NEW YORK APPELLATE DIGEST, LLC

Criminal Law
Reversal Report
December 2022

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released by Our New York State Court of Appeals and Posted on the New York Appellate Digest Website in December 2022. The Entries in the Table of Contents Link to the Summaries Which Link to the Full 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.

Table of Contents

Contents

Table of Contents

Table of Contents

Table of Contents

Table of Contents

Table of Contents

ASSAULT, PEPPER SPRAY BY LAW ENFORCEMENT, JUSTIFICATION DEFENSE.

THE USE OF PEPPER SPRAY BY JAIL PERSONNEL (AFTER A WARNING) WHEN DEFENDANT REFUSED TO TAKE OFF HIS SHOES WAS NOT "EXCESSIVE FORCE;" THEREFORE DEFENDANT, WHO ASSAULTED THE OFFICER FIVE SECONDS AFTER HE WAS SPRAYED, WAS NOT ENTITLED TO A JURY INSTRUCTION ON THE JUSTIFICATION DEFENSE IN HIS ASSAULT TRIAL (CT APP).

The Court of Appeals, reversing the appellate division, determined there was no reasonable view of the evidence which would support a jury instruction on the justification defense. At the jail, the defendant was ordered to take off his shoes. When he refused, after being warned, he was sprayed in the face with pepper spray. Five seconds after he was sprayed, defendant charged the officer and punched him in the head:

The Appellate Division concluded that, viewing the evidence in the light most favorable to defendant, there was a "reasonable view of the evidence that the use of the pepper spray constituted excessive force in this scenario" … . …

… [T]here is no reasonable view of the evidence that the sergeant's use of pepper spray was excessive or otherwise unlawful. The trial evidence was that defendant was given a lawful command to remove his footwear, that he was given that verbal command several times yet persisted in his refusal, and that he was specifically warned that he would be pepper sprayed if he did not comply. The officers further testified that the use of pepper spray was considered a "minimal" use of force compared to using "hands on" force to remove the footwear. People v Heiserman, 2022 NY Slip Op 07024, CtApp 12-12-22

Practice Point: Jail personnel ordered defendant to take off his shoes. He refused and continued to refuse after he was warned he would be pepper-sprayed. Hw assaulted the officer five seconds after being sprayed. The Court of Appeals, reversing the appellate division, determined the use of pepper spray was not excessive force and the defendant was not entitled to a jury instruction on the justification defense.

DECEMBER 13, 2022

ASSAULT, SERIOUS OR PROTRACTED DISFIGUREMENT.

THE PROOF THE VICTIM SUFFERED "SERIOUS OR PROTRACTED DISFIGUREMENT" IN THIS ASSAULT FIRST CASE WAS INSUFFICIENT; CONVICTION REDUCED TO ATTEMPTED ASSAULT FIRST (FIRST DEPT).

The First Department, reversing defendant's assault first conviction and reducing it to attempted assault first, determined the People did not prove the scar on the victim's cheek met the definition of "serious and protracted disfigurement." The People introduced two photos of the scar and the doctor who treated the injury testified. The victim did not testify:

Defendant's convictions were not supported by legally sufficient evidence because the People failed to prove that the victim suffered serious and permanent disfigurement, which was the basis of both counts (see Penal Law §§ 120.10[1], [2]). The People relied solely on two photos of the victim depicting a scar on his cheek, and the scar was briefly described by the doctor who treated the victim on the day of the slashing. Despite the scar's prominent location, neither the photos nor the doctor's testimony warrant an inference that the scar rendered the victim's appearance "distressing or objectionable" to a reasonable observer … . The victim did not testify, so the jury had no opportunity to observe the actual scar and evaluate whether it was seriously disfiguring, nor was any other evidence adduced regarding the scar's effects on the victim's appearance, health, and life … . People v McBride, 2022 NY Slip Op 07034, First Dept 12-13-22

Practice Point: Here defendant was charged with assault first for causing "serious and protracted disfigurement" to the victim. Although two photos of the scar were introduced in evidence and the treating doctor testified, the victim did not testify. It appears that the jury's inability to see the victim at the time of trial rendered the proof legally insufficient.

DECEMBER 13, 2022

ATTORNEYS, INEFFECTIVE ASSISTANCE.

DEFENDANT'S COUNSEL WAS INEFFECTIVE FOR FAILING TO FILE A VALID MOTION TO WITHDRAW THE PLEA; THE MOTION WAS MISCHARACTERIZED AS A MOTION TO VACATE THE CONVICTION AND WAS NOT SUPPORTED BY NECESSARY AFFIDAVITS; DEFENDANT'S SENTENCE WAS VACATED (THIRD DEPT).

The Third Department, vacating defendant's sentence, determined defendant's second counsel was ineffective in filing a motion to withdraw the plea:

Instead of filing a motion to withdraw defendant's plea pursuant to CPL 220.60 (3), second counsel moved to vacate the judgment of conviction pursuant to CPL 440.10 (1) (h) based on generalized allegations, supported by his own "information and belief," that first counsel had failed to properly investigate the facts, interview witnesses, assess the strength of the People's case, file any motions or inform defendant of the consequences of pleading guilty. The People opposed the motion, noting that, inasmuch as defendant had yet to be sentenced , a motion pursuant to CPL 440.10 was premature. In reply, second counsel agreed that the motion was premature, presented the same allegations and asked that County Court nonetheless exercise its discretion to permit defendant to withdraw his plea, prompting the People to oppose the motion on the merits. By order entered September 14, 2017, County Court denied defendant's CPL 440.10 motion to vacate the judgment of conviction as premature; alternatively, the court treated the motion as one to withdraw the plea and denied it, noting, among other things, that the motion was deficient as it was supported only by second counsel's affirmation. * * *

Although second counsel's mischaracterization of the subject motion does not, in and of itself, constitute ineffective assistance of counsel … , the motion was defective in other ways. Specifically, despite County Court granting second counsel two weeks to prepare a motion to withdraw defendant's plea, he filed the motion in one day. In rushing his submission, second counsel failed to support the motion with affidavits from either defendant or first counsel, and he failed to incorporate any of the allegations that defendant made through the PSI; rather, second counsel opted to rely, exclusively, on his own "information and belief" and submitted a general, pro forma motion that was facially deficient. People v Williams, 2022 NY Slip Op 07265, Third Dept 12-22-22

Practice Point: Defense counsel was ineffective for failure to file a proper motion to withdraw the plea. The motion was mischaracterized as a motion to vacate the conviction and was not supported by necessary affidavits based upon first-hand knowledge.

