NEW YORK APPELLATE DIGEST, LLC

Criminal Law
Reversal Newsletter
June 2022

An Organized Compilation of the Summaries of Selected Decisions, Mostly Reversals, Released by Our New York State Appellate Courts and Posted on the New York Appellate Digest in June 2022, Distilled to Practice Points, One or Two Sentences Each. 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 Newsletter.

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People v Smith, 2022 NY Slip Op 03547, Third Dept 6-2-22

Practice Point: Although the defendant sent the victim to the address where the victim was to sell marijuana to a buyer, there was no evidence defendant was aware the buyer intended to attack and rob the victim. Therefore, there was no evidence defendant shared the robbers intent and his robbery convictions under an accomplice-liability theory were reversed.

ASSAULT, PHYSICAL INJURY.

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People v Bunton, 2022 NY Slip Op 03856, Fourth Dept 6-9-22

Practice Point: Here there was only a vague description of pain and no medical records were introduced. The assault conviction was not supported by legally sufficient evidence the police officer suffered "physical injury."

BURGLARY, PARTIAL FINGERPRINT, APPEALS.

THERE WAS NO EVIDENCE LINKING DEFENDANT TO A BURGLARY EXCEPT A PARTIAL FINGERPRINT FOUND AT THE SCENE WHICH ONLY MATCHED 15 TO 22.5% OF THE CHARACTERISTICS OF DEFENDANT'S INKED PRINT; THE BURGLARY CONVICTION WAS AGAINST THE WEIGHT OF THE EVIDENCE (FOURTH DEPT).

People v Jones, 2022 NY Slip Op 03590, Fourth Dept 6-3-22

Practice Point: Here a partial fingerprint matched only 15 to 22.5% of the characteristics of defendant's inked print and the "match" was not verified by a second examiner conducting a blind verification. There was no other evidence linking defendant to the burglary. The conviction was deemed against the weight of the evidence.

CONSTRUCTIVE POSSESSION.

THE PROOF DEFENDANT CONSTRUCTIVELY POSSESSED A FIREARM FOUND IN THE CEILING OF A HOUSE WHERE DEFENDANT WAS A GUEST WAS LEGALLY INSUFFICIENT; DNA EVIDENCE MAY HAVE DEMONSTRATED DEFENDANT POSSESSED THE FIREARM AT SOME POINT IN TIME, BUT IT DID NOT DEMONSTRATE CONSTRUCTIVE POSSESSION AT THE TIME THE FIREARM WAS SEIZED (FOURTH DEPT).

People v King, 2022 NY Slip Op 03606, Fourth Dept 6-3-22

Practice Point: Here DNA evidence suggested the defendant possessed the firearm at some point. But defendant's presence as a guest in the room where the firearm was found was not sufficient evidence of constructive possession of the firearm. Conviction reversed.

COURT CLERK'S QUESTIONING PROSPECTIVE JURORS, NO MODE OF PROCEEDINGS ERROR.

AN INQUIRY MADE BY THE COURT CLERK OF PROSPECTIVE JURORS ABOUT WHETHER THEY COULD SERVE IN THIS SEXUAL-ASSAULT-OF-A-CHILD CASE DID NOT AMOUNT TO AN IMPROPER DELEGATION OF JUDICIAL AUTHORITY; THERE WAS NO MODE OF PROCEEDINGS ERROR (FIRST DEPT).

People v Ocampo, 2022 NY Slip Op 03803, First Dept 6-9-22

Practice Point: Here defense counsel consented to the court clerk's asking prospective jurors whether they could serve in this sexual-assault-of-a-child case. The inquiry was not an improper delegation of judicial authority. There was no mode of proceedings error (which would have required reversal on appeal even though the issue was not preserved).

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People v Laboriel, 2022 NY Slip Op 03863, CtApp 6-14-22

Practice Point: The affirmance of a legal sentence by the appellate division does not give the Court of Appeals the authority to review the validity of a guilty plea.

Practice Point: If a sentence is legal, an excessive-sentence claim is beyond the scope of the Court of Appeals.

DEPRAVED INDIFFERENCE MURDER, PLEA COLLOQUY.

