NEW YORK APPELLATE DIGEST, LLC

Criminal Law
Reversal Report
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. 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. Copyright 2022 New York Appellate Digest, LLC

Table of Contents

Contents

Table of Contents

Table of Contents

Table of Contents

Table of Contents

Table of Contents

Table of Contents

‘

ACCOMPLICE LIABILITY.

THERE WAS NO EVIDENCE DEFENDANT SHARED THE ATTACKERS' INTENT TO ROB THE VICTIM; DEFENDANT'S ROBBERY CONVICTIONS UNDER AN ACCOMPLICE-LIABILITY THEORY REVERSED (THIRD DEPT).

The Third Department, reversing defendant's robbery convictions, determined the evidence defendant shared the attackers' intent to rob the victim was legally insufficient. Defendant had set up a drug purchase from the victim. When the victim arrived, he was attacked and robbed by four masked men. Although the victim testified defendant was one of the masked men, there was strong evidence to the contrary:

The People … did not have any direct evidence demonstrating that defendant knew of or shared an intent to forcibly steal property from the victim … . Indeed, there was no evidence that defendant had prior knowledge of a plan to rob the victim … . 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.

THE EVIDENCE OF "PHYSICAL INJURY" WAS LEGALLY INSUFFICIENT; ASSAULT SECOND CONVICTION REVERSED (FOURTH DEPT).

The Fourth Department, reversing defendant's assault second conviction, determined the evidence the police officer sustained "physical injury" was legally insufficient:

" 'Physical injury' means impairment of physical condition or substantial pain" (Penal Law § 10.00 [9]). Although pain is subjective, the Court of Appeals has cautioned that "the Legislature did not intend a wholly subjective criterion to govern" … . "Factors relevant to an assessment of substantial pain include the nature of the injury, viewed objectively, the victim's subjective description of the injury and his or her pain, whether the victim sought medical treatment, and the motive of the offender" … . Here, the officer testified that he experienced "quite a bit of pain" to his "left upper thigh/groin area" after struggling with defendant when he resisted arrest and that his pain was a 6 or 7 out of 10 on the pain scale. There was only a vague description of the injury, and no medical records for the officer were introduced in evidence … . In addition, there was no testimony that the officer took any pain medication for the injury … and the officer did not miss any work or testify that he was unable to perform any activities because of the pain. 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).

The Fourth Department, reversing defendant's burglary conviction, determined the evidence that a partial fingerprint from the burglary scene matched the defendant was too weak to support the conviction. The conviction was therefore against the weight of the evidence:

On cross-examination, the fingerprint examiner agreed that her opinion is subjective, that two examiners may reach different opinions when examining the same set of prints, and that verification by a second examiner, particularly blind verification, significantly increases the accuracy of fingerprint analysis. She further testified that every individual fingerprint has approximately 80 to 120 classifiable characteristics, and that every characteristic between two prints must be identical for them to be considered a match. Here, because of the limited nature of the partial print, she was only able to match 18 characteristics, meaning that it matched 15% to 22.5% of the characteristics of defendant's inked print. Further, there was no evidence presented at trial that a second examiner had made a positive verification that the partial print was made by defendant. No other evidence was introduced at trial linking defendant to the crime. 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).

The Fourth Department, reversing defendant's conviction, over a dissent, determined the proof defendant constructively possessed a firearm was legally insufficient. The firearm was in the drop ceiling of a living room in which defendant was present as a guest. DNA evidence may have demonstrated defendant possessed the firearm at a point in time, but did not demonstrate constructive possession at the time the firearm was seized:

A defendant's mere presence in the house where the weapon is found is insufficient to establish constructive possession, and it is undisputed here that defendant had no connection to the apartment other than being there for a brief period of time for the purpose of gambling … . Further, the People failed to establish that defendant "exercised dominion or control over the [handgun] by a sufficient level of control over the area in which [it was] found" … .

… [D]efendant's contemporaneous text messages did not evince defendant's consciousness of guilt and, in any event, "mere knowledge of the presence of the handgun would not establish constructive possession" … . Further, although evidence that defendant's DNA profile matched that of the major contributor to DNA found on the handgun and that other individuals in the apartment were excluded as contributors thereto would support an inference that defendant physically possessed the gun at some point in time … , we conclude that it was not sufficient to support an inference that defendant had constructive possession of the weapon at the time that it was discovered … . 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 rin 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).

The First Department determined the judge did not improperly delegate judicial authority to the court clerk who made a preliminary inquiry of a group of prospective jurors:

Defendant was charged with committing sex crimes against his girlfriend's six-year-old daughter. The evidence included two videos, taken with defendant's phone, showing defendant having sexual intercourse with the child. On the first day of jury selection, to identify and dismiss prospective jurors who could not be fair and impartial in light of the nature of the charges and the graphic evidence, the court addressed the approximately 200 prospective jurors in groups of approximately 50. The court told each group about the charges and described the video evidence. All panelists who stated that they could not be fair and impartial in light of these circumstances were excused.

When jury selection continued two days later, 92 panelists remained. Because of the size of the group, they were placed in an assembly room down the hall from the courtroom and in the courtroom next door. The court informed the parties that some of the remaining panelists had approached court officers, stating that they had "thought about it" and now believed they could not serve as jurors. The court proposed sending the court clerk to each of the rooms where the jurors were waiting "to ask generally the question of since Tuesday is there anybody who in thinking about the judge's questions believe they can't serve on the case." Any prospective jurors who answered in the affirmative would be brought into the

courtroom for further questioning by the court. Defense counsel consented to this procedure.

Upon returning to the courtroom, the clerk reported that there were 10 prospective jurors who had "an issue." The 10 panelists were brought to the courtroom, where the court inquired whether, based on "the nature of the case [and] the kind of evidence you will be seeing during the course of this trial," the panelists now thought they could not be fair and impartial. 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).

COURT OF APPEALS, SCOPE OF REVIEW.

THE VALIDITY OF A GUILTY PLEA IS NOT PROPERLY RAISED IN THE COURT OF APPEALS AFTER THE AFFIRMANCE OF A LEGAL SENTENCE BY THE APPELLATE DIVISION; WHERE THE SENTENCE IS LEGAL, AN EXCESSIVE-SENTENCE CLAIM IS BEYOND THE SCOPE OF THE COURT OF APPEALS (CT APP).