DECEMBER 22, 2022

ATTORNEYS, CONFLICT OF INTEREST, FEE PAID BY ANOTHER.

THE EVIDENCE AT THE HEARING ON DEFENDANT'S MOTION TO VACATE HIS CONVICTION DID NOT SUPPORT THE ALLEGATION DEFENDANT'S FRIEND PAID DEFENDANT'S LEGAL FEES CREATING A CONFLICT OF INTEREST FOR DEFENDANT'S ATTORNEY (FIRST DEPT).

The First Department determined Supreme Court properly denied defendant's motion to vacate his conviction on the ground his attorney had a conflict of interest which deprived him of effective assistance of counsel. The case had gone to the Court of Appeals which held the defendant was entitled to a hearing on the motion:

The record supports the hearing court's factual determination that defendant's friend Salaam, whom his counsel represented on an unrelated criminal case, and who had initially been a suspect in the murder of which defendant was convicted, did not pay defendant's legal fees. At the hearing, defendant did not meet his burden of proving the necessary facts by a preponderance of the evidence … . The hearing evidence showed that Salaam physically handed cash to defendant's attorney for his retainer and for much of the balance of the fee, but that there was no proof as to the ultimate source of the cash. Counsel credibly testified that he viewed Salaam as his contact person and believed that the legal fees were being collectively raised by a group of defendant's friends and relatives, including Salaam. The court's finding was also supported by defendant's recorded calls made while incarcerated, and the fact that Salaam always delivered cash to the attorney while accompanied by other friends of defendant. The evidence also shows that defendant chose and hired the attorney. People v Brown, 2022 NY Slip Op 06889, First Dept 12-6-22

Practice Point: Defendant alleged his friend paid his legal fees. Defendant's friend had been represented in another criminal matter by defendant's attorney and was a suspect in the murder of which defendant was convicted. The evidence at the hearing on defendant's motion to vacate his conviction did not support the allegation defendant's friend was the source of the funds paid to defendant's attorney. Therefore defendant's argument he was deprived of effective assistance because of his attorney's conflict of interest was not supported by the evidence.

DECEMBER 6, 2022

ATTORNEYS, RIGHT TO COUNSEL AT LINEUP.

DEFENSE COUNSEL DID NOT WAIVE HIS CLIENT'S RIGHT TO HAVE HIM ATTEND THE LINEUP IDENTIFICATION BY SENDING HIS PARALEGAL, WHO WAS TURNED AWAY; DEFENSE COUNSEL SHOULD HAVE BEEN TOLD HIS PRESENCE WAS REQUIRED (FIRST DEPT).

The First Department, reversing defendant's conviction, determined defense counsel did not waive his client's right to have his attorney attend the lineup identification procedure by sending his paralegal. The paralegal was turned away:

Defendant was deprived of his right to have counsel present at a … postindictment lineup. It is undisputed that defendant had a right to counsel at this lineup, which was conducted at a time when he already had representation. Although defendant's counsel was notified of the lineup and did not attend, a paralegal employed by counsel attempted to attend the lineup but was turned away by the police.

The attorney did not waive his client's right to counsel at the lineup by failing to appear. The police should have briefly paused this nonexigent, postindictment lineup, conducted long after the crime … , in order to advise the attorney he needed to attend personally, or to have the paralegal so advise counsel. People v Bennett, 2022 NY Slip Op 07007, First Dept 12-8-22

Practice Point; Defense counsel sent his paralegal to attend his client's lineup, but the police sent the paralegal away. The police should have informed counsel his

presence was required before going ahead with the lineup. Counsel's failure to attend did not waive his client's right to have his attorney present.

DECEMBER 8, 2022

CIRCUMSTANTIAL EVIDENCE.

ALTHOUGH THERE WAS DIRECT EVIDENCE DEFENDANT OWNED THE CAMERA WHICH WAS SET UP TO VIEW THE VICTIM'S BEDROOM, THERE WAS NO DIRECT EVIDENCE IT WAS THE DEFENDANT WHO ACTUALLY PLACED THE CAMERA ON THE NEIGHBOR'S PROPERTY; THERFORE THE CIRCUMSTANTIAL EVIDENCE JURY INSTRUCTION SHOULD HAVE BEEN GIVEN; CONVICTION REVERSED (THIRD DEPT).

The Third Department, reversing defendant's conviction, determined defendant's request for the circumstantial evidence jury instruction should have been granted. Defendant was charged with setting up a camera on a neighbor's property to view the victim's bedroom. There was some direct evidence that the camera belonged to defendant. But the jury would have to rely on circumstantial evidence to find that the defendant had positioned the camera to view the victim:

… [P]roof by direct evidence as to one element of a crime … does not mean that a circumstantial evidence charge should be not given … . …

… [T]he record fails to disclose any eyewitness testimony — or any other proof — identifying defendant as the perpetrator who placed the camera on the neighbor's lawn … . To conclude that defendant was the perpetrator, the jury had to make an inference based upon defendant's ownership of the camera and the pictures of him found therein. Because "the People's proof relative to the identity of the perpetrator . . . was entirely circumstantial" … County Court should have granted defendant's request for a circumstantial evidence charge … . People v Lamb, 2022 NY Slip Op 07267, Third Dept 12-22-22

Practice Point: Even though there was direct evidence of an element of an offense, the circumstantial evidence jury instruction should have been in this case.

Defendant was charged with setting up a camera to view the victim in the victim's bedroom. There was direct evidence defendant owned the camera but no direct evidence it was defendant who placed the camera on the neighbor's property.

DECEMBER 22, 2022

CONCURRENT INCLUSORY COUNTS.

IN REVIEWING THE GRAND JURY MINUTES, COUNTY COURT SHOULD NOT HAVE DISMISSED THE CONCURRENT INCLUSORY COUNTS; RATHER THOSE COUNTS SHOULD BE SENT TO THE JURY IN THE ALTERNATIVE (THIRD DEPT).

The Third Department, reversing County Court and reinstating three counts of the indictment, determined that inclusory concurrent counts in an indictment should not be dismissed prior to trial:

… [T]he parties entered a stipulation in lieu of motions authorizing County Court to review the grand jury minutes to determine whether there was legally sufficient evidence, adequate instructions or any defects in the proceedings. The court thereafter dismissed those counts charging criminal sexual act in the first degree as inclusory concurrent counts of the predatory sexual assault counts pursuant to CPL 300.30 (4), occasioning this appeal by the People.

