NEW YORK APPELLATE DIGEST, LLC

Criminal Law
Reversal Report
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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. 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 Reversal Report.

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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).

The Third Department, noting that the relevant law was announced after defendant's sentencing but while the appeal was pending, determined County Court's failure to consider whether defendant should be afforded youthful offender status required vacation of the sentence and remittal for resentencing:

There is no dispute that Rudolph [21 NY2d at 499], which was decided after defendant was sentenced but before the appellate process was complete, required County Court to make a determination as to whether defendant, as an eligible youth, should be adjudicated a youthful offender, notwithstanding that no request was made for such treatment (see CPL 720.20 [1] …). Whether to grant youthful

offender status lies within the discretion of the sentencing court and cannot be dispensed with through the plea-bargaining process … . Although this Court is "vested with the broad, plenary power to modify a sentence in the interest of justice, . . . and, if warranted, exercise our power to adjudicate [a] defendant a youthful offender" … , we decline defendant's invitation to do so here, in the complete absence of any consideration by the sentencing court, either summarily or otherwise, as to whether defendant should be adjudicated a youthful offender. As such, we deem it appropriate, under such circumstances, to remit the matter to permit County Court the opportunity to make the initial discretionary determination as to whether youthful offender status for defendant is warranted, after the parties fully set forth their positions for and against such treatment … . Without expressing any opinion as to whether youthful offender adjudication should be afforded defendant, in the event that County Court grants such status upon remittal, which would result in the court imposing a lower sentence than the parties negotiated, the People must be given an opportunity to withdraw consent to the plea bargain … 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).

The Second Department, upon remittal from the Court of Appeals, adhered to its prior decision finding defendant's certification as a sex offender unlawful. The Court of Appeals ruled that sex-offender certification is not part of a sentence and therefore is not covered by an exception to the preservation requirement. But, because the Appellate Division, unlike the Court of Appeal, has "interest-of-justice" jurisdiction, the prior decision was upheld in the interest of justice by the Second Department, despite the lack of preservation:

In an opinion dated November 23, 2021, the Court of Appeals concluded that sex offender certification is not part of a defendant's sentence, and thus, a contention regarding sex offender certification does not fall within the exception to the preservation rule for challenges to unlawful sentences … . However, the Court of Appeals noted that although it does not have interest-of-justice jurisdiction to review unpreserved issues, the "Appellate Division may have authority to take corrective action in the interest of justice based upon defendant's unpreserved challenge to the legality of his certification as a sex offender" … . Accordingly, the Court of Appeals remitted the matter to this Court for further proceedings … .

We now reach the defendant's unpreserved contention in the exercise of our interest of justice jurisdiction (see CPL 470.15[3][c]; [6][a]). For the reasons stated in our prior opinion and order, the defendant's certification as a sex offender was unlawful … .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).

The Second Department, reversing (modifying) Supreme Court, determined plaintiff's counsel should have been found in criminal contempt for issuing subpoenas in defiance of Supreme Court order staying any further action in the case:

In contrast to civil contempt, because the purpose of criminal contempt is to vindicate the authority of the court, no showing of prejudice is required … . Instead, "[a]llegations of willful disobedience of a proper judicial order strike at the core of the judicial process and implicate weighty public and institutional concerns regarding the integrity of and respect for judicial orders" … . …

Notwithstanding [the court's order], the plaintiff's counsel issued subpoenas on six separate occasions. When … the Supreme Court reiterated the terms of the stay, both via interim relief granted in the order to show cause and in a separate order, the plaintiff's counsel did not desist but instead served four more subpoenas and moved to compel the production of subpoenaed documents. This conduct evidences a lack of "respect for judicial orders" and warranted holding the plaintiff's counsel in criminal contempt … . Under the circumstances of this case, we deem the statutory maximum sanction of $1,000 per offense warranted and therefore impose a total sanction of $10,000. 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).