The Court of Appeals, over an extensive two-judge dissenting opinion, determined (1) the validity of a guilty plea is not properly raised in the Court of Appeals after the appellate division has affirmed the defendant's legal sentence, and (2) where a sentence is legal, an excessive-sentence claim is beyond the scope of the Court of Appeals:

Defendant's challenge to the validity of his plea is not properly raised on this appeal from an Appellate Division order affirming a sentence, pursuant to 22 NYCRR § 670.11 (b) (see CPL 450.30 [1]; 470.35 [1]; People v Pagan, 19 NY3d 368, 370-371 [2012]). Defendant's sentence—an authorized prison term with post-release supervision—is not illegal, and any excessive sentence claim is beyond the

scope of this Court's review (see People v Veale, 78 NY2d 1022, 1023-1024 [1991]). The many dissenting opinions cited by the dissent provide no support for a different result (see dissenting op at 6, 8-11). 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).

The Fourth Department, vacating defendant's plea to depraved indifference murder, determined the plea colloquy negated an essential element of the offense:

… [W]e agree with defendant that, although his admissions during the plea allocution established the mens rea element of recklessness … , his recitation of the facts underlying the charge of murder in the second degree pursuant to Penal Law § 125.25 (2) "cast significant doubt upon his guilt insofar as it negated the [second mens rea] element of depraved indifference" … . In response to the court's question whether defendant did not care if harm happened to the victim or how the risk to the victim turned out, defendant stated through defense counsel that "[h]e did care for [the victim]." We conclude that defendant's statement negated the element of depraved indifference because the second mens rea element of the crime required that defendant "did not care whether [the] victim lived or died" … or, in other words, that he did "not care how the risk turn[ed] out" … . Defendant, however, conveyed during the factual recitation the exact opposite of the requisite mental state, i.e., that he did, in fact, care for the victim. 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.

DEPRAVED INDIFFERENCE MURDER, VEHICLE AND TRAFFIC LAW.

THE INTOXICATED DEFENDANT'S DRIVING WHEN HE FLED FROM THE POLICE, WHILE RECKLESS, DID NOT DEMONSTRATE DEPRAVED INDIFFERENCE; DEPRAVED INDIFFERENCE MURDER CONVICTION NOT SUPPORTED BY THE WEIGHT OF THE EVIDENCE; CONVICTION REDUCED TO MANSLAUGHTER (THIRD DEPT).

The Third Department, reducing defendant's conviction from depraved indifference murder to manslaughter, over a dissent, determined that the intoxicated defendant's driving when fleeing from the police did not evince a complete disregard for the safety of others. Therefore the depraved indifference murder conviction was against the weight of the evidence:

… [T]he credible evidence at trial made clear that defendant was extremely intoxicated, but his driving prior to police pursuit demonstrated that he was aware of his surroundings, obeyed multiple traffic signals and responded to the alerts of other drivers. Although he was traveling at an exceptionally high rate of speed during the pursuit, he did so "on a roadway designed to accommodate greater rates of speed than residential roads, at an hour when lighter traffic conditions predominated" … , and there is no evidence that he failed to abide by any traffic signals while he fled or that any vehicles were forced to pull over or move out of his way … . According deference to the jury's credibility determinations, defendant did partially enter the lane of oncoming traffic for brief periods of time, but such "episodic" conduct stands in stark contrast to cases where the defendant traveled in an oncoming lane "as part of a deadly game" … . Defendant in fact largely chose to evade police not by weaving in and out of the oncoming lane but instead by driving on a wide, paved shoulder, and, even if his "attempted escape [was] carried out in a reckless manner," he may "simultaneously intend to flee police and avoid striking other cars" … . "No contact occurred between

[defendant's] vehicle and any other vehicle before the accident" … , and the limited evidence of his proximity to other vehicles prior to the collision falls short of establishing the sort of "narrow[] miss[es]" the disregard of which could be some evidence of depraved indifference … . 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).

The Second Department, reversing County Court, determined defendant could not be directed to install an ignition interlock device in the absence of a sentence to probation or a conditional discharge. Matter remitted for resentencing:

Vehicle and Traffic Law § 1193(1)(b)(ii) provides that the court shall "sentence such person convicted of . . . a violation of [Vehicle and Traffic Law § 1192(2), (2-a), or (3)] to a term of probation or conditional discharge, as a condition of which it shall order such person to install and maintain, in accordance with the provisions of [Vehicle and Traffic Law § 1198], an ignition interlock device in any motor vehicle owned or operated by such person."

In directing the defendant to install and maintain a functioning ignition interlock device, the County Court failed to also impose a sentence of probation or conditional discharge and therefore failed to comply with the requirements of the statute … . 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).

The Frist Department, affirming Harvey Weinstein's criminal sexual act and rape convictions, in a full-fledged opinion by Justice Mazzarelli, determined the expert testimony about rape trauma was admissible, the Molineux evidence was properly admitted on the issue of intent, and the Sandoval ruling was proper. The opinion is fact-specific and much too detailed to fully summarize here:

… [W]e find that the trial court properly permitted Dr. Ziv to testify. … [D]efendant has presented us with no authority suggesting that rape trauma syndrome has been discredited as a scientific phenomenon … . And because the syndrome is shrouded by certain rape "myths," we can think of no more appropriate area where a jury requires the elucidation that can be facilitated by an expert witness. In other words, where there was a risk that the jury would be "puzzled" by some of the behaviors of the complainants during and after their sexual encounters with defendant, it was appropriate to admit "evidence of psychological syndromes" that would eliminate that confusion … . After all, defendant made clear that his defense would be based on those behaviors, which he would argue to the jury were inconsistent with how a victim of sexual assault would behave. * * *

From the People's perspective, there was a significant risk that the jury would have concluded that defendant did not intend to compel the women to have sex with him. By introducing the Molineux evidence, the People were able to counter defendant's narrative, by showing that the offenses against Haley and Mann were simply more elaborate manifestations of his practice of baiting women with opportunities for career advancement, and then taking advantage, all the while being completely uninterested in whether the women welcomed his advances, and being determined to go forward whether or not they did. Of course, the People

could have attempted to prove defendant's guilt merely by relying on the testimony of Haley, Mann and Sciorra, but that is an insufficient reason to preclude Molineux evidence … . * * *

The amount of Sandoval material is unquestionably large, and, at first blush, perhaps appears to be troublingly so. Nevertheless, in considering the propriety of whether to admit Sandoval material, and how much, the Court of Appeals has plainly stated that "the determination rests largely within the reviewable discretion of the trial court, to be exercised in light of the facts and circumstances of the particular case before it" (People v Hayes, 97 NY2d 203, 208 [2002]). While we acknowledge the sheer size of the impeachment material that the court allowed, we have analyzed that decision within the larger context of all of the circumstances presented by this case, and have concluded that the court providently exercised its discretion…. . 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).