"In assessing whether dismissal of an indictment is warranted under CPL 210.20 (1) (b), a reviewing court must assess whether the People presented legally sufficient evidence to establish the offense or offenses charged" … .. Although asked to review the indictment to ensure that the evidence submitted to the grand jury was legally sufficient, the court dismissed the counts at issue as inclusory. Even if certain counts charged in the indictment are inclusory concurrent counts, that does not require dismissal of those counts prior to trial or, upon trial, bar the submission of both the greater and the lesser counts to the jury for consideration. Rather, "[w]hen inclusory counts are submitted for consideration, they must be submitted in the alternative since a conviction on the greater count is deemed a

dismissal of every lesser count" … . People v Provost, 2022 NY Slip Op 06966, Third Dept 12-8-22

Practice Point: Conclusory concurrent counts should be allowed to go to the jury in the alternative.

DECEMBER 8, 2022

CONTEMPT.

PHONE CALLS TO THE PROTECTED PERSON SUPPORTED CRIMINAL CONTEMPT SECOND DEGREE BUT NOT CRIMINAL CONTEMPT FIRST DEGREE (FOURTH DEPT).

The Fourth Department determined phone calls, as opposed to "contact with the protected person," did not support the contempt first degree convictions. However the phone calls did support contempt second degree:

The … five counts of criminal contempt in the first degree … are based on evidence establishing that an order of protection had been issued against defendant for the benefit of a person and that on five occasions defendant made telephone calls from the Monroe County Jail to that person. … … With respect to those counts, the People were required to establish that defendant committed the crime of criminal contempt in the second degree … , and that he did so "by violating that part of a duly served order of protection . . . which requires the . . . defendant to stay away from the person or persons on whose behalf the order was issued" … . Here, defendant was in jail when the calls at issue were made and the People failed to "prove[], beyond a reasonable doubt, that defendant had any contact with the protected person during the charged incident[s]" … . People v Caldwell, 2022 NY Slip Op 07325, Fourth Dept 12-23-22

Practice Point: Here criminal contempt first degree required proof defendant failed to "stay away" from the protected person. That portion of the order was not violated by defendant's phone calls to the protected person (which supported convictions for criminal contempt second degree).

DECEMBER 23, 2022

DISCIPLINARY HEARINGS (INMATES), EVIDENCE.

THE RECORD DOES NOT REFLECT THE MEASURES TAKEN BY THE HEARING OFFICER TO DETERMINE THE BODY CAMERA FOOTAGE REQUESTED BY THE PETITIONER DID NOT EXIST; DETERMINATION ANNULLED AND NEW HEARING ORDERED (THIRD DEPT).

The Third Department, annulling the misbehavior determination, held that petitioner-inmate's request for body camera footage was improperly denied:

We … find merit to petitioner's contention that his request for body camera footage was improperly denied. Upon petitioner's request for such footage at the hearing, the Hearing Officer responded that the correction officer's body camera was turned off and, therefore, such footage did not exist. The record does not reflect the measures taken or the basis upon which the Hearing Officer concluded that the footage did not exist … . As such, petitioner's request for the body camera footage was improperly denied and, under these circumstances, the appropriate remedy is remittal for a new hearing … . Matter of Dorcinvil v Miller, 2022 NY Slip Op 06972, Third Dept 12-8-22

Practice Point: Here the petitioner-inmate requested body camera footage. The hearing officer denied the request, saying that the body camera had been turned off. Because the record did not reflect the steps taken by the hearing officer to defermine the footage didn't exist, the determination was annulled and a new hearing was ordered.

DECEMBER 8, 2022

FAMILY LAW, NEGLECT, MARIHUANA.

THE AMENDED STATUTE CHANGING THE CRITERIA FOR NEGLECT BASED ON MARIHUANA USE WENT INTO EFFECT TWO DAYS BEFORE THE HEARING AND WAS NOT APPLIED TO THE FACTS; MATTER REMITTED (FOURTH DEPT).

The Fourth Department, modifying Family Court, determined whether mother neglected the children within the meaning of the statute as amended by the Marihuana Regulation and Taxation Act required remittal:

"The Marihuana Regulation and Taxation Act … amended Family [Court] Act § 1046 (a) (iii) … by specifically foreclosing a prima facie neglect finding based solely upon the use of marihuana, while still allowing for consideration of the use of marihuana to establish neglect, provided '[that there is] a separate finding that the child's physical[,] mental or emotional condition was impaired or is in imminent danger of becoming impaired' " … . The amendment to section 1046 (a) (iii) went into effect … two days before the court rendered its decision in this case and, "[a]s a general matter, a case must be decided upon the law as it exists at the time of the decision" … . Inasmuch as petitioner's presentation of evidence was based on the state of the law at the time of the hearing, however, petitioner may not have fully explored the issue of impairment. We therefore remit the matter to Family Court to reopen the fact-finding hearing on the issue whether the children's condition was impaired or at imminent risk of impairment as a result of the mother's use of marihuana … . Matter of Gina R. (Christina R.), 2022 NY Slip Op 07321, Fourth Dept 12-23-22

Practice Point: The Family Court Act was amended to prohibit a finding of neglect based solely on marihuana use unless there is a finding the child's physical, mental or emotional condition was impaired or in danger of being impaired by the marihuana use.

DECEMBER 23, 2022

FAMILY LAW, NEGLECT, MARIJUANA.

THE AMENDMENT TO THE FAMILY COURT ACT WHICH PRECLUDES A FINDING OF NEGLECT BASED SOLELY ON MARIJUANA USE SHOULD BE APPLIED RETROACTIVELY; HOWEVER HERE THERE WAS SUFFICIENT EVIDENCE OF MOTHER'S NEGLECT OF THE CHILD BASED UPON HER "ABUSE" (AS OPPOSED TO "USE") OF MARIJUANA (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Zayas, determined (1) the amendment to the Family Court act precluding a finding of neglect based solely on marijuana use should be applied retroactively, and (2) the evidence mother neglected the child based upon abuse of marijuana was sufficient:

The 2021 amendment should not be interpreted as preventing any reliance on the misuse of marihuana, no matter how extensive or debilitating, to establish a prima facie case of neglect. After all, the statute still encompasses the misuse of other legal substances, such as alcoholic beverages and prescription drugs. Based on the plain language of the statute, the 2021 amendment does not prevent a court from finding that there has been a prima facie showing of neglect where the evidence establishes that the subject parent has, in fact, repeatedly misused marihuana in a manner that "has or would ordinarily have the effect of producing in the user thereof a substantial state of stupor, unconsciousness, intoxication, hallucination, disorientation, or incompetence, or a substantial impairment of judgment, or a substantial manifestation of irrationality" … . Such a finding is not based on "the sole fact" that the parent "consumes cannabis" … .

