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Criminal Law Reversal Report
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An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Addressing Criminal Law, Released by Our New York State Appellate Courts and Posted on the New York Appellate Digest Website in August 2022. The Entries in the Table of Contents Link to the Summaries Which Link to the Decisions on the Official New York Courts Website. Click on "Table of Contents" in the Header on Any Page to Return There. Right Click on the Citations to Keep Your Place in the Reversal Report.

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ACCOMPLICE LIABILITY.

THE MAJORITY AFFIRMED DEFENDANT'S CRIMINAL POSSESSION OF A CONTROLLED SUBSTANCE CONVICTION UNDER AN ACCOMPLICE THEORY; DEFENDANT ACCOMPANIED A FRIEND WHO WAS TO SELL COCAINE; TWO DISSENTERS ARGUED THE EVIDENCE OF SHARED INTENT WAS TOO WEAK TO SUPPORT THE CONVICTION (FOURTH DEPT).

The Fourth Department, over a two-justice dissent, determined the evidence was sufficient to support defendant's conviction of criminal possession of a controlled substance under an accomplice theory. Defendant agreed to go with her friend who was going to sell cocaine. The majority concluded the evidence defendant was

going to be compensated proved shared intent. The two dissenters found the evidence defendant was to be compensated was too weak:

Here, the evidence and the reasonable inferences drawn therefrom establish that, two days before her arrest, defendant agreed that, in exchange for compensation, she would either drive or otherwise accompany the friend to complete a sale of cocaine. According to defendant's testimony, the friend indicated that she wanted defendant to accompany her because they were friends and she did not want to be alone with the two people involved in the proposed drug transaction, i.e., the drug dealer and the ostensible buyer. * * *

From the dissent:

Here, the People's theory at trial was that defendant intentionally aided her friend's possession of drugs by agreeing to drive her friend to another city where the friend would engage in the sale of such drugs, and that defendant would return by bus. However, the evidence in this case, when considered in the light most favorable to the People …, established that defendant merely accompanied her friend. People v Lewis, 2022 NY Slip Op 04846, Fourth Dept 8-4-22

Practice Point: Here defendant accompanied a friend who was to sell cocaine, The majority held the evidence of shared intent, which included evidence defendant was to be compensated, proved shared intent. Two dissenters argued the evidence of shared intent was too weak to support the conviction.

DECRIMINALIZED OFFENSES.

MARIJUANA AND GRAVITY-KNIFE CONVICTIONS VACATED IN THE INTEREST OF JUSTICE BECAUSE THE "OFFENSES" HAVE BEEN DECRIMINALIZED (SECOND DEPT).

The Second Department vacated defendant's marijuana and gravity-knife convictions because the "offenses" had been decriminalized:

The defendant's conviction of criminal possession of marihuana in the third degree "'became a nullity by operation of law, independently of any appeal, and without

requiring any action by this [c]ourt,'" pursuant to CPL 160.50(5) … . Consequently, the appeal from so much of the judgment as convicted the defendant of criminal possession of marihuana in the third degree must be dismissed as academic … . * * *

The defendant contends that the conviction of criminal possession of a weapon in the fourth degree predicated on the defendant's possession of a gravity knife should be vacated because Penal Law § 265.01(1) has since been amended to decriminalize the simple possession of a gravity knife. The People, in the exercise of their broad prosecutorial discretion, agree that the judgment should be modified by vacating that conviction. Even though the statute decriminalizing the simple possession of a gravity knife did not take effect until May 30, 2019 … , under the circumstances of this case, we vacate that conviction and the sentence imposed thereon, and dismiss that count of the indictment, as a matter of discretion in the exercise of our interest of justice jurisdiction … . People v Lester, 2022 NY Slip Op 04977, Second Dept 8-17-22

Practice Point: Here the marijuana and gravity-knife convictions were vacated in the interest of justice because the offenses had been decriminalized. The gravity-knife conviction was vacated even though the offense was not decriminalized at the time of its commission.

HARMLESS ERROR ANALYSIS.