The Third Department, vacating defendant's promoting-prison-contraband conviction, determined the trial judge, who had initially dismissed the promoting-prison-contraband count, should not have subsequently stayed the dismissal and gone to trial on the promoting-prison-contraband count with the other charges.

Apparently the judge stayed the dismissal of the charge because the People had appealed the dismissal. After the trial, the People's appeal was dismissed as moot. Then the defendant appealed and argued the judge did not have the statutory authority to stay the dismissal and go to trial on the dismissed count:

We agree with defendant that County Court improperly stayed its dismissal order. The People had appealed to this Court pursuant to CPL 450.20 (1). In pertinent part, that provision authorizes the People to appeal, as of right, from an order that dismissed an accusatory instrument or a count thereof pursuant to CPL 210.20. Except as provided for in CPL 460.40, the taking of an appeal from a judgment, sentence or order does not automatically stay the execution thereof. With respect to appeals by the People to an intermediate appellate court, an automatic stay results only in the case of an appeal pursuant to CPL 450.20 (1-a) "from an order reducing a count or counts of an indictment or dismissing an indictment and directing the filing of a prosecutor's information" or an appeal pursuant to CPL 450.20 (1) "from an order dismissing a count or counts of an indictment charging murder in the first degree" (CPL 460.40 [2]). Plainly, none of those circumstances are present. * * *

… [T]here was no statutory authorization for a stay of County Court's dismissal order. Without a stay, the bench trial should not have included the charge of promoting prison contraband in the first degree, and, thus, there should have been no occasion for defendant to be convicted of the lesser included offense of promoting prison contraband in the second degree. Accordingly, we vacate that conviction. 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).

The Fourth Department determined there should be a hearing on whether defendant's plea to attempted gang assault was involuntary. Defendant contended the plea was based on inaccurate advice from counsel. "Attempted gang assault" is a legal impossibility for trial purposes:

… [W]e agree with defendant that "attempted gang assault in the second degree is a legal impossibility for trial purposes. . . , as 'there can be no attempt to commit a crime which makes the causing of a certain result criminal even though wholly unintended' " … . Based on that law and our review of the record, we further agree with defendant that the advice of defense counsel regarding the possibility of a conviction at trial of attempted gang assault in the second degree was erroneous.

Nevertheless, "[i]t is well settled that permission to withdraw a guilty plea rests largely within the court's discretion" … . "Whether a plea was knowing, intelligent and voluntary is dependent upon a number of factors 'including the nature and terms of the agreement, the reasonableness of the bargain, and the age and experience of the accused' . . . That the defendant allegedly received inaccurate information regarding [the possibility of a conviction at trial and the resulting impact upon] his possible sentence exposure is another factor which must be considered by the court, but it is not, in and of itself, dispositive" … . "Where . . . the record raises a legitimate question as to the voluntariness of the plea, an evidentiary hearing is required" … . 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).

The Fourth Department, reversing County Court, determined defendant's motion to vacate his conviction on ineffective assistance grounds should have been granted. Defense counsel did not interview a witness who, based on the witness's testimony at the hearing on the motion to vacate, would have testified defendant was not at the scene of the shooting:

… [W]e conclude that defendant met his burden of establishing that defense counsel's failure to interview the potentially exculpatory witness constituted ineffective assistance of counsel, inasmuch as the record before us reflects "the absence of strategic or other legitimate explanations for defense counsel's allegedly deficient conduct" … . The failure by defendant's trial counsel to interview the witness cannot be characterized as a legitimate strategic decision because, "without collecting that information, [defense] counsel could not make an informed decision as to whether the witness['s] evidence might be helpful at trial" … . To the extent that the defense team deemed the witness not credible due to his criminal record or history, that alone "does not excuse trial counsel's failure to investigate since a witness's unsavory background[ ] does not render his or her testimony incredible as a matter of law" … . Further, we conclude that, "even if the witness['s] criminal record[] provided a strategic basis for choosing not to present [his] testimony, it does not provide an excuse for [defense] counsel's failure to investigate [him] as [a] possible witness[ ]" … . Moreover, the witness's testimony at the CPL article 440 hearing was wholly consistent with the theory pursued by trial counsel, namely that defendant was not present at the shooting and that the crime was instead committed by an individual seeking to rob the victims' residence, and the proposed witness would have provided the only eyewitness testimony at trial as to the shooting. 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.

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).

The Third Department reversed defendant's judgment by guilty plea and dismissed the superior court information (SCI). A defendant cannot be prosecuted by an SCI after indictment (defendant here had already been indicted). The error is jurisdictional and need not be preserved by objection. The issue is not forfeited by a guilty plea:

As the Court of Appeals has observed, "[g]iven the objective and the plain language of CPL 195.10 (2) (b), the conclusion is inescapable that waiver cannot be accomplished after indictment . . ., even where it is the defendant who orchestrates the scenario" … .

Here, at the point in time when defendant agreed to be prosecuted by way of an SCI, defendant already had been indicted and the matter was scheduled for trial. Although the indictment subsequently was dismissed, there is no indication in the record that the dismissal was occasioned by a defect in the indictment itself (see CPL 210.20) or that Supreme Court authorized resubmission of the charge to the grand jury (see CPL 210.45 [9]), and it does not appear that a new felony complaint was filed. "Therefore, defendant was not placed on a formal preindictment procedural track" … . Under these circumstances, the waiver of indictment is invalid and the resulting SCI must be dismissed … . 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).