… In its order, the Family Court expressly determined that the mother had misused marihuana and "clearly had a substantial impairment of judgment, and/or substantial manifestation of irrationality and was disoriented and/or incompetent." Since this finding was not based on "the sole fact" that the mother "consumes cannabis" (Family Ct Act § 1046[a][iii]), it provided a sufficient basis on which to apply the presumption of neglect arising from repeated misuse of drugs that is articulated in the statute, as amended … . Matter of Mia S. (Michelle C.), 2022 NY Slip Op 06932, Second Dept 12-7-22

Practice Point: The amendment of the Family Court Act to preclude a finding of neglect based solely on use of marijuana should be applied retroactively. But the

amendment does not preclude a finding of neglect based on the "abuse," as opposed to "use," of marijuana.

DECEMBER 7, 2022

FAMILY LAW, JUVENILE DELINQUENCY.

THE ADMISSION ALLOCUTION IN THIS JUVENILE DELINQUENCY PROCEEDING, WHICH REQUIRES THAT THE JUDGE QUESTION THE JUVENILE AND A PARENT, FELL SHORT OF THE STATUTORY REQUIREMENTS IN THE FAMILY COURT ACT; PETITION DISMISSED (THIRD DEPT).

The Third Department, reversing respondent's admission to criminal mischief in this juvenile delinquency proceeding, determined: (1) the validity of the admission was not moot despite the completion of the one-year placement, and the issue need to be preserved for review; and (2) the admission allocution was insufficient:

… [R]espondent's argument that the plea allocution did not comply with Family Ct Act § 321.3 is not moot — despite the expiration of respondent's placement — because the delinquency determination challenged herein "implicates possible collateral legal consequences" … .

… Family Court must "ascertain through allocution of the respondent and his [or her] parent or other person legally responsible for his [or her] care, if present, that (a) he [or she] committed the act or acts to which he [or she] is entering an admission, (b) he [or she] is voluntarily waiving his [or her] right to a fact-finding hearing, and (c) he [or she] is aware of the possible specific dispositional orders" (Family Ct Act § 321.3 [1]). Although respondent's mother was present at the April 2021 allocution, Family Court only asked her whether she had sufficient time to speak to respondent about the proceedings…. The record reflects that the court failed to question respondent's mother regarding the acts to which respondent admitted, his waiver of the fact-finding hearing or her awareness of the possible dispositional options. As a result, Family Court's allocution fell short of the

statutory mandate … . Matter of Christian VV. (Christian VV.), 2022 NY Slip Op 07275, Third Dept 12-22-22

Practice Point: The Family Court Act requires that the admission allocution in a juvenile delinquency proceeding involve both the juvenile and a parent. Here the allocution of respondent and his mother fell short of the statutory requirements and the juvenile delinquent petition was dismissed. Although the respondent had already completed his placement, the issue was not moot because of the possible collateral consequences of the delinquency determination.

DECEMBER 22, 2022

HABEAS CORPUS.

WHEN A DEFENDANT MUST BE RELEASED BECAUSE HE OR SHE IS NOT CHARGED WITH A BAIL-ELIGIBLE OFFENSE, A COMPETENCY EXAMINATION MUST BE CONDUCTED AS AN OUT-PATIENT OR IN A HOSPITAL; THE DEFENDANT CANNOT BE ORDERED TO JAIL PENDING THE EXAMINATION; THE HABEAS CORPUS PETITION WAS PROPERLY GRANTED; THE APPEAL WAS HEARD AS AN EXCEPTION TO THE MOOTNESS DOCTRINE (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Rivera, determined defendant, who was not charged with a bail-eligible offense, could not be ordered to jail for a competency examination. Defendant must either be examined as an out-patient, or, upon a recommendation of a medical official, in a hospital. The writ of habeas corpus was properly granted and the appeal was heard as an exception to the mootness doctrine:

… [W]e conclude that Wei Li [defendant] was not "in custody" during his arraignment … because he was not charged with a qualifying offense under the bail laws and the court was required to order his release at arraignment (see CPL 510.10 [3]; 530.20 [1] [a]). As its plain text makes clear, subdivision (3) mandates the location for the examination as either (1) the place where the defendant is in custody at the time the court orders the examination, or (2) at a hospital facility, as

might be necessary for an effective examination. The statute's use of the phrase "in custody," like the phrase "hospital confinement," refers, as a practical matter, to where a defendant may be properly examined by psychiatric personnel. Thus, "in custody," as used in subdivision (3), does not broadly refer to custodial control over a defendant at a courthouse. …

A court issuing an order for a competency examination [pursuant to CPL 730.20] (1) may direct an examination on an outpatient basis or, (2) upon a medical recommendation of the director, the court may, but need not, order hospital confinement until completion of the examination. People v Warden, Rikers Is., 2022 NY Slip Op 07093, CtApp 12-15-22

Practice Point: A defendant who is not charged with a bail-eligible offense cannot be ordered to jail pending a competency examination. The defendant must be examined as an out-patient or, upon the recommendation of a medical official, in a hospital.

DECEMBER 15, 2022

HARASSMENT.

THE DEFENDANT POLICE OFFICER'S THREATS MADE TO HIS FORMER GIRLFRIEND WERE NOT MERELY ANGRY WORDS; THE EVIDENCE SUPPORTED DEFENDANT'S HARASSMENT CONVICTION (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Rivera, reversing the Appellate Term, determined the police officer's harassment conviction should stand:

During defendant's phone call with D.D., he accused D.D. and her husband of extorting him. He also made several threats, first that her children would get a bullet in their heads, then that he would firebomb her home, and finally that he would kill the entire family. Contrary to the Appellate Term's conclusion, a rational factfinder could have determined that this was not a mere outburst, but escalating threats of deadly violence targeted at D.D. and her family. The angry tone of the call, defendant's use of profanities to refer to D.D. and her children, and

the fact that defendant threatened to use deadly violence all support a finding that the statements were not said in jest. Indeed, the morning after this call defendant admitted to his captain that he said something he should not have—to the effect that he was going to shoot D.D.'s children in the head.

A rational factfinder could have concluded that defendant's statements were not just a rant or mere angry words said by someone in an intimate personal relationship gone bad, but rather serious threats of specific ways he would kill D.D. and her family: firebombing the home and shooting the children in the head. Defendant also communicated a motive for his threats: his alleged belief that D.D. had extorted him, and, as he had previously claimed, that she had cheated on him. The threats on the call were specific and unequivocal—the type of statements that a reasonable person in D.D.'s position, knowing that defendant was an armed police officer who was trained in the use of deadly force and who believed her to be unfaithful and an extortionist, would commonly understand as words describing intended violent action and not a crude outburst, puffery, or bluffs. People v Lagano, 2022 NY Slip Op 07021, CtApp 12-13-22

Practice Point: Here the line between a mere angry outburst and harassment was crossed by defendant police officer's threats to kill his ex-girlfriend and her children.