THE PLEA COLLOQUY IN WHICH DEFENDANT STATED HE CARED FOR THE THREE-YEAR-OLD VICTIM NEGATED AN ESSENTIAL ELEMENT OF DEPRAVED INDIFFERENCE MURDER; PLEA VACATED (FOURTH DEPT).

People v Bovio, 2022 NY Slip Op 03591, Fourth Dept 6-3-22

Practice Point: The defendant, during the plea colloquy for depraved indifference murder, stated that he cared for the three-year-old victim. That statement negated the element of depraved indifference murder which requires that the defendant "not care if the victim lived or died." The plea was vacated.

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DEPRAVED INDIFFERENCE MURDER, VEHICLE AND TRAFFIC LAW.

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People v Williams, 2022 NY Slip Op 03945, Third Dept 6-16-22

Practice Point: Here the intoxicated defendant acted recklessly in fleeing from the police, but his driving did not evince a depraved indifference to the safety of other drivers. For the most part defendant followed the rules of the road and avoided other vehicles. Therefore the depraved indifference murder conviction was not supported by the weight of the evidence. Conviction reduced to manslaughter.

DWI, IGNITION INTERLOCK DEVICE.

IN ORDER TO DIRECT A DEFENDANT TO INSTALL AN IGNITION INTERLOCK DEVICE, THE DEFENDANT MUST BE SENTENCED TO A PERIOD OF PROBATION OR A CONDITIONAL DISCHARGE (SECOND DEPT).

People v Dancy, 2022 NY Slip Op 03904, Second Dept 6-15-22

Practice Point: The Vehicle and Traffic Law requires that the direction to install an ignition interlock device be part of a sentence to a period of probation or a conditional discharge.

HARVEY WEINSTEIN.

HARVEY WEINSTEIN'S CRIMINAL SEXUAL ACT AND RAPE CONVICTIONS AFFIRMED (FIRST DEPT).

People v Weinstein, 2022 NY Slip Op 03576, First Dept 6-2-22

Practice Point: The First Department found that the expert testimony about rape trauma syndrome, the extensive Molineux evidence, and the extensive Sandoval evidence were properly admitted in the Harvey Weinstein trial.

IMPROPER STAY, JUDGE CANNOT STAY ITS OWN DISMISSAL OF A CHARGE.

COUNTY COURT DISMISSED THE PROMOTING PRISON CONTRABAND COUNT; THE PEOPLE APPEALED; COUNTY COURT THEN STAYED ITS DISMISSAL, HELD A TRIAL, AND DEFENDANT WAS CONVICTED; AFTER THE CONVICTION THE PEOPLE'S APPEAL WAS DISMISSED AS MOOT; THE DEFENDANT APPEALED; THE JUDGE HAD NO AUTHORITY TO STAY THE DISMISSAL AND GO TO TRIAL ON THAT COUNT; THE CONVICTION WAS THEREFORE VACATED (THIRD DEPT).

People v Felli, 2022 NY Slip Op 04192, Third Dept 6-30-22

Practice Point: With certain exceptions in CPL 460.40, the dismissal of a count cannot be stayed when the People appeal the dismissal. Here the judge dismissed a count, the People appealed, the judge then stayed the dismissal, held a trial, defendant was convicted of the count, and the People's appeal was dismissed as moot. Because the judge had no authority pursuant to CPL 460.40 to stay the dismissal and go to trial on the dismissed count, the conviction was vacated.

INEFFECTIVE ASSISTANCE.

DEFENDANT PLED GUILTY TO ATTEMPTED GANG ASSAULT, WHICH IS A LEGAL IMPOSSIBILITY AT TRIAL; DEFENDANT WAS ENTITLED TO A HEARING ON WHETHER HIS PLEA WAS RENDERED INVOLUNTARY BY COUNSEL'S INACCURATE ADVICE ABOUT THE POSSIBILITY OF CONVICTION; MATTER REMITTED (FOURTH DEPT).

People v Davis, 2022 NY Slip Op 03610, Fourth Dept 6-3-22

Practice Point: "Attempted gang assault" is a legal impossibility at trial. Here defendant was entitled to a hearing on whether his plea to attempted gang assault was involuntary because of counsel's inaccurate advice about the possibility of conviction at trial.

