, the court's inquiry did not "accomplish the goals of adequately warning a defendant of the risks inherent in proceeding pro se and apprising a defendant of the singular importance of the lawyer in the adversarial system of adjudication" … . The court failed to warn defendant about the numerous pitfalls of representing himself before and at trial, such as unfamiliarity with legal terms, concepts, and case names; the potential challenges of cross-examining witnesses and delivering an opening statement and summation as a pro se criminal defendant. While there is no mandatory "catechism for this inquiry," there must be a "searching inquiry" conducted by a court before permitting self-representation … . Under the particular circumstances of this case, we find that defendant's waiver of his right to counsel was not knowing, intelligent, and voluntary. 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).

The Fourth Department, reversing County Court, determined the pat down search of defendant traffic offender was not supported by reasonable suspicion:

… [A] pat down search of a traffic offender is not authorized unless, when the vehicle is stopped, there is reasonable suspicion that the defendant is armed or poses a threat to the officer's safety … . The requisite reasonable suspicion is simply lacking here; defendant made no evasive moves, he was not aggressive with the officer, he did not reach into his clothing or into dark hiding spots in the car, there were no telltale bulges in his clothes, he made no statements about weapons or other

dangerous items, and the officer had no prior knowledge of any defendant-specific concerns … . Contrary to the motion court's view, "non-compliant and erratic behavior" does not automatically give rise to reasonable suspicion of a threat to officer safety … . Although defendant's flat affect and partial disrobement during the traffic stop was odd, nothing about his specific odd behavior during the episode gave rise to reasonable suspicion that he was armed or posed a threat to the officer's safety … . If anything, the officer's ability to peer unobstructed into defendant's open pants should have assuaged, rather than heightened, any concerns that defendant was concealing a weapon. The crack cocaine should therefore have been suppressed as the fruit of the unlawful frisk … . 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).

The Court of Appeals, over an extensive, two-judge dissent, determined defendant's suppression motion was properly denied without holding a hearing. The majority concluded defendant did not sufficiently allege standing to contest to search. Defendant was a dinner guest in his friend's apartment at the time it was raided by the police. Evidence observed by the police during the raid was used to procure the search warrant:

CPL 710.60 (1) requires that a motion for suppression of physical evidence must state the ground or grounds of the motion and must contain sworn allegations of fact.

CPL 710.60 (3) permits summary denial of a suppression motion where the motion papers do not provide adequate sworn allegations of fact … . The suppression court did not abuse its discretion in denying, without an evidentiary hearing, that branch of defendant's motion which was to suppress the physical evidence recovered upon the search of the apartment pursuant to a search warrant that had been executed after his arrest, because the allegations in the motion papers were insufficient to warrant a hearing.

… In denying defendant's motion, the suppression court stated that "defendant has failed to sufficiently allege standing to challenge the search of the subject premises," which is the gravamen of our holding today. Defendant's remaining arguments addressed by the dissent, including the assertion that dinner guests have an expectation of privacy in the home of their hosts, are academic.

From the dissent:

Mr. Ibarguen's [defendant's] motion papers allege that he was a lawful invitee whose mail was delivered to that apartment and Mr. Ibarguen testified to having been at dinner at his friends' house "all night." Those facts support his claim that as a social guest, he held a legitimate expectation of privacy in at least some part of the searched apartment enabling him to challenge the legality of the warrantless search and suppress evidence recovered therein. People v Ibarguen, 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).

The Fourth Department determined defendant in this child pornography case established mitigating circumstances that warranted a downward departure of the risk level to level one:

We agree with defendant … that he established by a preponderance of the evidence that there are other mitigating factors that were "not otherwise adequately taken into account by the guidelines" … . Defendant established that he suffered from a rare, congenital disease that resulted in significant disfigurement and medical issues, requiring numerous surgeries throughout his life. Defendant was bullied as a child, primarily due to his disfigurement and, as a result, was socially isolated, having no significant peer relationships. Defendant has only one prior crime on his record, a misdemeanor for which he was referred to Mental Health Court, and, in the case at hand, the court sentenced him to probation pursuant to the People's recommendation, thus indicating that defendant does not pose a significant threat to the community. We also note that defendant will be under supervision by the Probation Department for 10 years.

As a result of the depression and related mental health issues that flowed from such a difficult childhood, defendant turned to alcohol and drugs, some of which had been properly prescribed to him following many of his surgeries. Defendant's use of child pornography generally occurred while he was under the influence of drugs. Inasmuch as defendant was sentenced to a 10-year term of probation, which would ensure that he continued to participate in all of his treatment programs, we conclude that, in light of the totality of the circumstances, a downward departure to risk level one is warranted in the exercise of our discretion … . 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).