DECEMBER 13, 2022

PROBABLE CAUSE TO ARREST.

AT THE TIME DEFENDANT RAN AS THE POLICE APPROACHED THERE WAS NO INDICATION THE POLICE WERE GOING TO CITE DEFENDANT FOR TRESPASS OR VIOLATION OF AN OPEN-CONTAINER LAW; DEFENDANT THEREFORE COULD NOT HAVE INTENDED TO OBSTRUCT GOVERNMENTAL ADMINISTRATION BY RUNNING; DEFENDANT'S RUNNING DID NOT PROVIDE PROBABLE CAUSE TO ARREST; THE PEOPLE'S ALTERNATIVE PROBABLE CAUSE ARGUMENT (TRESPASS AND OPEN-CONTAINER VIOLATION), ALTHOUGH PRESENTED TO THE SUPPRESSION COURT, WAS NOT RULED ON AND THEREFORE COULD NOT BE CONSIDERED ON APPEAL (FOURTH DEPT).

The Fourth Department, reversing the denial of defendant's suppression motion, determined the police did not have probable cause to arrest defendant for obstructing governmental administration. The People's alternative argument (the police had probable cause to arrest defendant for trespass and violation of an open-container law), made in a post-suppression-hearing memo, could not be considered on appeal because the suppression court did not rule on it. The police approached defendant as he was sitting at a picnic table on vacant property drinking from a cup. As the police approached, defendant got up from the table and ran:

… [A]lthough the officers testified that they were planning to issue citations for violation of the open container ordinance as they approached the picnic table, there is no evidence that, when defendant jumped up from the table and attempted to run away, the officers were in the process of issuing the citations … or that they had given any directive for defendant to remain in place while they issued such citations … . The officers thus had no reasonable basis to believe that defendant had the requisite intent—i.e., the conscious objective—to prevent them from issuing citations … . * * *

… [T]he court's determination that the officers had probable cause to arrest defendant for obstructing governmental administration, and that the searches and seizures were incident to a lawful arrest for that offense, "was the only issue decided adversely to defendant at the trial court" … . That determination "alone constituted the ratio decidendi for upholding the legality of the [searches and

seizures] and denying the suppression of evidence" (id.). Our "review, therefore, is confined to that issue alone" … . People v Tubbins, 2022 NY Slip Op 07317, Fourth Dept 12-23-22

Practice Point: Here defendant did not know the police were going to cite him for trespass and an open-container violation at the time he ran. Therefore his running was not obstruction of governmental administration and did not provide probable cause for arrest on that ground.

Practice Point: The People's alternative argument that the police had probable cause to arrest for trespass and an open-container violation was presented to the suppression court but was not ruled on. Therefore the appellate court could not consider it.

DECEMBER 23, 2022

SANDOVAL.

DEFENDANT'S TESTIMONY ABOUT HIS FELONY CONVICTIONS DID NOT OPEN THE DOOR TO A MODIFICATION OF THE COURT'S SANDOVAL RULING TO ALLOW QUESTIONING ABOUT THE FACTS UNDERLYING THE CONVICTIONS; CONVICTION REVERSED (FIRST DEPT).

The First Department, reversing defendant's conviction, determined the court should not have modified its original Sandoval ruling. The initial Sandoval ruling allowed defendant to be questioned about the number of felony conviction on his record but not about any of the underlying facts. When defendant was on the stand the court allowed the prosecutor to ask about the underlying facts:

On direct examination, when asked if he had ever been convicted of a crime in New York, defendant answered, "[y]es." When asked,"[d]o you know how many," he testified, "[a]pproximately maybe two or three felonies. Maybe four or five misdemeanors."

On cross-examination, when the prosecutor asked defendant if he had been convicted of three felonies, defendant replied, "I guess so." In response to the

prosecutor's next question, defendant said he was not sure how many felony convictions he had. The court then modified its Sandoval ruling and permitted the People to exceed the scope of the initial Sandoval ruling by inquiring about the underlying facts of those felony convictions, which included drug and theft-related crimes.

Defendant's trial testimony did not open the door to a prejudicial modification of the court's Sandoval ruling. Defendant was entitled to rely on the trial court's original Sandoval ruling as a matter of "plain fairness" … .

None of defendant's responses on direct or cross-examination were so incorrect or misleading as to permit the court's modification … . People v Henderson, 2022 NY Slip Op 07009, First Dept 12-8-22

Practice Point: The court's initial Sandoval ruling allowed defendant to be about the number of felony convictions on his record. When the defendant was on the stand, the judge modified the Sandoval ruling to allow questioning about the underlying facts. There was nothing about the defendant's testimony which justified the Sandoval modification and defendant's conviction was reversed.

DECEMBER 8, 2022

SEARCH AND SEIZURE, PLAIN VIEW.

PROBABLE CAUSE FOR SEARCH OF DEFENDANT'S VEHICLE UNDER THE AUTOMOBILE EXCEPTION WAS PROVIDED BY THE ODOR AND OBSERVATION OF MARIJUANA; SEIZURE OF A TRANSPARENT BAG OF PILLS WAS NOT JUSTIFIED BY THE PLAIN VIEW EXCEPTION TO THE WARRANT REQUIREMENT BECAUSE IT WAS NOT IMMEDIATELY APPARENT THE PILLS WERE CONTRABAND AND THERE WAS NO MARIJUANA IN THE BAG (SECOND DEPT).

The Second Department, reversing defendant's conviction stemming from a transparent plastic bag of pills seized from defendant's vehicle after a traffic stop. determined the seizure of the pills was not justified by the plain view exception to

the warrant requirement. The court noted that the Penal Law statute prohibiting a probable-cause finding based solely on the odor of marijuana is not applied retroactively and therefore the marijuana odor and the observation of the marijuana provided probable cause for a search pursuant to the automobile exception to the warrant requirement here:

The plain view doctrine is not applicable where the object must be moved or manipulated before its illegality can be determined … . The movement or manipulation of an object from its original state in a manner that goes beyond the objectives of the original search constitutes an independent search or seizure … . Such a search or seizure may not be upheld without proof that the officer who moved or manipulated the object had probable cause to believe that the object was evidence or contraband at the time that it was moved or manipulated … .