INEFFECTIVE ASSISTANCE.

DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILURE TO INTERVIEW A POTENTIALLY EXCULPATORY WITNESS; MOTION TO VACATE THE MURDER CONVICTION SHOULD HAVE BEEN GRANTED (FOURTH DEPT).

People v Williams, 2022 NY Slip Op 03625, Fourth Dept 6-3-22

Practice Point: Here defense counsel was made aware of a potentially exculpatory witness and did not interview him. The fact that defense counsel felt the witness was not credible did not excuse the failure to investigate. Defendant's motion to vacate his conviction on ineffective assistance grounds was granted by the appellate court.

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INVALID WAIVER OF INDICTMENT.

HERE DEFENDANT PLED GUILTY TO A SUPERIOR COURT INFORMATION (SCI) AFTER HE HAD BEEN INDICTED; THE WAIVER OF INDICTMENT WAS INVALID AND THE SCI WAS DISMISSED; THE ERROR IS JURISDICTIONAL AND NEED NOT BE PRESERVED BY OBJECTION (THIRD DEPT).

People v Michalski, 2022 NY Slip Op 04190, Third Dept 6-30-22

Practice Point: Here the defendant was already indicted when he waived indictment and pled guilty to a superior court information (SCI). That was a jurisdictional error which need not be preserved by objection.

JUDGES, ATTORNEYS, CONFLICT OF INTEREST.

THE JUDGE'S LAW CLERK WAS THE DISTRICT ATTORNEY WHO PROSECUTED DEFENDANT; THE JUDGE SHOULD NOT HAVE DECIDED DEFENDANT'S MOTION TO VACATE HIS CONVICTION (THIRD DEPT).

People v Roshia, 2022 NY Slip Op 03546, Third Dept 6-2-22

Practice Point: The judge should not have decided defendant's motion to vacate his conviction because the judge's law clerk was the DA who prosecuted defendant.

JUROR BIAS, ERROR NOT PRESERVED OR APPEAL.

BECAUSE THE ISSUE WAS NOT PRESERVED BY OBJECTION, THE MAJORITY DID NOT CONSIDER WHETHER COUNTY COURT MADE A PROPER INQUIRY OF A JUROR WHO, DURING DELIBERATIONS, FOR THE FIRST TIME, REVEALED SHE WAS A RAPE VICTIM; DEFENDANT WAS CHARGED WITH RAPE; THE DISSENTING JUDGE WOULD HAVE CONSIDERED THE ISSUE IN THE INTEREST OF JUSTICE AND ORDERED A NEW TRIAL (THIRD DEPT).

People v Rivera, 2022 NY Slip Op 04050, Third Dept 6-23-22

Practice Point: Because the issue was not preserved for appeal by objection, the majority refused to consider whether Count Court made a proper inquiry when a juror revealed during deliberations, for the first time, she was a rape victim, Defendant was charged with rape. The dissenting justice would have considered the issue in the interest of justice and ordered a new trial.

JURORS, DISCHARGE OF JUROR, UNPRESERVED ERROR.

THE MAJORITY REFUSED TO CONSIDER WHETHER COUNTY COURT PROPERLY DISCHARGED A JUROR WHO FAILED TO APPEAR BECAUSE THE ISSUE WAS NOT PRESERVED BY OBJECTION; TWO DISSENTERS WOULD HAVE CONSIDERED THE ISSUE IN THE INTEREST OF JUSTICE AND ORDERED A NEW TRIAL (THIRD DEPT).

People v Colter, 2022 NY Slip Op 04055, Third Dept 6-23-22

Practice Point: Here the issue whether County Court properly discharged a juror was not considered by the majority because the issue was not preserved by objection. The two dissenters argued the court did not conduct a proper inquiry to determine why the juror had not appeared and whether the juror would appear. The

dissenters would have considered the issue in the interest of justice and ordered a new trial.

JURY INSTRUCTIONS, JUSTIFICATION DEFENSE, APPEALS.

THE JURY WAS NOT INSTRUCTED TO STOP DELIBERATIONS IF IT FOUND THE JUSTIFICATION DEFENSE APPLIED TO THE TOP COUNT (MURDER); DEFENDANT'S MANSLAUGHTER CONVICTION REVERSED IN THE INTEREST OF JUSTICE (THE ISSUE WAS NOT PRESERVED) (THIRD DEPT).