ALTHOUGH DEFENDANT WAS PROPERLY DETAINED, ONCE THE PAT-DOWN SEARCH REVEALED DEFENDANT DID NOT HAVE A WEAPON THE POLICE WERE NOT JUSTIFIED IN REMOVING THE (STOLEN) WALLET FROM DEFENDANT'S POCKET AND SEARCHING IT; THE ERROR WAS NOT HARMLESS UNDER THE STANDARD FOR CONSTITUTIONAL ERROR (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion to suppress the wallet seized in the search of his person should have been granted. The related robbery convictions were reversed and a new trial on those counts was ordered. Defendant fled from the scene of the mugging and was properly detained

by the police. However, once the pat-down search revealed defendant did not have a weapon, the police should not have seized the (stolen) wallet from defendant's pocket and searched it. The "constitutional" error was not harmless because, under the facts, the error could have influenced the factfinder:

… [E]ven assuming that the officers were justified in performing a protective frisk … , there was no justification for searching the defendant's pants pocket, reaching into it, and removing the wallet. In the course of conducting a protective pat-down based upon reasonable suspicion, "[o]nce an officer has concluded that no weapon is present, the search is over and there is no authority for further intrusion" … . There was no evidence presented at the suppression hearing that, during his frisk of the defendant, Nelson felt anything in the defendant's pocket that seemed to be a weapon or that could have posed a danger to the officers at the scene. Indeed, Nelson did not testify at the hearing. Accordingly, there was no lawful basis for removing the wallet from the defendant's pocket … , and that act violated the defendant's Fourth Amendment right to be free from unreasonable searches and seizures … . The officers committed an additional constitutional violation when, after retrieving the wallet from the defendant's pocket, they opened it and conducted a warrantless search of its contents … . * * *

… [U]nder the constitutional standard, an error cannot be harmless if there is a reasonable possibility that it may have been a contributing factor that influenced the factfinder's determination … . People v Lewis, 2022 NY Slip Op 04920, Second Dept 8-10-22

Practice Point: Although defendant was properly detained in a street stop, once the pat-down search revealed defendant did not have a weapon the police were not justified in seizing the stolen wallet from defendant's pocket and then searching it.

Practice Point: There are two sets of harmless-error criteria, one for nonconstitutional error and one for constitutional error. Under the constitutional-error criteria, the error in this case was not harmless and a new trial was ordered.

JUDGES, DENIAL OF REQUEST FOR ADJOURNMENT TO ALLOW WITNESS TO TESTIFY, MISSING WITNESS JURY INSTRUCTION.

THE DENIAL OF DEFENDANT'S REQUEST FOR A ONE-DAY ADJOURNMENT TO ALLOW HIS DAUGHTER TO TRAVEL TO COURT TO TESTIFY, COUPLED WITH THE RELATED GRANT OF THE PEOPLE'S REQUEST FOR A MISSING-WITNESS JURY INSTRUCTION, DEPRIVED DEFENDANT OF A FAIR TRIAL (SECOND DEPT).

The Second Department, reversing defendant's conviction in the interest of justice, determined the judge's denial of defendant's request for a one-day adjournment to allow defendant's daughter to travel to court to testimony, and the grant of the People's related request for a missing witness jury instruction, deprived defendant of a fair trial:

"[W]hen the witness is identified to the court, and is to be found within the jurisdiction, a request for a short adjournment after a showing of some diligence and good faith should not be denied merely because of possible inconvenience to the court or others" … . Under the circumstances here, the Supreme Court should have granted a one-day continuance for the defendant's daughter to travel to New York from out of state … . The failure to grant this continuance cannot be considered harmless error, as there was conflicting testimony as to the defendant's whereabouts at the time of the robbery … . …

Although the defendant's contention that the Supreme Court improvidently exercised its discretion in granting the prosecution's request for a missing witness charge is unpreserved for appellate review … , this issue is inextricably linked with the denial of the defendant's request for a continuance, and this Court will consider the issue in the exercise of our interest of justice jurisdiction … . "The failure to produce a witness at trial, standing alone, is insufficient to justify a missing witness charge, '[r]ather, it must be shown that the uncalled witness is knowledgeable about a material issue upon which evidence is already in the case; that the witness would naturally be expected to provide noncumulative testimony favorable to the party who has not called him [or her], and that the witness is available to such party'" … . People v Reeves, 2022 NY Slip Op 04979, Second Dept 8-17-22

Practice Point: The request for a one-day adjournment to allow defendant's daughter to travel to court to give ostensibly relevant testimony (re: defendant's whereabouts at the time of the robbery), coupled with the grant of the People's request to give the missing-witness jury instruction, deprived defendant of a fair trial. The jury-instruction issue was not preserved and was considered in the interest of justice.

JURY NOTES.

A JURY NOTE WHICH REQUIRES NO ACTION BY THE COURT NEED NOT BE SHARED WITH DEFENSE COUNSEL (SECOND DEPT).