Here, Cruz [the officer] testified that he did not know what the pills in the ziploc bag were when he seized them. * * *

Since it was obvious that the transparent ziploc bag seized by Cruz did not contain marihuana, and since it was not immediately apparent that the ziploc bag contained any other type of contraband, there was no justification for seizing the bag … . People v Rodriguez, 2022 NY Slip Op 07080, Second Dept 12-14-22

Practice Point: The Penal Law statute prohibiting a probable-cause finding based solely on the odor of marijuana is not applied retroactively.

Practice Point: If an object, i.e., a transparent plastic bag of pills, must be manipulated before it can be determined to be contraband, seizure under the plain view exception is not justified. Here the odor and observation of marijuana provided probable cause for the search of the vehicle, and containers within the vehicle, for marijuana. Because the transparent bag of pills did not contain marijuana, the plain view exception did not apply.

DECEMBER 14, 2022

SEIZURE, REASONABLE SUSPICION.

AT THE TIME THE POLICE PARKED THE POLICE CAR BEHIND THE CAR IN WHICH DEFENDANT WAS A PASSENGER SUCH THAT THE DRIVER COULD NOT LEAVE THE AREA, THE POLICE DID NOT HAVE REASONABLE SUSPICION THAT THE OCCUPANTS OF THE CAR HAD COMMITTED A CRIME; DEFENDANT'S MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED; INDICTMENT DISMISSED (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction and dismissing the indictment, determined the police did not have the requisite reasonable suspicion when they parked behind the vehicle in which defendant was a passenger such that the driver could not leave the area. Therefore defendant's motion to suppress should have been granted:

Police officer testimony at the suppression hearing established that, at the time the officers made the initial stop, they were responding to the sound of multiple gunshots that had originated at or near the gas station, which was known to be a high crime area. The officers also testified, however, that at no time did they visually observe the source of the gunshots, and they did not see any shots emanating from the area where defendant's vehicle was parked. The officers' attention was drawn to defendant's vehicle because, at the time they arrived on the scene, it had collided with another vehicle as it tried to leave the area. Defendant's vehicle was one of a number of vehicles and pedestrians that the police saw trying to leave the gas station due to the ongoing gunfire. Under those circumstances—i.e., where the police are unable to pinpoint the source of the gunfire, and the individuals in defendant's vehicle are not the only potential suspects present at the scene—the evidence does not provide a reasonable suspicion that the individuals in defendant's vehicle had committed, were committing, or were about to commit a crime … . On the record before us, defendant's vehicle was, at most, "simply a vehicle that was in the general vicinity of the area where the shots were heard," which is insufficient to establish reasonable suspicion … . People v Singletary, 2022 NY Slip Op 07392, Fourth Dept 12-23-22

Practice Point: Parking a police car behind a car such that the car cannot leave is a seizure requiring reasonable suspicion a crime has taken place.

DECEMBER 23, 2022

SENTENCING, FOREIGN CONVICTION, PREDICATE FELONY.

THIS WAS NOT A CIRCUMSTANCE WHERE THE ACCUSATORY INSTRUMENTS, AS OPPOSED TO THE LANGUAGE OF THE FLORIDA STATUTE ALONE, CAN BE USED TO DETERMINE WHETHER THE FLORIDA CONVICTION ALLOWED DEFENDANT TO BE SENTENCED AS A SECOND CHILD SEXUAL ASSAULT FELONY OFFENDER; THE FLORIDA STATUTE SHOULD NOT HAVE BEEN DEEMED A PREDICATE FELONY (FOURTH DEPT).

The Fourth Department, reversing County Court, determined defendant's Florida conviction could not serve as a predicate felony allowing defendant to be sentenced as a second child sexual assault felony offender. This was not a circumstance where the underlying accusatory instruments, as opposed to the language of the Florida statute, can be the basis of a predicate-felony analysis. The appellate division's analysis is comprehensive and too detailed to fairly summarize here:

We agree with defendant that consideration of the facts and circumstances of the underlying Florida conviction is impermissible in this case … . "[U]nder a narrow exception to the [general] rule, the underlying allegations must be considered when 'the foreign statute under which the defendant was convicted renders criminal several different acts, some of which would constitute felonies and others of which would constitute only misdemeanors [or no crime] if committed in New York' " … . "In those circumstances, the allegations will be considered in an effort to 'isolate and identify' the crime of which the defendant was accused, by establishing 'which of those discrete, mutually exclusive acts formed the basis of the charged crime' " … . * * *

… [W]e conclude that "[b]ecause the [Florida] statute, itself, indicates that a person can be convicted of the [Florida] crime without committing an act that would qualify as a felony in New York (i.e., by [instead committing the

misdemeanor of sexual misconduct]), defendant's [Florida] conviction for [lewd or lascivious battery] was not a proper basis for a predicate felony offender adjudication" … . People v Gozdziak, 2022 NY Slip Op 07377, Fourth Dept 12-23-22

Practice Point: Here the Florida statute, and not the accusatory instruments in the Florida prosecution, is the only proper basis for the predicate-felony analysis. The Florida statute should not have served as a predicate felony to allow defendant to be sentenced as a second child sexual assault felony offender.

DECEMBER 23, 2022

SENTENCING.

BEFORE SENTENCING DEFENDANT AS A SECOND VIOLENT FELONY OFFENDER, THE COURT DID NOT MAKE A FINDING WHETHER THE TEN-YEAR LOOK-BACK FOR ANY PREDICATE VIOLENT FELONY WAS TOLLED BY A PERIOD OF INCARCERATION; THE ISSUE SURVIVES A WAIVER OF APPEAL AND WAS PROPERLY RAISED FOR THE FIRST TIME ON APPEAL; MATTER REMITTED FOR RESENTENCING (THIRD DEPT).

The Third Department, remitting the matter for resentencing, determined the court did not make a finding about whether the 10-year look-back for a predicate violent felony was tolled by periods of incarceration. The issue survives a waiver of appeal and, because the issue is clear from the record, was properly raised for the first time on appeal:

To qualify as a predicate violent felony, the sentence for the prior violent felony "must have been imposed not more than [10] years before commission of the felony of which the defendant presently stands convicted" (Penal Law § 70.04 [1] [b] [iv]). "In calculating this 10-year look-back period, 'any period of time during which the person was incarcerated for any reason between the time of commission of the previous felony and the time of commission of the present felony shall be excluded and such 10-year period shall be extended by a period or periods equal to the time served under such incarceration'" … .