The Court of Appeals, without explanation, reversed the Fourth Department which had reversed defendant's conviction on the ground defendant was not present during a side bar conference concerning the bias of a prospective juror: People v McKenzie-Smith, 2022 NY Slip Op 03308, CtApp 5-19-22

From the Fourth Department Decision (Reversed Without Explanation by the Court of Appeals):

A … prospective juror was peremptorily excused by defendant's counsel, however, and, during a sidebar conference at which defendant was not present, that juror was questioned "to search out [her] bias, hostility or predisposition to believe or discredit the testimony of potential witnesses" (Antommarchi, 80 NY2d at 250). Consequently, we conclude that, "absent a knowing and voluntary waiver by defendant of his right to be present at that sidebar conference, his conviction cannot stand" … . The only evidence in the record concerning a waiver consists of a conversation between the court, defendant's counsel and codefendant's counsel that occurred after the prospective juror was excused, in which codefendant's counsel indicated that he had just discussed with codefendant the right to approach the bench during such conferences, and defendant's counsel merely assented. Inasmuch as the discussion was vague and prospective, and there is no indication

that defendant or defendant's counsel were waiving defendant's Antommarchi rights retrospectively, that conversation is insufficient to establish that defendant waived those rights concerning the questioning of the prospective juror at issue here. We therefore reverse the judgment of conviction and grant a new trial. People v Mckenzie-Smith, 2020 NY Slip Op 05653, Fourth Dept 10-9-20

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).

The Third Department, annulling the petitioner-inmate's misbehavior determination, held that the petitioner was denied due process by not being given the opportunity to see the video of the incident:

"[A]n [incarcerated individual] 'should be allowed to call witnesses and present documentary evidence in his [or her] defense when permitting him [or her] to do so will not be unduly hazardous to institutional safety or correctional goals'" … . The videotaped incident occurred while petitioner was incarcerated at a different facility. The Hearing Officer informed petitioner that, due to the format of the video, it could not be played in the hearing room and could only be played on equipment located in a secure area of the facility from which petitioner was barred entry. The Hearing Officer stated that he had viewed the video in the secure area, and he described what he believed the video depicted. Petitioner objected, arguing that he was being prevented from providing exculpatory testimony as to what occurred in the video. The Hearing Officer denied the objection, stating that 'the video speaks for itself,' and the record reflects that he relied, in part, on the video in reaching the determination of guilt. Contrary to respondent's contention, the

explanation that the only video equipment capable of playing the video was in a secure area, without any apparent attempt to either move the equipment or find other equipment capable of playing the video for petitioner, did not articulate institutional safety or correctional goals sufficient to justify denying petitioner's right to reply to evidence against him … .. Similarly, the fact that petitioner may have seen the video at his former facility during a prior hearing on these charges before a different Hearing Officer, a hearing that resulted in a determination that was administratively reversed, does not excuse the denial of petitioner's right to view the video during the new hearing and offer exculpatory testimony as to its contents … .

As to the remedy, we conclude that a new hearing, not expungement, is appropriate. 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.

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).

The Third Department confirmed the determination finding petitioner-inmate guilty of urging others to participate in a demonstration at the prison. There was a video of the meeting where the demonstration was allegedly planned. An officer

who witnessed the meeting and testified about it apparently viewed the video. Petitioner made timely requests for the video, but it was never provided. The dissent argued the failure to retain and provide the video of the alleged meeting required that the determination be annulled:

From the dissent:

The sergeant and the correction officer have described two distinctly different meetings, one involving 12 people, the other 30 to 40 … . This discrepancy heightens the relevance of the … video, as does the fact that the sergeant viewed the video and the Hearing Officer was uncertain whether that viewing occurred before or after the undefined retention period expired. Complicating matters, the Hearing Officer noted the three-week delay between the … meeting and issuance and service of the misbehavior report on petitioner.

… In a situation such as this, where there is an extended delay in issuing a misbehavior report and the author of that report has in fact reviewed a video, it is incumbent upon the correctional facility to preserve that evidence … . The failure to do so here compromised petitioner's due process right to a fair evidentiary hearing … . That is particularly so in view of the sergeant's affirmative testimony as to what ostensibly happened in the E-yard on May 29, 2020. It is further evident that the Hearing Officer should have, but failed to, inquire further as to the existence of the video or the circumstances of its deletion … 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.