People v Harris, 2022 NY Slip Op 03548, Third Dept 6-2-22

Practice Point: If the justification defense is to be considered by the jury, the jury must be instructed to stop any further deliberations (re: the lesser counts) if the justification defense is deemed to apply to to the top count. Here the issue was not preserved by an objection to the jury instruction, but the Third Department reversed in the interest of justice.

JUVENILE DELINQUENCY, DNA.

APPELLANT, 16, IN THIS JUVENILE DELINQUENY PROCEEDING, WAS BEING INTERROGATED ABOUT A ROBBERY WHEN HE DRANK WATER FROM A DISPOSABLE CUP; THE INTERROGATING OFFICER SENT THE CUP FOR DNA ANALYSIS; THERE WAS NO INVESTIGATORY PURPOSE FOR THE DNA COLLECTION; APPELLANT'S MOTION TO EXPUNGE THE DNA EVIDENCE SHOULD HAVE BEEN GRANTED (FIRST DEPT).

Matter of Francis O., 2022 NY Slip Op 03969, First Dept 6-16-22.

Practice Point: Here the appellant was 16 when he was interrogated by the police. He drank water from a paper cup. The interrogating officer sent the cup for DNA analysis. There was no investigative purpose for the DNA collection. The appellant

did not abandon the cup and did not waive his privacy interest in it. His constitutional rights were therefore violated by the collection of his DNA and he was entitled to expungement of the DNA evidence.

JUVENILE DELINQUENCY.

THIS JUVENILE DELINQUENCY PROCEEDING STEMMED FROM ALLEGATIONS RESPONDENT COMMITTED VIOLENT ACTS AGAINST THE MOTHER OF HIS CHILD; THE PROCEEDING SHOULD NOT HAVE BEEN DISMISSED "IN FURTHERANCE OF JUSTICE;" CRITERIA EXPLAINED (THIRD DEPT).

Matter of James JJ., 2022 NY Slip Op 03555, Third Dept 6-2-22

Practice Point: The allegations of violence in this juvenile delinquency proceeding were deemed too serious to warrant dismissal of the juvenile delinquency proceeding "in furtherance of justice." This remedy should be used sparingly and at least one of the statutory factors for dismissal in furtherance of justice must be readily identifiable.

LARCENY, INTENT TO PERMANENTLY DEPRIVE OWNER OF PROPERTY.

DEFENDANT TOOK A KEY, GOT IN A U-HAUL VAN, SAT FOR TWO MINUTES AND GOT OUT OF THE VAN; THE PEOPLE DID NOT PROVE DEFENDANT INTENDED TO PERMANENTLY DEPRIVE THE OWNER OF ITS PROPERTY; GRAND LARCENY AND POSSESSION OF STOLEN PROPERTY CONVICTIONS REVERSED (SECOND DEPT).

People v Golding, 2022 NY Slip Op 03741, Second Dept 6-8-22

Practice Point: Grand Larceny includes the intent to permanently deprive the owner of the property. Here defendant took a key to a U-Haul van, got in the van,

sat for two minutes, and got out of the van. There was, therefore, proof of an intent to permanently deprive the owner of its property. Because grand larceny was not proven, possession of stolen property was not proven as well.

MIRANDA.

AFTER TRIGGERING A SECURITY ALARM AT A SPORTING GOODS STORE, DEFENDANT WAS DETAINED IN THE STORE FOR HALF AN HOUR IN THE PRESENCE OF POLICE OFFICERS WHOSE QUESTIONS WERE NOT CONFINED TO THE PETIT LARCENY INVESTIGATION RE: AMMUNITION, BUT RATHER RELATED TO DEFENDANT'S POSSESSION OF FIREARMS; DEFENDANT'S UNWARNED STATEMENTS SHOULD HAVE BEEN SUPPRESSED; CONVICTION REVERSED (THIRD DEPT).