The Second Department determined there was no need for the judge to notify defense counsel of a jury note which did not require any action by the court, Also, jury notes requesting exhibits did not need to be shared with counsel because counsel agreed at the outset of deliberations that the jury could request exhibits:

In the defendant's view, the Supreme Court's failure to read note 6 into the record constituted a mode of proceedings error. We disagree.

Note 6 did not request "further instruction or information with respect to the law, [or] with respect to the content or substance of any trial evidence" (CPL 310.30). Nor did it indicate that the jury was deadlocked or struggling to reach a verdict on any or all of the counts submitted to it, or otherwise apprise the court of a significant development in the deliberations … . All the note conveyed was that the jury was continuing to deliberate on all of the charges, and that they were nearing a verdict on the first count in the defendant's case, as well as the two counts in the codefendant's case. Plainly, then, there was no action for the Supreme Court to take, and, concomitantly, no input or participation from defense counsel was necessary to ensure that the defendant's rights were "adequately protect[ed]" … . Note 6 was, in short, not a substantive communication from the jury. People v Edwards, 2022 NY Slip Op 04818, Second Dept 8-3-22

Practice Point: A jury note which does not require action by the judge need not be shared with defense counsel. Here the note informed the judge that they were near a verdict on certain counts.

LESSER INCLUDED OFFENSES.

UPON CONVICTION OF ROBBERY SECOND, ROBBERY THIRD, AS A LESSER INCLUDED OFFENSE, MUST BE DISMISSED (SECOND DEPT).

The Second Department noted that robbery third is a lesser included offense of robbery second and must be dismissed upon conviction of robbery second:

… [R]obbery in the third degree is a lesser included offense of robbery in the second degree (see CPL 300.30[4] …). A verdict of guilt upon the greater count is deemed a dismissal of every lesser count (see CPL 300.40[3]). Accordingly, we vacate the conviction of robbery in the third degree and the sentence imposed thereon, and dismiss that count of the indictment … . People v Hardy, 2022 NY Slip Op 04820, Second Dept 8-3-22

Practice Point: Upon conviction of the greater offense, a lesser included offense must be dismissed.

PLEA AGREEMENTS, JUDGES.

HERE THE DEFENDANT DID NOT COMPLETE THE TREATMENT REQUIRED BY THE PLEA AGREEMENT; THE GUILTY PLEA WAS THEREFORE INDUCED BY AN UNFULFILLED PROMISE WHICH USUALLY REQUIRES THAT THE PLEA BE VACATED; HERE SUPREME COURT FELT DEFENDANT SHOULD NOT HAVE BEEN TERMINATED BY THE TREATMENT PROGRAM AND PROPERLY EXERCISED DISCRETION IN FASHIONING A SENTENCE MUCH LESS THAN THAT REQUIRED BY THE PLEA AGREEMENT, LEAVING THE GUILTY PLEA IN PLACE (SECOND DEPT).

The Second Department determined Supreme Court properly exercised discretion in the face of defendant's failure to complete treatment as required by the plea agreement. The court found that, although defendant had relapsed during the treatment for alcoholism, the relapse did not justify his being terminated by the program. Therefore the court did not vacate defendant's guilty plea (on the ground

it was induced by an unfulfilled promise) and fashioned a drastically reduced sentence (time served):

"[I]n most instances when a guilty plea has been induced by an unfulfilled promise either the plea must be vacated or the promise honored, but that the choice rests in the discretion of the sentencing court" … . In this case, the Supreme Court providently exercised its discretion in determining that, although the defendant spent more than a year in residential substance abuse treatment programs, specific performance of the conditional plea agreement was not warranted. Although the court did not believe that the defendant's alcohol relapse and other reported problems at the final treatment program he attended were the real reason for his discharge, those issues nevertheless suggested that the defendant's alcoholism, which played a role in his commission of the instant offenses, remained an unresolved concern.

Moreover, the manner in which this case was ultimately resolved essentially split the difference between what was promised if the defendant was successful in treatment, and the sentence the Supreme Court could have imposed if he was not. Although the defendant's conviction of sexual abuse in the first degree was not vacated, he was effectively sentenced to time served, instead of four years in prison. In addition, the alternative sentence that was contemplated at the time of the defendant's pleas of guilty included seven years of postrelease supervision. Because the court sentenced the defendant to definite terms of imprisonment, however, he avoided being subject to postrelease supervision … . People v Boissard, 2022 NY Slip Op 05042, Second Dept 8-24-22

Practice Point: Usually a guilty plea induced by a plea agreement that was not fulfilled will be vacated. Here the defendant did not wish to withdraw his guilty plea and the court properly exercised discretion in fashioning a sentence much more lenient than that required by the plea agreement. The judge took into account the defendant's attempts to comply with the treatment required by the plea agreement, and expressed the opinion defendant should not have been terminated by the program.

