NEW YORK APPELLATE DIGEST, LLC

Criminal Law Reversal Newsletter
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An Organized Compilation of Summaries of Selected Decisions Addressing Criminal Law, Mostly Reversals, Released by Our New York State Appellate Courts and Posted on the New York Appellate Digest Website in May 2022, Distilled to Practice Points, One or Two Sentences Each. The Entries in the Table of Contents Link to the Practice Points 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 Reversal Newsletter.

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APPEALS, LAW CHANGED WHILE APPEAL PENDING.

ALTHOUGH THE RELEVANT DECISION [PEOPLE VS RUDOLPH] CAME DOWN AFTER DEFENDANT WAS SENTENCED, THE DECISION CAME DOWN BEFORE DEFENDANT'S APPELLATE PROCESS WAS COMPLETE; THEREFORE DEFENDANT WAS ENTITLED TO CONSIDERATION WHETHER HE SHOULD BE AFFORDED YOUTHFUL OFFENDER STATUS; SENTENCE VACATED AND MATTER REMITTED FOR RESENTENCING (SECOND DEPT).

People v Simon, 2022 NY Slip Op 03277, Third Dept 5-19-22

Practice Point: Even if the requirement that youthful offender status be considered for all potentially eligible defendants was not in force when a defendant was sentenced, if the decision imposing the requirement (People vs Rudolph) came down before defendant's appellate process was complete, defendant is entitled to resentencing applying the new law.

APPEALS, SEX OFFENDER STATUS IS NOT PART OF A SENTENCE.

SEX OFFENDER CERTIFICATION IS NOT PART OF A SENTENCE AND THEREFORE IS NOT COVERED BY THE UNLAWFUL-SENTENCE EXCEPTION TO THE PRESERVATION REQUIREMENT; THEREFORE THE UNPRESERVED ISSUE COULD NOT BE CONSIDERED BY THE COURT OF APPEALS; HOWEVER, UPON REMITTAL, THE ISSUE CAN BE (AND WAS) CONSIDERED AT THE APPELLATE DIVISION LEVEL IN THE INTEREST OF JUSTICE (SECOND DEPT).

People v Buyund, 2022 NY Slip Op 03004, Second Dept 5-4-22

Practice Point: The Court of Appeals does not have interest-of-justice jurisdiction and therefore cannot consider appellate issues that are not preserved. The Appellate Division, however, can invoke interest-of-justice jurisdiction to consider unpreserved appellate issues.

ATTORNEYS, CRIMINAL CONTEMPT.

PLAINTIFF'S COUNSEL SHOULD HAVE BEEN HELD IN CRIMINAL CONTEMPT FOR ISSUING SUBPOENAS IN DEFIANCE OF AN ORDER STAYING THE PROCEEDINGS; DIFFERENCE BETWEEN CIVIL AND CRIMINIAL CONTEMPT EXPLAINED (SECOND DEPT).

Madigan v Berkeley Capital, LLC, 2022 NY Slip Op 03237, Second Dept 5-18-22

Practice Point: Criminal contempt seeks to vindicate the authority of the court. Therefore no showing of prejudice is required. Here plaintiff's counsel issued subpoenas in defiance of an order of the court. A $10,000 sanction for criminal contempt was imposed on the attorney by the appellate court.

DEFENDANT'S PRESENCE AT SIDEBAR.

THE COURT OF APPEALS, WITHOUT EXPLANATION, REVERSED THE FOURTH DEPARTMENT WHICH HAD REVERSED DEFENDANT'S CONVICTION ON THE GROUND THE DEFENDANT WAS NOT PRESENT DURING A SIDEBAR CONFERENCE CONCERNING THE BIAS OF A PROSPECTIVE JUROR; THE MATTER WAS SENT BACK TO THE FOURTH DEPARTMENT FOR CONSIDERATION OF OTHER ISSUES AND FACTS RAISED IN THE APPEAL BUT NOT CONSIDERED BY THE FOURTH DEPARTMENT (CT APP).

People v McKenzie-Smith, 2022 NY Slip Op 03308, CtApp 5-19-22

Practice Point: The Fourth Department had reversed defendant's conviction on the ground the defendant was not present at a sidebar conference when the bias of a prospective juror was discussed. Here the Court of Appeals reversed without explanation and sent the case back to the Fourth Department for consideration of other issues raised in the appeal.

DISCIPLINARY HEARINGS (INMATES), DUE PROCESS.

PETITIONER-INMATE WAS DENIED DUE PROCEES WHEN HE WAS NOT ALLOWED TO VIEW A VIDEO OF THE INCIDENT WHICH RESULTED IN THE MISBEHAVIOR CHARGE; NEW HEARING ORDERED (THIRD DEPT).