The Third Department, reversing County Court, determined defendant's motion to vacate his conviction should not have been considered by the judge whose law clerk was the District Attorney at the time of defendant's conviction:

As one of the grounds raised in his CPL article 440 motion, defendant argued that he was deprived of his right to appear before the grand jury due to the actions of the District Attorney. The parties do not dispute that, at the time that defendant's CPL article 440 motion was decided, the judge's law clerk was the former District Attorney who had prosecuted defendant. That said, defendant contends that the judge should have recused himself from deciding defendant's motion. We agree. "Not only must judges actually be neutral, they must appear so as well" … . In view of the law clerk's direct involvement in defendant's case during her tenure as the District Attorney and the allegations made in the CPL article 440 motion about her conduct while she was prosecuting him, as well as taking into account the need to maintain the appearance of impartiality, it was an improvident exercise of discretion for the judge to decide defendant's motion … . 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).

The Third Department refused to consider whether County Court properly handled an "outburst by a juror during deliberations" because the issue was not preserved by objection. The dissenting justice would have considered the issue in the interest of justice and ordered a new trial:

From the dissent:

The foreperson said it best — "how did you get this far if that's the case? . . . you shouldn't be here." The foreperson said this to one of the jurors, who was in seat No. 6, after this juror revealed during deliberations that she was a victim of rape — one of the crimes for which defendant was being tried. Juror No. 6 had not disclosed this fact during voir dire or on the juror questionnaire. In any event, County Court proceeded to question each juror, including juror No. 6, to determine if any of them was grossly unqualified. Such inquiry, however, was not "probing and tactful" … and, consequently, the court failed to ensure that the finding of guilt was the product of a fair and impartial jury. * * *

In my view, County Court's inquiry did not meet the probing and tactful standard. Based on the allegations of rape made against defendant, juror No. 6's revelation of being a rape victim and the doubt expressed by the foreperson about juror No. 6's impartiality, it was incumbent upon the court, at the very least, to ask juror No. 6 about being a rape victim. Indeed, the court intended on asking juror No. 6 about being a sexual assault victim but, for some reason that is not apparent in the record, it never did. Merely asking whether juror No. 6 was a crime victim did not address the emotionally charged situation that the foreperson brought to the court's

attention. The court's inquiry was therefore flawed from the outset. 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 County 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 DISCHARRGED 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).

The Third Department refused to consider whether the court properly discharged a juror because the issue was not preserved by objection. The two dissenting justices would have ordered a new trial in the interest of justice:

From the dissent:

If a juror is unable to continue serving due to an illness, "the court shall make a reasonably thorough inquiry concerning such illness . . . and shall attempt to ascertain when such juror will be appearing in court" (CPL 270.35 [2] [a]). * * *

… [O]n the day at issue and approximately 30 minutes after the scheduled start of the trial, County Court noted that juror No. 1 was not present. The court remarked, "She did leave sick yesterday," and, after such remark, stated that it was necessary to replace juror No. 1 with an alternate juror. …

… [T]here was no reasonably thorough inquiry — let alone, any inquiry — as to juror No. 1's absence. Although juror No. 1 was apparently ill on the day when she was selected for service, the court did not bother to learn if she continued to be ill.

It seems that the court merely speculated that, because juror No. 1 was ill the day before, she continued to be ill and that was the reason why she did not show up at the scheduled time for the start of the trial. Such speculation, however, does not meet the standard of conducting a reasonably thorough inquiry. … [E]ven if it could be said that the court did make a reasonably thorough inquiry, the court still failed to ascertain when juror No. 1 would return to court. The record discloses that, prior to discharging juror No. 1, the court neither heard from nor reached out to her to see if she would not be making it for the trial or if she was en route to the courthouse … . 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).

The Third Department, reversing defendant's manslaughter conviction in the interest of justice, determined the jury instruction on the justification defense was flawed. The instruction did not explain that if the justification defense was the basis for acquittal on the top count (murder here) the jury must not consider the lesser counts:

… Supreme Court inadequately charged the jury regarding his justification defense. Although this issue is unpreserved inasmuch as defendant failed to raise it during the charge conference and did not object to the final charge … , we nevertheless find it appropriate to exercise our interest of justice jurisdiction to take corrective action and reverse defendant's conviction … .

Where … a defendant raises a claim of self-defense, the trial court commits reversible error if it fails to "instruct the jury that, if it finds the defendant not guilty of a greater charge on the basis of justification, it is not to consider any lesser counts" … . This error was compounded by the verdict sheet, which directed the jury to consider manslaughter in the first degree if the jury found defendant not guilty of murder in the second degree; the verdict sheet did not contain a qualifier if the acquittal of murder was based on the defense of justification … . Even though … "the jury may have acquitted on the top charge[] without relying on defendant's justification defense, it is nevertheless impossible to discern whether acquittal of the top count[] was based on the jury's finding of justification so as to mandate acquittal on the lesser count[] to which justification also applied" … .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 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).

The First Department, in a full-fledged opinion by Justice Mendez, over a dissent, reversing Family Court, determined appellant's motion to expunge all DNA evidence collected from him in this juvenile delinquency proceeding should have been granted. When appellant,16, was being interrogated by the police about a robbery, he was given a disposable cup from which he drank water. The cup was then sent by the interrogating officer for DNA analysis. No DNA had been

collected from the robbery scene, so there was no investigatory purpose for collection of appellant's DNA:

A juvenile delinquency adjudication, just as a youthful offender adjudication, is not a criminal conviction and a juvenile delinquent should not be denominated a criminal by reason of such adjudication … . A juvenile delinquent is not and should not be afforded fewer adjudication protections than a youthful offender or an adult in the equivalent circumstances … . Family Court, therefore, has the discretion to order the expungement of appellant's DNA and any other documents related to the testing of his DNA sample. * * *

It has not been established that appellant purposefully divested himself of the cup or his DNA, thereby relinquishing his expectation of privacy. Nor has it been established that he waived, impliedly or explicitly, his constitutional rights to that expectation. * * *

DNA evidence obtained after an arrest should be material and relevant and should have a link to the charges for which the individual is arrested. There must be an articulable basis to obtain this DNA evidence and a correlation to the investigation or prosecution of the charged offense. That articulable basis to obtain appellant's DNA is lacking here. * * *

Under the totality of the circumstances, maintaining appellant's DNA profile in OCME's database in perpetuity is completely incompatible with the statutory goal and would result in a substantial injustice to the appellant. 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).