The instant offense occurred on March 3, 2018. Prior to sentencing, the People filed a predicate statement indicating that defendant had previously been convicted of a violent felony in 2004 … . The People also submitted a presentence report which demonstrated that defendant was convicted of additional felonies in 2010 and 2014, but — as the People concede — neither the predicate statement nor the presentence report established the time periods during which defendant was incarcerated during the time between the two violent felonies in order to toll the 10-year look-back period … . People v Faulkner, 2022 NY Slip Op 06957, Third Dept 12-8-22

Practice Point: Before sentencing defendant as a second violent felony offender, the sentencing court did not make a finding whether the ten-year look-back for a predicate violent felony was tolled by a period of incarceration. The issue survives a waiver of appeal and was properly raised for the first time on appeal. The matter was remitted for resentencing.

DECEMBER 8, 2022

SENTENCING.

THE FELONY WHICH WAS THE BASIS FOR DEFENDANT'S SECOND FELONY OFFENDER STATUS DID NOT MEET THE CRITERIA FOR A PREDICATE FELONY (THIRD DEPT).

The Third Department, reversing County Court, determined the felony which was the basis of defendant's second felony offender status did not meet the criteria for a predicate felony:

In order for a prior conviction to constitute a predicate felony, the "sequentiality requirement" must be satisfied, which means "that the 'sentence upon such prior conviction must have been imposed before commission of the present felony'" … . Defendant was sentenced on the predicate felony forming the basis for her second felony status on the same day that she was sentenced on the instant offense. As such, that felony offense — referenced in the predicate felony information as an August 27, 2020 conviction for criminal sale of a controlled substance in the fifth

degree — could not be used to meet the requirements for sentencing defendant as a second felony offender on the instant offense. People v Hayes, 2022 NY Slip Op 06965, Third Dept 12-8-22

Practice Point: In order to meet the criteria for a predicate felony re: second felony offender status, the sentence for the prior conviction must have been imposed before the instant felony was committed.

DECEMBER 8, 2022

SENTENCING.

UPON REMITTAL AFTER THE INITIAL PERSISTENT FELONY OFFENSE SENTENCE WAS OVERTURNED, THE SENTENCING COURT PROPERLY RELIED ON ADDITIONAL INFORMATION TO AGAIN SENTENCE DEFENDANT AS A PERSISTENT FELONY OFFENDER (CT APP).

The Court of Appeal, reversing the Appellate Division, over an extensive dissent, determined the sentencing court, upon remittal after the initial persistent violent felony offender sentence was overturned on appeal, properly relied on additional information to again sentence defendant as a persistent violent felony offender:

Upon the appeal from defendant's judgment of conviction and original sentence as a persistent violent felony offender in 2013, the People conceded that defendant's prior incarceration dates did not provide sufficient tolling to qualify his 1987 conviction as a requisite predicate offense … . …

On remittal, Supreme Court resentenced defendant as a persistent violent felony offender, relying on supplemental evidence of defendant's prior incarceration brought to the court's attention in connection with collateral motion practice. Defendant appealed, and the Appellate Division, with one Justice dissenting, vacated defendant's resentence and remitted for a second time. …

At the time of resentencing, Supreme Court was on notice of the supplemental evidence of defendant's prior incarceration, which conclusively demonstrates that defendant is, in fact, a persistent violent felony offender. … [T]he Appellate

Division did not limit its remittal …. … Supreme Court was not precluded from imposing the statutorily required sentence based on the evidence before it, particularly given that court's "inherent authority to correct illegal sentences" … . People v Kaval, 2022 NY Slip Op 07022, CtApp 12-13-22

Practice Point: Here the appellate division overturned defendant's sentence as a persistent felony offender because sufficient tolling of the ten-year lookback due to defendant's incarceration was not demonstrated. The appellate division did not limit its remittal. Therefore, on remittal the sentencing court properly relied upon additional information about defendant's incarceration which tolled the ten-year lookback and sentenced defendant again as a persistent felony offender.

DECEMBER 13, 2022

SEX OFFENDER REGISTRATION ACT (SORA), FOREIGN FELONY, SEXUALLY VIOLENT OFFENDER STATUS.

IF A DEFENDANT IS CONVICTED OF A FELONY IN A FOREIGN JURISDICTION WHICH REQUIRES THE DEFENDANT TO REGISTER AS A SEX OFFENDER, THE DEFENDANT WILL BE DESIGNATED A SEXUALLY VIOLENT OFFENDER IN NEW YORK EVEN IF THE FOREIGN FELONY DID NOT INVOLVE VIOLENCE (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Troutman, over a dissent, determined a defendant who has been convicted in a foreign jurisdiction of a felony for which the defendant was required to register as a sex offender must be designated a sexually violent offender in New York, even if the foreign offense did not involve violence:

The statutory language is clear and unambiguous: "a felony in any other jurisdiction for which the offender is required to register as a sex offender" therein is, under subdivision (3), a "sexually violent offense" … . "As a general rule, unambiguous language of a statute is alone determinative" … . * * *

Defendant—and the many learned judges, lawyers, and legal scholars—may well be correct that subdivision (3) (b)'s foreign jurisdiction clause contains a legislative drafting error, but that does not give the courts license to ignore it. Courts must not "legislate under the guise of interpretation" … . If we were to take it upon ourselves to delete subdivision (3) (b)'s foreign registration clause as the Committee suggested the legislature should do, we would be impinging on the province of the legislature … . Thus, we are constrained to construe subdivision (3) (b)'s foreign registration clause according to its plain language. If the legislature did err, we unequivocally call upon it to remedy that error … . People v Talluto, 2022 NY Slip Op 07025, CtApp 12-13-22

Practice Point: If a defendant has been convicted of a felony in another state which requires the defendant to register as a sex offender in that state, the defendant will be designated a sexually violent offender in New York, even if the out-of-state conviction did not involve violence.

DECEMBER 13, 2022

SEX OFFENDER REGISTRATION ACT (SORA).

DEFENDANT IN THIS SORA RISK-ASSESSMENT PROCEEDING REQUESTED A DOWNWARD DEPARTURE WHICH WAS NOT ADDRESSED BY COUNTY COURT; THE ORDER WAS REVERSED AND THE MATTER SENT BACK FOR THE RELEVANT FINDINGS OF FACT AND CONCLUSIONS OF LAW (THIRD DEPT).