Matter of Proctor v Annucci, 2022 NY Slip Op 03298, Third Dept 5-18-22

Practice Point: Prison inmates charged with misbehavior have due process rights. Here the petitioner-inmate was entitled to see the video which allegedly depicted the charged misbehavior. The determination was annulled and a new hearing ordered.

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DISCIPLINARY HEARINGS (INMATES), PRISONERS HAVE DUE PROCESS RIGHTS.

DESPITE THE APPARENT FAILURE TO PRESERVE A VIDEO OF A MEETING DURING WHICH PETITIONER ALLEGEDLY PLANNED A DEMONSTRATION AT THE PRISON, THE DETERMINATION FINDING PETITIONER GUILTY OF PLANNING THE DEMONSTRATION WAS CONFIRMED; THE DISSENT ARGUED PETITIONER WAS DEPRIVED OF DUE PROCESS BY THE FAILURE TO TURN OVER THE VIDEO, WHICH HAD BEEN REVIEWED BY THE OFFICER WHO PREPARED THE MISBEHAVIOR REPORT (THIRD DEPT).

Matter of Headley v Annucci, 2022 NY Slip Op 03166, Third Dept 5-12-22

Practice Point: Inmates subjected to disciplinary actions by prison authorities have due process rights. Here the dissent argued that the failure to preserve and provide a video of the meeting at which petitioner-inmate allegedly planned a prison demonstration deprived him of his due process rights. The dissenter would have annulled the determination on that ground.

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DNA DATATBASE, FAMILIAL MATCH.

PETITIONERS. RELATIVES OF PERSONS IN THE NYS DNA DATABASE, HAD STANDING TO CHALLENGE THE RESPONDENTS' REGULATIONS ALLOWING THE RELEASE OF "FAMILIAL DNA MATCH" INFORMATION LINKING DNA FROM A CRIME SCENE TO A FAMILY, NOT AN INDIVIDUAL; THE REGULATIONS WERE BASED ON SOCIAL POLICY AND THEREFORE EXCEEDED THE REGULATORY POWERS OF THE RESPONDENT AGENCIES; TWO-JUSTICE DISSENT ARGUED THE PETITIONERS DID NOT HAVE STANDING TO CHALLENGE THE REGULATIONS (FIRST DEPT).

Matter of Stevens v New York State Div. of Criminal Justice Servs., 2022 NY Slip Op 03062, First Dept 5-5-22

Practice Point: Relatives of persons in the NYS DNA database had standing to challenge the regulations issued by the respondent agencies allowing the release of "familial DNA match" information linking DNA from a crime scene to a family, not an individual.

Practice Point: The "familial DNA match" regulations were deemed to be rooted in social policy, which is the realm of the legislature, and therefore the promulgation of the regulations exceeded the agencies' powers.

EVIDENCE, SCREENSHOTS OF DELETED TEXTS.

HERE SCREENSHOTS OF TEXT MESSAGES WHICH HAD BEEN DELETED FROM THE VICTIM'S PHONE WERE SUFFICIENTLY AUTHENTICATED TO BE ADMISSIBLE, EVEN IF THE BEST EVIDENCE RULE APPLIED; THE MESSAGES OF A SEXUAL NATURE ALLEGEDLY WERE SENT BY THE DEFENDANT, A VOLLEY BALL COACH, TO THE VICTIM, A 15-YEAR-OLD PLAYER ON THE TEAM (CT APP).

People v Rodriguez, 2022 NY Slip Op 03307, CtApp 5-19-22

Practice Point: Text messages of a sexual nature were allegedly sent by the defendant, a volley ball coach, to a 15-year-old player on the team. The original messages were deleted, but the victim's boyfriend had taken screenshots of some of the messages. The screenshots were deemed authenticated and admitted by the trial court. The Second Department reversed, applying the best evidence rule. The Court of Appeals reversed the Second Department, finding that, even if the best evidence rule applied, the trial court did not abuse its discretion by finding the the screenshots had been sufficiently authenticated.

EVIDENCE.

EXCLUDING EVIDENCE WHICH CONTRADICTED AN IMPORTANT PROSECUTION-WITNESS'S ACCOUNT OF HIS ACTIONS RIGHT UP UNTIL THE TIME OF THE SHOOTING, AND THREE 911 CALLS WHICH QUALIFIED AS PRESENT SENSE IMPRESSIONS, DEPRIVED DEFENDANT OF HIS RIGHT TO PUT ON A DEFENSE (CT APP).

People v Deverow, 2022 NY Slip Op 03362, CtApp 5-24-22

Practice Point: Here an important prosecution witness claimed he was with his girlfriend right up until seconds before the shooting he allegedly witnessed. The girlfriend's testimony that she was not with the witness that day should not have been excluded as collateral. In addition, three 911 calls which qualified as present

sense impressions should not have been excluded. The Court of Appeals held these evidentiary errors deprived defendant of his right to put on a defense.