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SEX OFFENDER REGISTRATION ACT (SORA), APPEALS, SEX OFFENDER CERTIFICATION.

HERE DEFENDANT, WHO PLED GUILTY TO BURGLARY AS A SEXUALLY MOTIVATED FELONY, ATTEMPTED TO CHALLENGE HIS CERTIFICATION AS A SEX OFFENDER, PRONOUNCED AT SENTENCING, IN THE SORA RISK-LEVEL ASSESSMENT PROCEEDING; THE SEX OFFENDER CERTIFICATION WAS DEEMED TO BE PART OF THE JUDGMENT OF CONVICTION WHICH CAN ONLY BE CHALLENGED ON DIRECT APPEAL (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Rivera, determined that the defendant could not challenge his certification as a sex offender at the SORA risk-level-assessment proceeding. The sex-offender certification is part of the judgment of conviction which must be challenged on direct appeal. Here the defendant pled guilty to burglary as a sexually motivated felony and was designated a sex offender at sentencing.

… [W]e take this opportunity to pronounce that where, as here, a defendant challenges certification on the ground that the underlying New York conviction is for an offense which does not require registration under SORA, the issue is one which is properly raised on a direct appeal from the judgment of conviction, not on an appeal from an order designating his or her sex offender risk level…. . People v Matos, 2022 NY Slip Op 04984, Second Dept 8-17-22

Practice Point: Here the defendant was certified as a sex offender at sentencing for burglary as a sexually motivated felony. He attempted to challenge the certification at the SORA risk-level-assessment proceeding. The Second Department, like the First Department, held the sex offender certification was part of the judgment of conviction and can only be challenged by direct appeal.

SEX OFFENDER REGISTRATION ACT (SORA), RIGHT AGAINST SELF-INCRIMINATION.

WHERE DEFENDANT ASSERTED HIS INNOCENCE AT TRIAL, HAS A PENDING APPEAL AND ASSERTS HIS RIGHT AGAINST SELF-INCRIMINATION IN THE SORA PROCEEDING, THE SORA COURT SHOULD NOT ASSESS POINTS UNDER RISK FACTOR 12 FOR FAILURE TO TAKE RESPONSIBILITY FOR THE OFFENSE (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Pitt, reversing the SORA court, in a matter of first impression, determined that where defendant asserted his innocence at trial, has a pending appeal, and has asserted his right to avoid self-incrimination, he should not be assessed points under risk factor 12 for failing to take responsibility for the relevant offense:

… [W]e conclude that a defendant who has invoked his Fifth Amendment right against self-incrimination and has a direct appeal pending should not be assessed points under risk factor 12. Considering this conclusion, and in view of defendant's consistent refusal to incriminate himself and the pending status of his direct appeal, the assessment of 10 points under this factor amounts to a violation of defendant's Fifth Amendment rights. * * *

… [D]efendant was forced to choose between, on the one hand, exercising his Fifth Amendment right against self-incrimination and being assessed points under risk factor 12, and, on the other, admitting responsibility for the acts that led to his conviction after so far maintaining his innocence and risking that those admissions would be used against him in a potential retrial or form the basis of a perjury charge. Ultimately, the penalty imposed on defendant when presented with this choice is that he was assessed 10 points under risk factor 12 and adjudicated a risk level two sex offender.

The difference between a level one and level two sex offender adjudication is substantial and illustrative of why the penalty is so great as to compel self-incrimination. If defendant were classified as a level one sex offender, he would be required to register annually for a period of 20 years from the date of initial registration (see Correction Law § 168-h), but his personal information would not be listed in a publicly available database. However, as a level two sex offender,

defendant would be required to register annually for life (see Correction Law § 168-h), and his photograph, address, place of employment, physical description, age, and distinctive markings would be included in a public database (see Correction Law § 168-q). People v Krull. 2022 NY Slip Op 04783, First Dept 8-2-22

Practice Point: Here defendant asserted his innocence at trial, had a pending appeal and asserted his right against self-incrimination in the SORA proceedings. The SORA court should not have assessed points under risk factor 12 for failure to take responsibility for the offense.