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).

The First Department, in a full-fledged opinion by Justice Gische, reversing Supreme Court, over a full-fledged two-justice dissenting opinion, determined the respondent agencies exceeded their regulatory powers when they authorized the release of so-called "familial DNA" information to be used as a possible lead for identifying the perpetrator of a crime. In the absence of a DNA "match" or a "partial match" a "familial match" may indicate the perpetrator has a familial relationship with someone in the DNA database. A crucial threshold question was whether the petitioners, relatives of persons whose genetic profiles are in the New York State DNA database, had standing to contest the familial DNA regulations. The dissenters argued the petitioners did not have standing. The majority concluded the basis for the familial DNA regulations was primarily social policy, and therefore the regulations were legislative, rather than administrative, in nature:

Each petitioner's brother has genetic information stored in the DNA databank. Neither petitioner has been asked or mandated to provide DNA for comparison. Because they are law abiding citizens, neither petitioner knows if they have been targeted for investigation as a result of a familial DNA search, but they harbor great concern and anxiety that they might be investigated for no other reason than that they share family genetics with a convicted criminal … . * * *

We are not required to determine whether respondents made a good or beneficial policy decision. The fact that the decisions respondents made are by their very nature policy driven, greatly favors a conclusion that they were made in excess of respondents' authority. 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).

The Court of Appeals, reversing the Appellate Division, determined the trial court did not abuse its discretion when screen shots of text messages of a sexual nature allegedly sent by the defendant, a high-school volley ball coach, to the 15-year-old victim, a player on the team. The victim had deleted the messages, but her boyfriend had taken screenshots of some of the messages and those screenshots were allowed in evidence. On appeal the Second Department reversed the conviction on the ground that the screenshots had not been properly authenticated:

"[T]echnologically generated documentation [is] ordinarily admissible under standard evidentiary rubrics" and "this type of ruling may be disturbed by this Court only when no legal foundation has been proffered or when an abuse of discretion as a matter of law is demonstrated" … . This Court recently held that for digital photographs, like traditional photographs, "the proper foundation [may] be established through testimony that the photograph accurately represents the subject matter depicted" … . We reiterated that "[r]arely is it required that the identity and accuracy of a photograph be proved by the photographer" … . which would be the boyfriend here. Rather, "any person having the requisite knowledge of the facts

may verify" the photograph "or an expert may testify that the photograph has not been altered" … .

Here, the testimony of the victim—a participant in and witness to the conversations with defendant—sufficed to authenticate the screenshots. She testified that all of the screenshots offered by the People fairly and accurately represented text messages sent to and from defendant's phone. The boyfriend also identified the screenshots as the same ones he took from the victim's phone on November 7. Telephone records of the call detail information for defendant's subscriber number corroborated that defendant sent the victim numerous text messages during the relevant time period. Moreover, even if we were to credit defendant's argument that the best evidence rule applies in this context, the court did not abuse its discretion in admitting the screenshots. 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).

The Court of Appeals, in a full-fledged opinion by Judge Singas, reversing the Appellate Division in this murder case, determined evidentiary rulings excluding evidence which impeached an important witness and 911 calls admissible as

present sense impressions deprived defendant of his right to present a defense. R.M. was a crucial prosecution witness. R.M. claimed to have been with his girlfriend, R.J. right up until the time of the shooting. But R.J. would have testified she was not with R.M. that day:

R.J.'s proffered testimony was probative of R.M.'s ability to observe and recall details of the shooting. At trial, R.M. testified that he was with R.J. until "seconds" before he witnessed the shooting, and that he was at the scene to walk R.J. home. Upon the People's questioning, R.M. explained in detail his relationship with R.J., resulting in many pages of testimony as to where he met up with her that evening, the amount of time they spent together, and when they parted ways. This testimony, introduced and relied upon by the People, made R.J. an integral part of R.M.'s account of why he was in a position to witness the shooting, and placed her with him mere seconds before it occurred. Since the People's own theory of the case placed R.J. on the scene the instant before the shooting, her testimony cannot be characterized as collateral. …