The Third Department, reversing Family Court, determined this juvenile delinquency proceeding should not have been dismissed "in furtherance of justice." The respondent was charged with acts of violence against the mother of his child:

Dismissal in the furtherance of justice is an extraordinary remedy that must be employed "sparingly, that is, only in those rare cases where there is a compelling factor which clearly demonstrates that prosecution . . . would be an injustice" … . In determining such a motion, the statutory factors which must be considered, individually and collectively, are as follows: "(a) the seriousness and circumstances of the crime; (b) the extent of harm caused by the crime; (c) any exceptionally serious misconduct of law enforcement personnel in the investigation and arrest of the respondent or in the presentment of the petition; (d) the history, character and condition of the respondent; (e) the needs and best interest of the respondent; (f) the need for protection of the community; and (g) any other relevant fact indicating that a finding would serve no useful purpose" … . "At least one of these factors must be readily identifiable and sufficiently compelling to support the dismissal" …

According to the sworn statement of the victim — the mother of respondent's child — respondent became verbally abusive toward her when she got pregnant, and physically abusive after their child was born, including pinching, punching and slapping her, once when she was holding the child. On the date in question, respondent threw a full, eight-ounce baby bottle at the victim, which hit her in the face, when she asked him to feed the child, who was crying. The victim stated that, although she was bleeding heavily, respondent and his father discouraged her from seeking medical attention. When she eventually did go to the hospital the next day, a cut on her face was glued shut by a doctor and she was told to return for X rays after the swelling had abated. The victim indicated that she felt unsafe living with

the child in the home of respondent and his father. 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).

The Second Department, reversing larceny and possession of stolen property convictions, determined the evidence defendant intended to permanently deprive the owner of the U-Haul van of its property was insufficient. Defendant took a key to the van, sat in it for two minutes, and then got out of the van:

… [I]n order to sustain a conviction for grand larceny the People must establish that the defendant had the requisite larcenous intent, which means the "intent to deprive another of property or to appropriate the same to himself or to a third person" (Penal Law § 155.05[1]).

"[T]he concepts of 'deprive' and 'appropriate,' which 'are essential to a definition of larcenous intent,' 'connote a purpose . . . to exert permanent or virtually permanent control over the property taken, or to cause permanent or virtually permanent loss to the owner of the possession and use thereof'" … . For that reason, "[t]he mens rea element of larceny . . . is simply not satisfied by an intent temporarily to use property without the owner's permission" … .

… [T]he evidence failed to establish beyond a reasonable doubt that the defendant intended to cause permanent or virtually permanent loss to the owner of the U-Haul van. …

… [A]jury could rationally infer that the defendant intended to use the van temporarily. To prove grand larceny, however, the People had to do more than prove that the defendant intended to use the van temporarily. They had to prove, in addition, that the defendant intended to "permanently deprive an owner of his or her property or to deprive the owner of it for so extended a period of time that a major portion of its economic value is lost" … . 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, no 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).

The Third Department, reversing defendant's conviction, determined the questioning by the police when defendant was still in a sporting goods store where he allegedly attempted to steal ammunition constituted custodial interrogation in the absence of the Miranda warnings. The statements made by the defendant at the sporting goods store should have been suppressed:

The entire interaction at the sporting goods store was captured by the various body cameras worn by the police involved. Viewing same, it is evident that, throughout most of the interaction, four police officers were present at the sporting goods store, with at least one officer positioned between defendant and the exit. More importantly, shortly after the police arrived, defendant had been told to empty his pockets and place all of his personal property on the counter. Defendant did so. While being detained by the police, defendant asked the police multiple times if he could retrieve his possessions. The police denied each of these requests. … Additionally, the questions posed by the police to defendant exceeded that necessary for investigation. Many of their inquiries were not limited to the petit larceny, the allegation in question, but instead focused on firearms that defendant may have possessed, their location, caliber and defendant's intent as to his usage of same. With the benefit of viewing the interaction between the police and defendant, and considering all the circumstances involved, we cannot say that a reasonable person would have felt free to leave … . 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).

The Fourth Department granted defendant's petition for a writ of prohibition barring retrial on the ground of double jeopardy. A jury was selected and three witnesses had testified when the trial judge became ill and scheduled a COVID test (which came back negative). The judge ultimately, sua sponte, declared a mistrial without defendant's consent. Because there were alternatives to a mistrial, a continuance, for example, the double-jeopardy prohibition precluded retrial:

… [T]here was no manifest necessity for the mistrial, and the court therefore abused its discretion in granting it sua sponte … . The record establishes that the court did not consider the alternatives to a mistrial, such as a continuance … or substitution of another judge … . "[I]f the judge acts so abruptly as to not permit consideration of the alternatives . . . or otherwise acts irrationally or irresponsibly . . . or solely for convenience of the court and jury . . . , retrial will be barred" … . "The court has the duty to consider alternatives to a mistrial and to obtain enough information so that it is clear that a mistrial is actually necessary" … . 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).

The Fourth Department, reversing defendant's robbery and grand larceny convictions, determined Molineux evidence of a burglary of the robbery-victim's home three days before the robbery should not have been admitted to show intent. The intent to rob was demonstrated by the victim's testimony, rendering proof of the prior burglary more prejudicial than probative:

… [E]vidence that defendant may have been involved in an earlier burglary of the victim's home was not necessary for the jury to infer that, three days later, defendant had the intent to rob the victim. Rather, defendant's intent to forcibly steal property can be inferred from the victim's testimony that defendant, while wielding a baseball bat, directed him to comply with the demands of an unidentified masked gunman to turn over money and property. Under those circumstances, any probative value of the evidence of the prior burglary "is outweighed by its potential for prejudice" … . For the same reason, defendant's "intent to deprive another of property" … as required for a conviction of grand larceny in the fourth degree (§ 155.30 [1], [5]), or intent "to place another person in reasonable fear of physical injury, serious physical injury or death" as required for a conviction of menacing in the second degree (§ 120.14 [1]) could likewise be easily inferred from the victim's testimony describing defendant's conduct during the alleged crimes. 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).