FRAUDULENT ACCOSTING.

THE ACCUSATORY INSTRUMENT CHARGING THE DEFENDANT WITH "FRAUDULENT ACCOSTING" WAS FACIALLY SUFFICIENT; IT WAS ENOUGH TO ALLEGE THAT DEFENDANT SPOKE FIRST TO PERSONS PASSING AROUND HIM ON THE SIDEWALK ASKING FOR DONATIONS FOR THE HOMELESS; THERE WAS NO NEED TO ALLEGE DEFENDANT WAS AGGRESSIVE OR PERSISTENT OR TARGETED AN INDIVIDUAL (CT APP).

People v Mitchell, 2022 NY Slip Op 03360, Ct App 5-24-22

Practice Point: Here, to determined the meaning of the word "accost" as used in the "fraudulent accosting" statute, the Court of Appeals referred only to definitions of the word in dictionaries extant in 1952, when the statute was enacted. and ignored more recent definitions.

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IMMIGRATION LAW, INEFFECTIVE ASSISTANCE, DEPORTATION CONSEQUENCES OF GUILTY PLEA.

DESPITE THE STRENGTH OF THE EVIDENCE AGAINST HIM, DEFENDANT DEMONSTRATED A DECISION TO GO TO TRIAL WOULD HAVE BEEN RATIONALE BECAUSE OF HIS FAMILY OBLIGATIONS; DEFENDANT WAS ENTITLED TO A HEARING ON HIS MOTION TO VACATE HIS CONVICTION ON INEFFECTIVE ASSISTANCE GROUNDS; DEFENDANT ALLEGED HIS ATTORNEY MISADVISED HIM ON THE DEPORTATION CONSEQUENCES OF A GUILTY PLEA (SECOND DEPT).

People v Samaroo, 2022 NY Slip Op 03128, Second Dept 5-11-22

Practice Point: Even if the evidence of defendant's commission of the crime is strong, a defendant may demonstrate a decision to go to trial, rather than accept a plea offer, would have been rationale based upon family obligations. Here defendant, who is a legal resident and has lived in the US since he was ten, has two minor children, is employed, and his wife can't work because of medical problems. Defendant brought a motion to vacate his conviction (by guilty plea) on the ground his attorney did not inform him of the deportation consequences of the plea. Defendant was entitled to a hearing on his motion.

IMMIGRATION LAW, RIGHT TO A B MISDEMEANOR JURY TRIAL.

DEFENDANT DID NOT DEMONSTRATE CONVICTION OF THE B MISDEMEANORS WITH WHICH HE WAS CHARGED WOULD RESULT IN DEPORTATION; THEREFORE DEFENDANT WAS NOT ENTITLED TO A JURY TRIAL (CT APP).

People v Garcia, 2022 NY Slip Op 03359, CtApp 5-24-22

Practice Point: Generally B misdemeanors do not warrant a jury, as opposed to a bench, trial. However, if conviction will result in deportation, the defendant has a

right to a jury trial. Here the Court of Appeals held the defendant did not demonstrate conviction of the B misdemeanors with which he was charged triggered deportation.

INDICTMENT JURISDICTIONALLY DEFECTIVE, AMENDMENT IMPROPER, EVIDENCE, SANDOVAL.

THE BURGLARY COUNT WAS JURISDICTIONALLY DEFECTIVE BECAUSE IT ALLEGED DEFENDANT WAS ARMED WITH A "KNIFE" WHICH IS NOT NECESSARILY A "DEADLY WEAPON;" THE ATTEMPT TO AMEND THE COUNT WAS NOT AUTHORIZED; THE SANDOVAL RULING WAS (HARMLESS) ERROR (SECOND DEPT).

People v Bloome, 2022 NY Slip Op 03398, Second Dept 5-25-22

Practice Point: Only certain knives meet the definition of "deadly weapon" as used in the burglary first statute. Therefore the count which alleged defendant was armed with a knife did not allege burglary first and was therefore jurisdictionally defective. A count which does not state an offense cannot be amended pursuant to CPL 200.70. The Sandoval ruling, which allowed defendant to be cross-examined about crimes similar to those with which he was charged, was (harmless) error.

NEW YORK CITY, CRIMINALIZING COMPRESSION OF THE DIAPHRAGM DURING ARREST.

THE NEW YORK CITY ADMINISTRATIVE CODE PROVISION WHICH PROHIBITS "COMPRESSION OF THE DIAPHRAGM" (BY KNEELING, SITTING OR STANDING ON A PERSON) WHEN EFFECTING AN ARREST IS NOT VOID FOR VAGUENESS (FIRST DEPT).