The court also erred in excluding the three 911 calls. The calls were admissible as present sense impressions. The present sense impression exception to the hearsay rule applies to statements that are "(1) made by a person perceiving the event as it is unfolding or immediately afterward" and "(2) corroborated by independent evidence establishing the reliability of the contents of the statement" … . "[D]escriptions of events made by a person who is perceiving the event as it is unfolding" are "deemed reliable . . . because the contemporaneity of the communication minimizes the opportunity for calculated misstatement as well as the risk of inaccuracy from faulty memory" … . 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.

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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).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over an extensive three-judge dissent, determined the accusatory instrument charging defendant with "fraudulent accosting" was facially sufficient. Defendant set up a couple of milk crates as a table in the sidewalk and asked people for donations to the homeless as they walked around the table. Defendant unsuccessfully argued the term "accost" required an element of aggressiveness or persistence directed toward an individual:

A person is guilty of fraudulent accosting when he or she "accosts a person in a public space with intent to defraud him of money or other property by means of a trick, swindle or confidence game" (Penal Law § 165.30 [1]). * * *

During the relevant period in 1952, when the legislature created the offense of fraudulent accosting … contemporary dictionaries defined "accost" to mean either to "approach," to "speak to first," or to "address" … .No dictionary cited from the relevant time period limits the term to an aggressive or persistent physical approach … . 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.

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).

The Second Department, reversing (modifying) Supreme Court, determined defendant should have been afforded a hearing on his motion to vacate his conviction on ineffective assistance grounds. Defendant alleged he was misadvised of the deportation consequence of his guilty plea.

… [N]either the fact that the defendant had previously been convicted of an offense that may subject him to removal, nor the seemingly strong evidence against him with respect to the instant offense, nor the favorable plea bargain he received, necessarily requires a finding that the defendant was not prejudiced by his counsel's alleged misadvice … . The defendant's averments, including that he has resided in the United States since he was 10 years old, that he is married to his spouse with whom he has two minor children, that his spouse is unable to work due to a medical condition, that he is gainfully employed, and that he is the sole source of financial support to his family, sufficiently alleged that a decision to reject the plea offer would have been rational … . 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).

The Court of Appeals, over an extensive two-judge dissent, determined that the defendant did not demonstrate the misdemeanors with which he was charged triggered a right to a jury trial because conviction would result in deportation:

Defendant was originally charged with public lewdness, two counts of forcible touching, and two counts of sexual abuse in the third degree after police officers observed him masturbating on a subway platform and pressing himself against two women on a subway car. The People thereafter filed a prosecutor's information reducing the two class A misdemeanor charges of forcible touching to attempted forcible touching, so that the top charges against defendant were Class B misdemeanors obviating his right to a jury trial under state statute … . After a bench trial, defendant was convicted of public lewdness and acquitted of all other charges. …

While the Appellate Term first improperly conducted the deportability analysis based only on the crime of conviction, that court went on to correctly analyze defendant's deportability based on all the charges he faced (see Suazo, 32 NY3d at 508). It remained, however, "the defendant's burden to overcome the presumption that the crime charged is petty and establish a Sixth Amendment right to a jury trial" (id. at 507). … [D]efendant's conclusory allegation that he was deportable if convicted "on any of the charged B misdemeanors," supported by a bare citation to 8 USC § 1227 (a) (2) (A) (ii), under which an alien is deportable if "convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct," was insufficient to establish his right to a jury trial. 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).