The Fourth Department, reversing defendant's convictions and ordering a new trial, determined the Molineux evidence allowed by County Court did not meet the "modus operandi" criteria:

Before trial, County Court granted the People's motion seeking to introduce testimony that defendant sexually abused his eldest son in the 1990s, on the ground that the earlier, uncharged conduct was admissible under the modus operandi exception to the Molineux rule … . …

Modus operandi evidence is a means of establishing the defendant's identity as the perpetrator … . Here, even assuming, arguendo, that defendant's identity as the person who committed the crimes was not conclusively established … , we conclude that the similarities between the uncharged acts and the charged crimes were not "sufficiently unique to make the evidence of the uncharged crimes probative of the fact that [defendant] committed the [crimes] charged" … .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's 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).

The Third Department, reversing County Court, determined defendant had raised several issues in the motion to vacate the convirction which were not addressed by the People's response. Some of the issues were corroborated in an affidavit from defendant's prior attorney. Therefore a hearing was necessary:

… [W]e agree with defendant that he is entitled to a hearing on whether counsel was ineffective in connection with defendant's alleged failure to fully cooperate under the terms of the 2016 cooperation agreement. A hearing is required on a CPL article 440 motion "if the submissions show that the nonrecord facts sought to be established are material and would entitle the defendant to relief" … . In that regard, defendant averred that he consistently gave a truthful account of the burglary and had fully cooperated in the prosecution of [a codefendant] as required by the 2016 cooperation agreement, and his motion papers included a September 2016 supporting deposition from his sister and an affidavit from [his former attorney] to support those claims. Defendant also alleged specific deficiencies in counsel's performance, namely, that counsel failed to investigate whether the Special Prosecutor's withdrawal of the 2016 cooperation agreement was impermissibly "premised on bad faith, invidiousness, . . . dishonesty" or unconstitutional considerations and, moreover, failed to discuss the possibility of demanding a hearing on that issue with defendant … . 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 in 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).

The Third Department determined the People could not appeal County Court's granting defendant's motion to withdraw her plea, vacate her felony conviction and allow her to plead to a misdemeanor. Defendant made the motion after she completed a drug-court treatment program:

"It is well settled that no appeal lies from a determination made in a criminal proceeding unless specifically provided for by statute" … . "CPL 450.20 delineates the instances in which the People may appeal as of right to an intermediate appellate court" … . Here, judgment has not been entered. We find that County Court's order resolved to be a postsentence, prejudgment motion and no right to appeal lies under CPL 450.20 … . We "may not resort to interpretative contrivances to broaden the scope and application of [this] statute[]" … , as the Legislature's policy is "to limit appellate proliferation in criminal matters" … . "Absent a specific statute granting the People the right to appeal, . . . this Court is without jurisdiction to hear the appeal" … . 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).

The First Department, reversing defendant's conviction and ordering a new trial, determined the photo array from which the victim identified defendant was unduly suggestive:

The hearing court should have granted defendant's motion to suppress the victim's identification of defendant in a photo array. The photo array was unduly suggestive because defendant was the only person shown wearing "distinctive clothing . . .which fit the description" of the suspect … . Moreover, the distinctive clothing was an outstanding feature of the identifying witness's description of the robber … The victim told the police that he "fixated" on the "unusual shirt" the robber was wearing during the incident, a white shirt with a distinctive black design. In the photo array, the visible part of defendant's shirt closely matched the robber's shirt as described by the victim. The fillers, on the other hand, all wore shirts that, to the extent visible in the photos, were solid-colored shirts without any markings or designs. 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).

The Third Department, reversing defendant's conviction by guilty plea, determined the defendant made statements during the plea allocution which negated elements of criminal possession of a weapon. At that point, the sentencing judge should have made an inquiry. This issue falls within an exception to the preservation requirement:

Penal Law § 265.03 (3) requires the possession of a "loaded firearm," meaning "an operable gun with either live ammunition in the gun or held on [the defendant's] person" with the gun … . … [D]efendant negated that element at sentencing when he stated that the handgun in question was in his bedstand drawer, not on his person, and that it "wasn't loaded." At that point, it was incumbent upon County Court to either "conduct a further inquiry or give . . . defendant an opportunity to withdraw the plea" … . 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.

PLEA ALLOCUTION NEGATES ELEMENT OF CHARGE.

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

The Third Department, vacating the plea to perjury, determined defendant's plea colloquy negated an essential element of the crime:

… [W]e conclude that defendant is entitled to challenge the plea because he made statements during the colloquy that negated an essential element of the crime … . "A person is guilty of perjury in the third degree when he [or she] swears falsely" … . "A person 'swears falsely' when he [or she] intentionally makes a false statement which he [or she] does not believe to be true . . . under oath in a subscribed written instrument" … . An "'[o]ath' includes an affirmation and every other mode authorized by law of attesting to the truth of that which is stated" … . The document in question was captioned as an "Affidavit of Financial Information." The preamble begins with the representation that defendant, "being duly sworn, deposes and says the following under penalty of perjury." The following statement is included above defendant's signature: "I have carefully read the foregoing statements contained in this Affidavit of Financial Information. They are true and correct." The document includes defendant's signature and a jurat completed by defendant's attorney in July 2017 … . The same is true for the amended affidavit signed in August 2017.

During the plea allocution, defendant explained that he received the affidavit from his attorney by e-mail "and then [he] filled it out on e-mail as well and sent it right back to him." No statement was made that the attorney actually administered an oath to defendant before he signed the affidavits. Given defendant's limited explanation of the affidavit sequence, County Court was obligated to further inquire as to the oath element before accepting the plea … . 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).