People v Abdullah, 2022 NY Slip Op 04045, Third Dept 6-23-22

Practice Point: Defendant triggered a security alarm in a sporting goods store when he attempted to steal ammunition. He was detained by police in the store for half an hour and was asked questions about his possession of firearms. Because the questions exceeded the scope of the petit larceny investigation and were not preceded by the Miranda warnings, defendant's statements should have been suppressed. His conviction was reversed.

MISTRIAL, DOUBLE JEOPARDY.

AFTER THE TRIAL HAD BEGUN AND WITNESSES HAD TESTIFIED, THE JUDGE BECAME ILL AND SOUGHT A COVID TEST; AFTER THE NEGATIVE TEST-RESULT, THE JUDGE, SUA SPONTE, WITHOUT DEFENDANT'S CONSENT, DECLARED A MISTRIAL; THE JUDGE'S FAILURE TO CONSIDER A CONTINUANCE OR THE SUBSTITUTION OF ANOTHER JUDGE WAS AN ABUSE OF DISCRETION; THE DOUBLE-JEOPARDY PROHIBITION PRECLUDED RETRIAL (FOURTH DEPT).

Matter of McNair v McNamara, 2022 NY Slip Op 03825, Fourth Dept 6-9-22

Practice Point: Here the judge became ill after the trial had begun and declared a mistrial without defendant's consent and without considering a continuance or the substitution of another judge. There was no manifest necessity for the mistrial. The double-jeopardy prohibition therefore precluded retrial.

MOLINEUX EVIDENCE NOT NEEDED TO PROVE INTENT.

MOLINEUX EVIDENCE OF A PRIOR BURGLARY OF THE ROBBERY-VICTIM'S HOME TO SHOW THE INTENT TO COMMIT ROBBERY AND GRAND LARCENY SHOULD NOT HAVE BEEN ADMITTED; THE INTENT TO COMMIT ROBBERY AND GRAND LARCENY WAS DEMONSTRATED BY THE VICTIM'S TESTIMONY RENDERING EVIDENCE OF THE PRIOR BURGLARY TOO PREJUDICIAL (FOURTH DEPT).

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People v Dejesus, 2022 NY Slip Op 03584, Fourth Dept 6-3-22

Practice Point: Evidence of defendant's commission of an uncharged crime (Molineux evidence) to show defendant's intent to commit the charged offenses

will be deemed too prejudicial if the intent element of the charged offenses is demonstrated by the victim's testimony.

MOLINEUX, MODUS OPERANDI.

THE SEXUAL ABUSE ALLEGATIONS FROM THE 1990'S WERE NOT SUFFICIENTLY SIMILAR TO THE CHARGED OFFENSES AND THEREFORE DID NOT MEET THE "MODUS OPERANDI" CRITERIA UNDER MOLINEUX TO PROVE IDENTITY; NEW TRIAL ORDERED (FOURTH DEPT).

People v Mountzouros, 2022 NY Slip Op 03840, Fourth Dept 6-9-22

Practice Point: If the identity of the perpetrator is an issue and the manner in which the charged crime was committed is unique, evidence of defendant commission of an uncharged crime involving the same unique "modus operandi" may be admissible under Molineux. Here sexual abuse allegations from the 1990's were not sufficiently similar to the charged offenses. The uncharged-crime evidence should not have been admitted. New trial ordered.

MOTION TO VACATE CONVICTION, HEARING REQURED.

HERE THE DEFENDANT, IN HIS MOTION TO VACATE HIS CONVICTION, RAISED ISSUES ABOUT THE EXTENT OF HIS COOPERATION AND WHETHER NEW DEFENSE COUNSEL ADEQUATELY INVESTIGATED THE PROSECUTOR'S WITHDRAWAL OF THE COOPERATION AGREEMENT; THE PEOPLE'S RESPONSE DID NOT ADDRESS THESE SUBSTANTIVE ISSUES; THEREFORE COUNTY COURT SHOULD HAVE HELD A HEARING (THIRD DEPT).

People v Buckley, 2022 NY Slip Op 04197, Third Dept 6-30-22

Practice Point: If a motion to vacate the conviction raises substantive issues which are corroborated is some way (here with an affidavit by defendant's prior attorney), and these substantive issues are not adequately dealt with in the People's responding papers, a hearing must be held.

PEOPLE'S APPEALS.