The Second Department dismissed a jurisdictionally defective count of the indictment, held the People's attempt to amend that count was not authorized, held that certain Sandoval evidence should not have been admitted, but deemed the Sandoval error harmless and upheld defendant's convictions on the other counts:

… [C]ount 1 of the indictment alleged that "in the course of effecting entry into said dwelling," the defendant "was armed with a dangerous weapon, to wit: a knife." Inasmuch as the offense of burglary in the first degree requires that the defendant be armed with a "deadly weapon," a term which is specifically defined in Penal Law § 10.00(12) and which definition includes only certain specified knives, count 1 of the indictment was jurisdictionally defective because it failed to effectively charge the defendant with the commission of a crime (see id. §§ 10.00, 140.30[1]).

… CPL 200.70(2)(a) prohibits any amendment of an indictment when the amendment is needed to cure "[a] failure thereof to charge or state an offense" … .

… Although "questioning concerning other crimes is not automatically precluded simply because the crimes to be inquired about are similar to the crimes charged" … , "'cross-examination with respect to crimes or conduct similar to that of which the defendant is presently charged may be highly prejudicial, in view of the risk, despite the most clear and forceful limiting instructions to the contrary, that the

evidence will be taken as some proof of the commission of the crime charged rather than be reserved solely to the issue of credibility'" … . 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).

The First Department, reversing Supreme Court, determined the NYC Administrative Code provision prohibiting and criminalizing the use of certain methods of restraint in effecting an arrest was not void for vagueness.

Plaintiffs challenge Administrative Code § 10-181 as unconstitutionally vague and preempted by New York State law. This provision, which became effective July 15, 2020, makes it a criminal misdemeanor to use certain methods of restraint "in the course of effecting or attempting to effect an arrest" (Administrative Code § 10-181[a]). Specifically, the statute prohibits "restrain[ing] an individual in a manner that restricts the flow of air or blood by compressing the windpipe or the carotid arteries on each side of the neck [the chokehold ban], or sitting, kneeling, or standing on the chest or back in a manner that compresses the diaphragm [the diaphragm compression ban]" ,,, , …

The only language plaintiffs take issue with is "in a manner that compresses the diaphragm." But the meaning of this language, even if "imprecise" or "open-

ended," is sufficiently definite "when measured by common understanding and practices" … . Police officers — the targets of the law — can be (and are) trained on the location and function of the diaphragm. And even plaintiffs have no difficulty understanding the meaning of the word "compress[]" when used in the context of the accompanying chokehold ban, which they do not challenge. That it may not be the most accurate word, from a medical standpoint, to describe what happens to the diaphragm when someone sits, kneels, or stands on it does not mean that it is incapable of being understood. 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).

The Second Department vacated defendant's robbery second and grand larceny fourth convictions as repugnant to the acquittal of unauthorized use of a vehicle third:

The defendant was charged with various crimes arising from an incident during which the defendant, a codefendant, and a third perpetrator who was never apprehended, robbed the complainant, a cab driver, at knife point. The jury convicted the defendant of robbery in the first degree (Penal Law § 160.15[3]), robbery in the second degree (id. § 160.10[3]), grand larceny in the fourth degree (id. § 155.30[8]), and menacing in the second degree (id. § 120.14[1]), and acquitted him of unauthorized use of a vehicle in the third degree (id. § 165.05[1]).

"A verdict is repugnant when, evaluated only in terms of the elements of the crimes as charged to the jury—and without regard to the evidence as to what actually occurred—acquittal on one count necessarily negates an . . . element of a crime of which the defendant was convicted" … .. Here, as the crimes were charged to the jury, the acquittal on the charge of unauthorized use of a vehicle in the third degree rendered repugnant the convictions of robbery in the second degree and grand larceny in the fourth degree … . 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).

The Second Department, reversing County Court, determined, because the defendant objected to the restitution-amount, a hearing to determined the amount was required:

"'Before a defendant may be directed to pay restitution a hearing must be held if either: (1) the defendant objects to the amount of restitution and the record is insufficient to establish the proper amount; or (2) the defendant requests a hearing'" … .

Here, the defendant objected to the amount of restitution payable to the complainant, and the record was insufficient to establish the value of damages to the complainant's property in the amount of $7,630 … . 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).