The Fourth Department, vacating defendant's plea to depraved indifference murder, determined the plea colloquy negated an essential element of the offense:

… [W]e agree with defendant that, although his admissions during the plea allocution established the mens rea element of recklessness … , his recitation of the facts underlying the charge of murder in the second degree pursuant to Penal Law § 125.25 (2) "cast significant doubt upon his guilt insofar as it negated the [second mens rea] element of depraved indifference" … . In response to the court's question whether defendant did not care if harm happened to the victim or how the risk to the victim turned out, defendant stated through defense counsel that "[h]e did care for [the victim]." We conclude that defendant's statement negated the element of depraved indifference because the second mens rea element of the crime required that defendant "did not care whether [the] victim lived or died" … or, in other words, that he did "not care how the risk turn[ed] out" … . Defendant, however, conveyed during the factual recitation the exact opposite of the requisite mental state, i.e., that he did, in fact, care for the victim. 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).

The Third Department, remitting the matter for resentencing, noted the sentencing judge did not pronounce sentence separately for the two counts:

… [W]e are … obliged to remit for resentencing. The sentencing transcript reflects that County Court imposed a single sentence upon defendant and "failed to pronounce sentence separately on each of the two counts [of] which [she was convicted], as required by CPL 380.20" … . As a result, the matter must be remitted so that County Court can pronounce sentence on each count … . 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).

The Fourth Department, reversed the robbery third and assault second convictions as lesser included offenses of robbery second:

… [R]obbery in the third degree is a lesser included offense of robbery in the second degree … . Moreover, although not raised by the parties, we note that assault in the second degree under section 120.05 (6) is a lesser included offense of robbery in the second degree under section 160.10 (2) (a) … . We therefore modify the judgment by reversing those parts convicting defendant of robbery in the third degree and assault in the second degree and dismissing counts one and three of the indictment … . 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 offenses 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).

The First Department, in a full-fledged opinion by Justice Webber, determined defendant, who was representing himself at the time, was not deprived of his right to be present at a material stage of the proceeding when the judge, outside defendant's presence, discussed whether defendant, who apparently was in an agitated state, should be examined by a psychiatrist. Ultimately no examination was ordered. The First Department held the trial judge properly terminated defendant's self-representation based on his behavior during the trial. In addition, the First Department concluded that a juror who apparently stated he did not wish to continue participating in the deliberations, was not grossly unqualified:

… [T]he record supports a determination that defendant's conduct prevented the fair and orderly exposition of the issues and was disruptive to the proceedings … . During the examination of the People's witnesses, defendant was repeatedly told by the court to "calm down," to not get agitated, to not argue and be combative with the witnesses, and to not argue with the court regarding its rulings. The record also reflects instances where the court explained its rulings to defendant, defendant stated he understood and would then immediately engage in the same conduct. Moreover, during his testimony, the court repeatedly admonished defendant to stop making arguments to the jury. When asked twice by the court to sit down, he refused to do so. Defendant also repeatedly ignored the direction of the court officer to sit down. Instead, defendant remained standing, continued his argument

and questioned the court's ruling. Defendant also made reference to his over one-year period of pretrial detention as well as that he had a teenage son. 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).

The Second Department, in a full-fledged opinion by Justice Brathwaite Nelson, in a matter of first impression, determined that the 20-year duration of registration and verification of a level one sex offender starts anew when a sex offender registered in another state moves to New York:

The defendant contends that the 20-year period set forth in Correction Law § 168-h(1) must be diminished by the period of time that he was registered as a sex offender in another state. We disagree and hold that the "initial date of registration" referred to in that statutory provision means the initial date of the offender's registration with the Division of Criminal Justice Services pursuant to New York's Sex Offender Registration Act (Correction Law art 6-C; hereinafter SORA). 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).

The Court of Appeals, in a full-fledged opinion by Judge Rivera, determined the amendment to the speedy trial statute (CPL 30.30 (1) (e)) which made the statutory time-limits applicable to traffic infractions jointly charged with crimes or violations should not be applied retroactively. The amendment went into effect while defendant's appeal to the Appellate Term was pending. The Court of Appeals held that the defendant's motion to dismiss the accusatory instrument (which jointly charged misdemeanors and traffic infractions) on speedy-trial grounds should not have been granted by the Appellate Term:

Defendant was charged in 2014 in a single accusatory instrument with three misdemeanor counts and three traffic infractions under various sections of the Vehicle and Traffic Law. Approximately 17 months later, defendant moved to dismiss the accusatory instrument on speedy trial grounds pursuant to CPL 30.30. The court denied the motion, concluding that the statute did not apply to jointly charged traffic infractions and that the People did not exceed the 90-day statutory time limit applicable to the misdemeanor counts. Thereafter, a jury convicted defendant of two misdemeanors and two infractions and acquitted him of the remaining counts. …

The Appellate Term granted defendant's motion to dismiss the accusatory instrument, including the traffic infractions, concluding that the People exceeded the statutory time limit to state their readiness for trial on the misdemeanor counts and that the amendment applied retroactively … . * * *

… [B]ecause the amended statute was not in effect when the criminal action against defendant was commenced, CPL 30.30 (1) (e) has no application to defendant's direct appeal from that judgment of conviction. 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 not 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).

The Fourth Department, dismissing the indictment, over a two-justice dissent, determined the police did not have a reasonable suspicion defendant was armed and therefore should not have attempted to frisk him when he got out of the vehicle. The fact that defendant threw his coat at the officer and ran did not justify defendant's arrest for obstructing governmental administration because the police conduct (the attempted frisk) was not authorized:

… [T]he police proceeded to an attempted frisk by approaching the passenger side of the truck, opening the door, and directing defendant to exit the truck so that, as they informed defendant, they could perform a frisk of his person … . The attempted frisk was unlawful, however, because the record establishes that the police did not have " 'knowledge of some fact or circumstance that support[ed] a reasonable suspicion that . . . [defendant was] armed or pose[d] a threat to [their] safety' " … . Furthermore, even though defendant, despite being instructed to leave his coat in the truck, grabbed the coat, threw it onto one of the officers, and fled in the grassy area by the side of the interstate highway, instead of submitting to the

frisk of his person, the police lacked probable cause to arrest defendant for obstructing governmental administration in the second degree based on his alleged obstruction of the officers' attempted frisk, because that police conduct was not authorized … . Moreover, while the officers had also indicated to defendant that they were going to perform a search of the truck, the People did not rely below on the theory that defendant was properly arrested for obstructing a lawful search of the truck, nor, as the dissent states, did the court "explicitly base[] its decision on that theory." We thus conclude that, as "an appellate court[, we] may not uphold a police action on a theory not argued before the suppression court" … . 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 which 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).