THE PEOPLE CAN NOT APPEAL THE GRANT OF DEFENDANT'S MOTION TO WITHDRAW HER PLEA, VACATE HER FELONY CONVICTION AND ALLOW HER TO PLEAD TO A MISDEMEANOR; DEFENDANT MADE THE MOTION AFTER SUCCESSFUL COMPLETION OF A DRUG-COURT TREATMENT PROGRAM (THIRD DEPT).

People v Backus, 2022 NY Slip Op 03949, Third Dept 6-16-22

Practice Point: The People can only appeal on the grounds described in the Criminal Procedure Law (CPL). Here County Court granted defendant's motion to withdraw her plea, vacate her felony conviction and allow her to plead to a misdemeanor, Her motion was made after she completed a drug-court treatment program. The CPL does not give the People the authority to appeal County Court's grant of defendant's motion.

PHOTO-ARRAY.

THE PHOTO ARRAY WAS UNDULY SUGGESTIVE; THE VICTIM WAS FIXATED ON THE UNIQUE WHITE AND BLACK PATTERN ON THE SHIRT WORN BY THE ROBBER; IN THE PHOTO ARRAY A SHIRT WITH A BLACK AND WHITE DESIGN WAS VISIBLE IN THE DEFENDANT'S PHOTO, BUT THE FILLERS WERE ALL WEARING SOLID COLOR SHIRTS (SECOND DEPT).

People v Sulayman, 2022 NY Slip Op 04132, First Dept 6-28-22

Practice Point: Here the victim told the police the robber wore an "unusual shirt" with a black and white pattern. In the photo array from which the victim identified the defendant, the defendant was the only one with a black-and-white patterned shirt. All the fillers had solid color shirts. The array was deemed unduly suggestive and a new trial was ordered.

PLEA ALLOCUTION NEGATES ELEMENT OF CHARGE.

DEFENDANT'S STATEMENTS DURING THE PLEA ALLOCUTION NEGATED ELEMENTS OF THE CHARGED OFFENSE; THE JUDGE SHOULD HAVE CONDUCTED AN INQUIRY OR GIVEN THE DEFENDANT THE OPPORTUNITY TO WITHDRAW HIS PLEA; THIS ISSUE FALLS WITHIN AN EXCEPTION TO THE PRESERVATION REQUIREMENT (THIRD DEPT).

People v Reese, 2022 NY Slip Op 04194, Third Dept 6-30-22

Practice Point: When a defendant makes statements during the plea allocution which negate an element of the charged offense, the judge must make an inquiry or give the defendant the opportunity to withdraw the plea. The error need not be preserved for appeal.

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PLEA ALLOCUTION NEGATES ELEMENT OF CHARGE.

DEFENDANT'S PLEA COLLOQUY NEGATED AN ESSENTIAL ELEMENT (JURAT) OF HIS PERJURY CONVICTIONS; PLEA VACATED (THIRD DEPT).

People v Marone, 2022 NY Slip Op 03543, Third Dept 6-2-22

Practice Point: Here the defendant's plea colloquy negated an essential element of the crime.. The judge should have inquired further before accepting the plea. Plea vacated.

PLEA ALLOCUTION NEGATES ELEMENT OF CHARGE, DEPRAVED INDIFFERENCE MURDER.

THE PLEA COLLOQUY IN WHICH DEFENDANT STATED HE CARED FOR THE THREE-YEAR-OLD VICTIM NEGATED AN ESSENTIAL ELEMENT OF DEPRAVED INDIFFERENCE MURDER; PLEA VACATED (FOURTH DEPT).

People v Bovio, 2022 NY Slip Op 03591, Fourth Dept 6-3-22

Practice Point: The defendant, during the plea colloquy for depraved indifference murder, stated that he cared for the three-year-old victim. That statement negated the element of depraved indifference murder which requires that the defendant "not care if the victim lived or died." The plea was vacated.

PRONOUNCE SENTENCE.

THE SENTENCING JUDGE DID NOT SEPARATELY PRONOUNCE A SENTENCE FOR EACH CONVICTION; MATTER REMITTED (THIRD DEPT).