The Second Department, reversing (modifying) Supreme Court, ruled a hearing was required to determined whether defendant's Connecticut conviction could serve as a predicate offense for second felony offender status. The issue was not preserved and was considered in the interest of justice:

Although the defendant did not preserve for appellate review the issue of whether he was properly sentenced as a second felony offender, we reach that issue in the exercise of our interest of justice jurisdiction. The defendant's prior conviction in Connecticut was for larceny in the first degree under Connecticut General Statutes former § 53a-122(a). This statute defined grand larceny differently under several subdivisions, not all of which are felonies under New York law. To determine which subdivision applied to this defendant, the Supreme Court could have looked at the Connecticut accusatory instrument to determine the subdivision of the Connecticut statute under which the defendant was convicted … . However, the Connecticut accusatory instrument is not in the record.

Accordingly, in the interest of justice, we vacate the defendant's adjudication as a second felony offender and the sentence imposed, and remit the matter to the Supreme Court, Queens County, for a second felony offender hearing and for resentencing thereafter. 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).

The First Department, reversing Supreme Court, determined the Bronx County SORA proceeding should have been dismissed because New York County had entered a sex offender level adjudication based on the defendant's conduct in both counties:

… [T]he proceeding in Bronx County should have been dismissed on defendant's motion where Supreme Court, New York County had entered a sex offender level adjudication based on defendant's criminal conduct in both counties, which constituted the "current offenses" under the risk assessment instrument … . 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).

The Second Department, reversing Supreme Court, determined the crime for which defendant was convicted, at the time of its commission in 2007, was not a registrable offense under the Sex Offender Registration Act (SORA). Therefore defendant's motion to seal the record should not have been summarily denied. The matter was remitted for a hearing:

… [A]t the time of the defendant's conviction for attempted promoting prostitution in the third degree (Penal Law §§ 110.00, 230.25), the definition of "sex offense" in Correction Law § 168-a(2) did not include convictions of an attempt to commit Penal Law § 230.25 … . Further, the defendant has never been required to register under SORA for this conviction. Accordingly, under the plain language of the statute, the defendant has not been not convicted of "an offense for which registration as a sex offender is required pursuant to article six-C of the correction law" (CPL 160.59[1][a] …). Thus, the Supreme Court should not have determined that the defendant's conviction falls into the category of excluded offenses … . Likewise, although CPL 160.59(3)(a) provides that the reviewing court must summarily deny the defendant's application when, inter alia, "the defendant is required to register as a sex offender pursuant to article six-C of the correction law," here, the defendant is not required to do so.

As the defendant's motion was not subject to mandatory denial under CPL 160.59(3) and the district attorney opposed the defendant's motion, a hearing on the defendant's motion was required … . 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.

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).

The Second Department, reversing defendant's convictions by guilty pleas, determined the police officer who stopped the taxi in which defendant was a passenger did not have probable cause to believe defendant had committed a crime. Because defendant pled guilty to several offenses based upon a promise of concurrent sentences, all convictions were reversed:

Upon our evaluation of the totality of the circumstances in this case, we conclude that, at the time the police officer stopped the taxi in which the defendant was a passenger, the officer lacked reasonable suspicion to believe that the defendant had committed a crime. The stop was based merely on the report of an identified citizen, made 40 minutes after the fight had occurred, that the neighbor with whom she was talking to on the phone was presently observing the defendant getting into a black taxi on the block where the fight occurred. There was no evidence that the informant or the neighbor saw the fight, and the neighbor, who testified at the hearing, did not state that she knew that the defendant was involved in the fight. Indeed, the police officer who stopped the taxi admitted that, when he made the stop, he did not know whether the defendant was a victim, a perpetrator, or involved "in anything." Under these circumstances, the gun recovered by that officer upon the vehicle stop should have been suppressed … . …

The defendant correctly contends that the judgments relating to the drug cases also must be reversed inasmuch as his pleas of guilty in those cases were premised on the promise of sentences that would run concurrently with the sentence imposed on the weapon possession charge … . 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.