The First Department, in a full-fledged opinion by Justice Manzanet-Daniels, over a dissent, determined the police did not have reasonable suspicion defendant had committed a crime and the level-three stop of the defendant was not justified. The suppression motion was granted and the indictment dismissed. The street stop was based upon a vague description of a robbery suspect which did not match the defendant. The fact that the defendant acted "suspiciously" when the police followed him was not enough to validate the stop:

The officers did not have reasonable suspicion to conduct a level three forcible stop and detention by ordering defendant to put his hands against a wall, grabbing his arms, and forcing him to the ground. Defendant matched the description only in that he was a black male. … That a defendant matches a vague, general description, such as the one the complainant gave of the perpetrator, is insufficient to give rise to reasonable suspicion, particularly where, as here, key parts of the description do not match … . …

Although defendant was walking at a fast pace and hiding his face from the officers, such equivocal behavior was just as susceptible to an innocent interpretation and may not increase the level of suspicion so as to justify a forcible stop … . Walking at a quick pace is not considered flight … . Defendant was under no obligation to walk more slowly or to show his face to the officers since he had a right to be let alone and refuse to respond to police inquiry … . Defendant's desire not to make eye contact with the officers was equally consistent with an innocent desire as a black male to avoid interactions with the police. 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).

The Court of Appeals, in a full-fledged opinion by Judge Singas, reversing the Appellate Term and dismissing the accusatory instrument, determined the accusatory instrument did not allege that the synthetic cannabinoid defendant was

charged with possessing was a controlled substance pursuant to the Public Health Law:

Defendant … was charged with criminal possession of a controlled substance in the seventh degree for allegedly possessing an illegal synthetic cannabinoid. The Public Health Law's controlled substance schedules criminalize possession of some, but not all, synthetic cannabinoids. Because the misdemeanor [complaint] to which defendant pleaded guilty failed to allege a sufficient factual basis to conclude that the substance defendant possessed was illegal, that count was facially deficient and should be dismissed. * * *

The Public Health Law's statutory framework, which criminalizes only a subset of synthetic cannabinoids, renders it difficult for both the public and law enforcement alike to reasonably conclude whether a synthetic cannabinoid is a controlled substance without additional facts … . Given this particular statutory framework, the misdemeanor count in this accusatory instrument contains a fundamental defect because it does not sufficiently allege that defendant committed a crime. …

The instrument's factual assertions gave no basis for concluding that the substance defendant possessed was a controlled substance; that is, an illegal synthetic cannabinoid as listed with precision in Public Health Law § 3306 (g), as opposed to one of the many synthetic cannabinoid substances that are not criminalized in the schedule. 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).

The Third Department, reversing defendant's "making a terroristic threat" conviction, determined the conviction was against the weight of the evidence. Defendant's brother was incarcerated. Defendant was concerned that his brother was being harassed by corrections officers. Defendant allegedly called the Department of Corrections and Community Supervision and said he would "blow an officer's head off" "if they touch my brother:"

…"[A] person is guilty of making a terroristic threat when[,] with intent to . . . affect the conduct of a unit of government by murder, . . . he or she threatens to commit . . . a specified offense and thereby causes a reasonable expectation or fear of the imminent commission of such offense" (Penal Law § 490.20 [1]). Penal Law article 490 was enacted following the September 11, 2001 attacks and was "specifically designed to combat the evils of terrorism" … . Accordingly, "[t]he concept of terrorism has a unique meaning and its implications risk being trivialized if the terminology is applied loosely in situations that do not match our collective understanding of what constitutes a terrorist act" … ….

… [T]he evidence fails to establish that defendant "cause[d] a reasonable expectation or fear of the imminent commission" of an offense under the factual circumstance presented here (Penal Law § 490.20 [1]). Neither the first investigator nor the supervisor took any actions to warn the correctional facility or any other agency or individuals of the threat. While a notice was eventually issued, this was not done until well after the initial threat was made. None of the witnesses provided any testimony that they or anyone else had a reasonable expectation or fear that the threat would be imminently carried out, nor did their actions indicate any such belief. 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).

The Third Department, reversing defendant's criminally negligent homicide conviction and dismissing the indictment, determined defendant's failure to see the victim's vehicle on the side of the highway until it was too late did not rise to the level of criminal negligence (legally insufficient evidence). The victim was in a pickup truck with a sign on the back warning drivers that roadwork was being done ahead:

"A person is guilty of criminally negligent homicide when, with criminal negligence, he [or she] causes the death of another person" … . "A defendant acts with criminal negligence in this context when the defendant 'fails to perceive a substantial and unjustifiable risk' that death will result" … . "That 'risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation'" … . "[C]riminal liability cannot be predicated on every act of carelessness resulting in death[;] . . . the carelessness required for criminal negligence is appreciably more serious than that for ordinary civil negligence, and that . . . carelessness must be such that its seriousness would be apparent to anyone who shares the community's general sense of right and wrong" … . As such, a defendant must "engage[] in some blameworthy conduct creating or contributing to a substantial and unjustifiable risk of death" … . Importantly, "nonperception of a risk, even if death results, is not enough" … . …

… [T]he Court of Appeals has held that "[t]he unexplained failure of a driver to see the vehicle with which he [or she] subsequently collided does not, without more, support a conviction for the felony of criminally negligent homicide" … . 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).

The Fourth Department, vacating defendant's plea and granting defendant's suppression motion, determined the police did not have probable cause to seize defendant's vehicle by blocking its exit with the police vehicle:

Police officer testimony at the suppression hearing established that, at the time the officers stopped their vehicle in front of defendant's vehicle, they had observed defendant's presence in a vehicle at 1:00 p.m. in the parking lot of an apartment complex known for drug activity and where officers believed defendant did not reside, and they were aware that defendant had a history of drug-related convictions. Such evidence does not provide a reasonable suspicion that defendant had committed, was committing, or was about to commit a crime … . 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.

Table of Contents

Copyright 2022 New York Appellate Digest, LLC