People v Robbins, 2022 NY Slip Op 03549, Third Dept 6-2-22

Practice Point: A sentencing judge must pronounce a sentence separately for each conviction.

ROBBERY, LESSER INCLUDED OFFENSES.

ROBBERY THIRD AND ASSAULT SECOND CONVICTIONS REVERSED AS LESSER INCLUDED OFFENSES OF ROBBERY SECOND (FOURTH DEPT).

People v Coleman, 2022 NY Slip Op 03842, Fourth Dept 6-9-22

Practice Point: Here the robbery third and assault second convictions were reversed as lesser included offense of robbery second.

SELF-REPRESENTATION PROPERLY LIMITED.

THE TRIAL JUDGE PROPERLY TERMINATED DEFENDANT'S SELF-REPRESENTATION DURING THE TRIAL BASED ON DEFENDANT'S BEHAVIOR; THE TRIAL JUDGE PROPERLY DECLINED TO EXCUSE A JUROR WHO, DURING DELIBERATIONS, SAID HE DID NOT WANT TO CONTINUE; DEFENDANT WAS NOT EXCLUDED FROM A MATIERAL STAGE OF THE PROCEEDING WHEN THE TRIAL JUDGE DISCUSSED HIS MENTAL CONDITION WITH COUNSEL (FIRST DEPT).

People v Williams, 2022 NY Slip Op 04135, First Dept 6-28-22

Practice Point: Here defendant's agitated behavior during the trial was a proper ground for terminating his self-representation. The judge's discussion with counsel, outside defendant's presence, of defendant's mental health was not a material stage of the proceedings. The judge properly refused to exclude a juror who, during deliberations, said he did not want to continue.

SEX OFFENDER REGISTRATION ACT (SORA).

THE 20-YEAR DURATION OF REGISTRATION AND VERIFICATION OF A LEVEL ONE SEX OFFENDER STARTS ANEW WHEN THE OFFENDER, ALREADY REGISTERED IN ANOTHER STATE, MOVES TO NEW YORK AND NOTIFIES THE DIVISION OF CRIMINAL JUSTICE SERVICES (SECOND DEPT).

People v Corr, 2022 NY Slip Op 04183, Second Dept 6-29-22

Practice Point: A level one sex offender who was registered in another state before moving to New York does not get credit for the duration of the out-of-state registration.

SPEEDY TRIAL, TRAFFIC INFRACTIONS.

THE AMENDMENT TO THE SPEEDY TRIAL STATUTE WHICH EXTENDED THE STATUTE'S COVERAGE TO TRAFFIC INFRACTIONS JOINTLY CHARGED WITH CRIMES OR VIOLATIONS IS NOT TO BE APPLIED RETROACTIVELY (CT APP).

People v Galindo, 2022 NY Slip Op 03928, Ct App 6-16-22

Practice Point: The amendment to the speedy trial statute which extended the statute's coverage to include traffic infractions jointly charged with crimes or violations is not to be applied retroactively. Here the amendment became effective while defendant's appeal to the Appellate Term was pending. The Appellate Term should hot have ruled the amendment applied to the defendant's accusatory instrument, which jointly charged misdemeanors and traffic infractions.

STREET STOPS, REASONABLE SUSPICION, FRISK.

THE POLICE DID NOT HAVE A REASONABLE SUSPICION DEFENDANT WAS ARMED AND THEREFORE SHOULD NOT HAVE ATTEMPTED TO FRISK HIM; THE POLICE DID NOT HAVE PROBABLE CAUSE TO ARREST DEFENDANT WHEN HE THREW HIS COAT AT AN OFFICER AND RAN BECAUSE THE POLICE WERE NOT AUTHORIZED TO ATTEMPT THE FRISK; INDICTMENT DISMISSED; AN APPELLATE COURT CANNOT CONSIDER A THEORY WHICH WOULD SUPPORT DENIAL OF SUPPRESSION BUT WHICH WAS NOT RAISED BY THE PEOPLE BELOW (FOURTH DEPT).

People v Hodge, 2022 NY Slip Op 03821, Fourth Dept 6-9-22

Practice Point: Here the police did not have a reasonable suspicion that the defendant was armed and therefore should not have attempted to frisk him. The fact that the defendant threw his coat at an officer and ran did not provide probable cause for arrest because the police conduct (attempting to frisk him) was not

authorized. An appellate court cannot consider a theory which would support the denial of suppression but with was not raised below.