The Third Department determined defendant should not have been shackled during the trial, but deemed the error harmless:

Defendant … contends that County Court erred in allowing him to be shackled during a portion of the trial. It is well settled that "a defendant has a right to be free of visible restraints during criminal proceedings unless the trial court states a case-specific reason for their use" … . The use of shackles has been deemed appropriate "for reasons of security, to prevent disruption of the trial, harm to those in the courtroom, escape or release of the accused, or the commission of other crimes" … . The record discloses that, in making its determination, County Court considered the nature of the crime with which defendant was charged, deferred to the correction officers' recommendations and referenced defendant's verbal outbursts throughout the morning. These are insufficient reasons to restrain defendant … .

… [W]e are satisfied that this error was harmless as the evidence demonstrated that defendant's guilt was overwhelming and there was no reasonable possibility that the error affected the outcome of the trial. We are even more confidant of this conclusion in light of the fact that County Court gave curative instructions to the jury on numerous occasions — including during jury selection, at the commencement of the trial and during final jury instructions — and especially considering that the jury was aware that defendant was already incarcerated … . 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).

The Second Department, reversing Supreme Court, over a two-justice dissent, determined defendant's motion to suppress should have been granted in this street stop case. The police officers' observations of defendant, pursuant to the DeBour criteria, did not justify approaching him and asking whether a bag on the counter in a store belonged to him. There was a gun in the bag:

At the suppression hearing, one of the officers testified that as his vehicle was approaching a red traffic signal at the intersection, the defendant "tensed up" or "stiffened up" and, after making eye contact with the officer through the front windshield, the defendant's "eyes widened" and the defendant walked into the corner store. The officer continued to observe the defendant through the store's window, but did not have a full view of him. The officer saw the defendant do "a little pacing back and forth" and then come back outside. When the traffic signal turned green, the officer and his partner pulled over and exited their vehicle. * * *

… [T]he officer who testified at the suppression hearing failed to articulate any reason for approaching the defendant, other than that he appeared nervous and the officer wanted to "see why he went into the store." This, standing alone, did not provide an objective, credible reason for the officers to approach the defendant and request information … .

… [E]ven assuming, arguendo, that the arresting officers had an objective, credible reason for approaching the defendant, they had no basis for immediately engaging the defendant in a pointed inquiry regarding the ownership and contents of the bag

inside the store … . 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).

The Court of Appeals, over an extensive three-judge dissent, determined there was sufficient evidence in the record to support the finding that the canine sniff was justified by a founded suspicion that criminal activity was afoot. The traffic stop was pretextual, ostensibly based on a burned-out license-plate light:

In the course of a stop predicated on the observation of traffic violations … defendant consented to a search of the backseat of his vehicle. Instead of conducting that search, the police officer walked his canine around the exterior of the vehicle and, in mere seconds, the canine alerted to the trunk. Defendant argues that law enforcement lacked founded suspicion that criminal activity was afoot and, thus, unlawfully conducted the exterior canine sniff search.

A canine sniff search of a vehicle's exterior is lawful if police possess a founded suspicion that criminal activity is afoot … . Determinations regarding the existence of a founded suspicion of criminality involve mixed questions of law and fact … . Therefore, our review is "limited to whether there is evidence in the record supporting the lower courts' determinations" … . …

Based on the evidence presented at the suppression hearing, including the officers' observations prior to and during the stop, there is record support for the

determination that a founded suspicion of criminal activity existed here and, thus, the issue is beyond further review … .

From the dissent:

Mr. Blandford's case illustrates a troubling aspect of police behavior: law enforcement can pursue someone they suspect of criminal behavior without a founded suspicion of criminality, wait for the right moment to stop that person for a minor traffic infraction, and then serve up a stew of flavorless facts to transform a stop in which they have no intrinsic interest into the search they sought before they had any evidentiary basis to suspect wrongdoing. Although this case illustrates that problem, its resolution should be much simpler than resolution of the systemic problem: here, the officers did not possess information sufficient to justify the canine search. 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).

The First Department, reversing Supreme Court, determined the pretextual traffic stop was valid and defendant's suppression motion should not have been granted on that ground. Apparently the license-plate frame obscured New Jersey's nickname "Garden State" on the plate, which constitutes a violation of Vehicle and Traffic Law 402(1)(b):

The trial court's concerns of permitting police officers to engage in pretextual traffic stops based on observations of trivial or technical traffic violations, which may lead to impermissible profiling, are noteworthy and merit consideration. However, once the court found that the officers reasonably believed that a traffic violation had been committed, this provided the required probable cause to stop the car … , regardless of whether the violation could be deemed de minimis, ubiquitous, unintentional, or caused by a third party such as a car dealer … . "Probable cause to believe that the Vehicle and Traffic Law has been violated provides an objectively reasonable basis for the police to stop a vehicle and . . . there is no exception for infractions that are subjectively characterized as 'de minimis'" … . 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.