Police Benevolent Assn. of the City of N.Y., Inc. v City of New York, 2022 NY Slip Op 03329 First Dept 5-19-22

Practice Point: The NYC Administrative Code provision which prohibits and criminalizes "compressing the diaphragm" by sitting, kneeling or standing on a person when effecting an arrest is not void for vagueness.

REPUGNANT VERDICT.

PRESUMABLY THE ROBBERY AND GRAND LARCENY CHARGES STEMMED FROM THE THEFT OF THE TAXI CAB (THE FACTS ARE NOT EXPLAINED); THE ACQUITTAL OF UNAUTHORIZED USE OF A MOTOR VEHICLE RENDERED THE ROBBERY AND GRAND LARCENY CONVICTIONS REPUGNANT (SECOND DEPT).

People v Rodriguez, 2022 NY Slip Op 03403, Second Dept 5-25-22

Practice Point: A rare example of a repugnant verdict requiring vacation of the convictions. The facts are not explained. The Second Department determined the acquittal of unauthorized use of a vehicle rendered the robbery and grand larceny convictions repugnant. Presumably the charges stemmed from the theft of the vehicle.

RESTITUTION, OBJECTION TO.

BECAUSE DEFENDANT OBJECTED TO THE AMOUNT OF RESTITUTION A HEARING TO DETERMINE THE AMOUNT SHOULD HAVE BEEN HELD (SECOND DEPT).

People v Jensen, 2022 NY Slip Op 03250, Second Dept 5-18-22

Practice Point: Where a defendant objects to the amount of restitution and the record is insufficient to establish the proper amount, a hearing must be held.

SECOND FELONY OFFENDER, OUT-OF-STATE CONVICTION.

WHETHER DEFENDANT'S CONNECTICUT CONVICTION CAN SERVE AS A PREDICATE FOR SECOND FELONY OFFENDER STATUS CANNOT BE DETERMINED WITHOUT THE CONNECTICUT ACCUSATORY INSTRUMENT; THE UNPRESERVED ISSUE WAS CONSIDERED IN THE INTEREST OF JUSTICE; MATTER REMITTED FOR A HEARING (SECOND DEPT).

People v Robinson, 2022 NY Slip Op 03010, Second Dept 5-4-22

Practice Point: Here portions of the Connecticut larceny statute were equivalent to a New York felony and other portions were not. Therefore, whether the Connecticut conviction could serve as a predicate for second felony offender status cannot be determined without examining the Connecticut accusatory instrument. The issue was not preserved for appeal but was considered in the interest of justice. Matter remitted for a hearing.

SEX OFFENDER REGISTRATION ACT (SORA), ONLY ONE SORA RULING FOR THE SAME CONDUCT IN DIFFERENT COUNTIES.

THE SEX OFFENDER LEVEL ADJUDICATION IN NEW YORK COUNTY REQUIRED THE DISMISSAL OF THE SORA PROCEEDING IN BRONX COUNTY WHICH WAS BASED ON THE SAME CONDUCT (FIRST DEPT).

People v Cisneros, 2022 NY Slip Op 03454, First Dept 5-26-22

Practice Point: The same conduct in two counties will not support more than one SORA sex offender level adjudication.

SEX OFFENDER REGISTRATION ACT (SORA), SEALING OF RECORD.

AT THE TIME DEFENDANT COMMITTED THE OFFENSE IN 2007, IT WAS NOT A REGISTRABLE OFFENSE UNDER THE SEX OFFENDER REGISTRATION ACT; THEREFORE DEFENDANT'S MOTION TO SEAL THE RECORD SHOULD NOT HAVE BEEN SUMMARILY DENIED; MATTER REMITTED FOR A HEARING (SECOND DEPT).

People v Miranda, 2022 NY Slip Op 03009, Second Dept 5-4-22

Practice Point: If an offense is now a registrable offense pursuant to the Sex Offender Registration Act, but was not a registrable offense when committed (here in 2007), a defendant's motion to seal the record cannot be summarily denied. The motion may still be denied after a hearing, however.

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TRAFFIC STOPS, NO PROBABLE CAUSE.

THE STOP OF THE TAXI IN WHICH DEFENDANT WAS A PASSENGER WAS NOT SUPPORTED BY PROBABLE CAUSE TO BELIEVE DEFENDANT HAD COMMITTED A CRIME; BECAUSE DEFENDANT PLED GUILTY TO ALL OFFENSES BASED UPON A PROMISE OF CONCURRENT SENTENCES, ALL CONVICTIONS REVERSED (SECOND DEPT).

People v Gomez, 2022 NY Slip Op 03399, Second Dept 5-25-22

Practice Point: One of the charges to which defendant pled guilty was overturned because the police did not have probable cause to make a vehicle stop. The guilty pleas to all the charges were reversed because of the promise the sentences would run concurrently with the sentence for the overturned conviction.