STREET STOPS.

THE LEVEL THREE STREET STOP WAS NOT JUSTIFIED BY THE VAGUE DESCRIPTION OF A ROBBERY SUSPECT WHICH DEFENDANT DID NOT MATCH; THAT THE DEFENDANT HID HIS FACE AND WALKED QUICKLY WHEN THE POLICE FOLLOWED HIM DID NOT PROVIDE THE POLICE WITH THE REQUISITE REASONABLE SUSPICION (FIRST DEPT).

People v Thorne, 2022 NY Slip Op 03696, First Dept 6-7-22

Practice Point: Here the police conducted a level-three street stop based upon a vague description of a robbery suspect which the defendant did not match. The stop was not justified by defendant's hiding his face and walking quickly when the police followed him.

SYNTHETIC CANNABINOIDS.

THE MISDEMEANOR COMPLAINT DID NOT ALLEGE SUFFICIENT FACTS TO DETERMINE WHETHER THE SYNTHETIC CANNABINOID DEFENDANT WAS CHARGED WITH POSSESSING WAS ONE OF THE SYNTHETIC CANNABINOIDS DESIGNATED AS CONTROLLED SUBSTANCES BY THE PUBLIC HEALTH LAW (CT APP).

People v Ron Hill, 2022 NY Slip Op 03930, CtApp 6-16-22

Practice Point: There are many synthetic cannabinoids in addition to those designated controlled substances by the Public Health Law. Here the misdemeanor complaint did not allege enough facts to determine whether the synthetic

cannabinoid allegedly possessed by the defendant was on the Public-Health-Law list. The complaint was therefore facially deficient.

TERRORISTIC THREAT.

DEFENDANT WAS CONCERNED HIS INCARCERATED BROTHER WAS BEING HARASSED BY CORRECTIONS OFFICERS; HE CALLED THE DEPARTMENT OF CORRECTIONS AND THREATENED TO "BLOW AN OFFICER'S HEAD OFF" "IF THEY TOUCH MY BROTHER;" DEFENDANT'S "MAKING A TERRORISTIC THREAT" CONVICTION WAS AGAINST THE WEIGHT OF THE EVIDENCE (THIRD DEPT).

People v Santiago, 2022 NY Slip Op 04196, Third Dept 6-30-22

Practice Point: Here defendant's statement he would "blow an officer's head off" "if they touch my brother" did not cause the investigators who heard the statement to expect or fear the imminent commission of the offense, which is an element of "making a terroristic threat." Defendant's conviction was therefore against the weight of the evidence. The decision cautions against interpreting the "terroristic threat" statute loosely.

TRAFFIC ACCIDENTS, CRIMINAL NEGLIGENCE.

THE UNEXPLAINED FAILURE TO SEE A VEHICLE BEFORE COLLIDING WITH IT, WITHOUT MORE, DOES NOT RISE TO THE LEVEL OF CRIMINAL NEGLIGENCE; THE EVIDENCE OF CRIMINAL NEGLIGENCE WAS LEGALLY INSUFFICIENT (THIRD DEPT).

People v Faucett, 2022 NY Slip Op 04195, Third Dept 6-30-22

Practice Point: This case includes a detailed description of the criteria for criminal negligence. In the context of a traffic accident, the defendant's unexplained failure

to see the other vehicle until it was too late, without more, does not constitute criminal negligence.

TRAFFIC STOPS.

THE POLICE DID NOT HAVE PROBABLE CAUSE TO BELIEVE DEFENDANT HAD COMMITTED OR WAS COMMITTING A CRIME WHEN THEY BLOCKED DEFENDANT'S VEHICLE WITH THE POLICE VEHICLE, WHICH CONSTITUTES A SEIZURE; PLEA VACATED AND SUPPRESSION MOTION GRANTED (FOURTH DEPT).

People v King, 2022 NY Slip Op 03595, Fourth Dept 6-3-22

Practice Point: Blocking defendant's vehicle with a police vehicle is a seizure which requires probable cause to believe defendant has committed or is committing a crime.