The Third Department, reversing County Court, determined defendant's request for a downward departure in the SORA risk-assessment proceeding was not addressed by the court. The matter was sent back for the relevant findings of fact and conclusions of law:

County Court failed to address his request for a downward departure. We agree and, inasmuch as County Court did not set forth on the record any findings or conclusions on the request, we are unable to assess the court's reasoning for the implicit denial thereof. "Consequently, we reverse and remit so that County Court

may determine whether or not to order a departure from the presumptive risk level indicated by the offender's guidelines factor score and to set forth its findings of fact and conclusions of law as required" … . People v Howland, 2022 NY Slip Op 06967, Third Dept 12-8-22

Practice Point: In a SORA risk-assessment proceeding, if the defendant requests a downward departure, the court must address the request and make the relevant findings of fact and conclusions of law.

DECEMBER 8, 2022

SPEEDY TRIAL.

UPON REMITTITUR FROM THE COURT OF APPEALS, THE APPELLATE DIVISION AGAIN FOUND THE SEVEN-YEAR PREINDICTMENT DELAY DID NOT DEPRIVE DEFENDANT OF DUE PROCESS OF LAW (FOURTH DEPT).

The Fourth Department, upon remittal from the Court of Appeals, determined defendant was not deprived of his right to due process by the seven-year preindictment delay. The Fourth Department had reached that same conclusion before the matter was heard by the Court of Appeals. The Court of Appeals sent the matter back because it found the Fourth Department did not correctly analyze the case under the Taranovich (37 NY2d 442, 445 [1975]) factors:

After review of defendant's contention upon remittitur, we conclude that he was not deprived of due process of law by the preindictment delay. In determining whether defendant was deprived of due process, we must consider the factors set forth in Taranovich, which are: "(1) the extent of the delay; (2) the reason for the delay; (3) the nature of the underlying charge; (4) whether or not there has been an extended period of pretrial incarceration; and (5) whether or not there is any indication that the defense has been impaired by reason of the delay" … . "[N]o one factor [is] dispositive of a violation, and [there are] no formalistic precepts by which a deprivation of the right can be assessed" … , but "it is well established that the extent of the delay, standing alone, is not sufficient to warrant a reversal" … . People v Johnson, 2022 NY Slip Op 07407, Fourth Dept 12-23-22

Practice Point: The seven-year preindictment delay, applying the Taranovich factors, did not deprive defendant of due process of law.

DECEMBER 23, 2022

SUPERIOR COURT INFORMATION.

THE FELONY COMPLAINT CHARGED DEFENDANT WITH RAPE FIRST (FORCIBLE COMPULSION); THE SUPERIOR COURT INFORMATION (SCI) CHARGED RAPE THIRD (LACK OF CONSENT); BECAUSE RAPE THIRD AS CHARGED IN THE SCI WAS NOT A LESSER INCLUDED OFFENSE OF RAPE FIRST AS CHARGED IN THE FELONY COMPLAINT, THE WAIVER OF INDICTMENT AND SCI WERE JURISDICTIONALLY DEFECTIVE (THIRD DEPT).

The Third Department, reversing defendant's conviction by plea to a superior court information (SCI), determined the SCI did not charge the felony charged in the felony complaint (rape first) or a lesser included offense rendering the waiver of indictment and SCI jurisdictionally defective. The SCI charged rape third based upon lack of consent:

Although we acknowledge that "it is unnecessary to forcibly compel another to engage in sexual acts unless that person is an unwilling participant" … , it is nevertheless theoretically possible for one to use physical force to compel a victim to have sexual intercourse where the victim did not clearly express nonconsent. … [O]ne who commits the greater crime of rape in the first degree by forcible compulsion through physical force does not, by the same conduct, necessarily commit the lesser offense of rape in the third degree in which the victim expressly communicated his or her non-consent … . Consequently, rape in the third degree as charged in the SCI to which defendant pleaded guilty is not a lesser included offense of rape in the first degree as charged in the felony complaint … . People v Odu, 2022 NY Slip Op 07266, Third Dept 12-22-22

Practice Point: Here the felony complaint charged rape first (forcible compulsion) and the superior court information (SCI) charged rape third (lack of consent).

Therefore the offense charged in the SCI was not a lesser included offense of the offense charged in the felony complaint, rendering the waiver of indictment and SCI jurisdictionally defective.

DECEMBER 22, 2022

SUPPRESSION, APPEALS.

SUPPRESSION OF THE WEAPON WAS PROPERLY DENIED, BUT DEFENDANT'S STATEMENT ADMITTING POSSESSION OF THE WEAPON SHOULD HAVE BEEN SUPPRESSED; ALTHOUGH THE HARMLESS ERROR DOCTRINE IS RARELY APPLIED TO UPHOLD A GUILTY PLEA WHERE SUPPRSSION SHOULD HAVE BEEN GRANTED, HERE THE APPELLATE DIVISION DETERMINED THE PLEA WOULD NOT HAVE BEEN AFFECTED BY SUPPRESSION OF THE STATEMENT; THE DISSENT DISAGREED (FOURTH DEPT).

The Fourth Department, over a dissent, determined defendant's guilty plea to possession of a weapon could not have been affected by the failure to suppress his statement admitting possession of the weapon. The Fourth Department determined the statement was a product of unwarned custodial interrogation:

'The term "interrogation" under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response' " … . "Although the police may ask a suspect preliminary questions at a crime scene in order to find out what is transpiring . . . , where criminal events have been concluded and the situation no longer requires clarification of the crime or its suspects, custodial questioning will constitute interrogation" … . Here, after defendant had been restrained and handcuffed, an officer asked defendant, "what's going on? Are you all right? Are you okay?" Defendant responded, "you saw what I had on me. I was going to do what I had to do." We conclude that the interaction between defendant and the officer "had traveled far beyond a 'threshold crime scene inquiry' " and, under the

circumstances, it was likely that the officer's particular questions " 'would elicit evidence of a crime and, indeed, it did elicit an incriminating response' " … . …

"[W]hen a conviction is based on a plea of guilty an appellate court will rarely, if ever, be able to determine whether an erroneous denial of a motion to suppress contributed to the defendant's decision, unless at the time of the plea he [or she] states or reveals his [or her] reason for pleading guilty" (People v Grant, 45 NY2d 366, 379-380 [1978]). "The Grant doctrine is not absolute, however, and [the Court of Appeals has] recognized that a guilty plea entered after an improper court ruling may be upheld if there is no 'reasonable possibility that the error contributed to the plea' " … . People v Robles, 2022 NY Slip Op 07336, Fourth Dept 12-23-22

Practice Point: This case is rare exception to the rule that a guilty plea will not stand if a suppression motion should have been granted. Here the appellate division determined suppression of defendant's statement admitting possession of the weapon would not have affected his decision to plead guilty because the weapon itself had not been suppressed. There was a dissent.

DECEMBER 23, 2022

SUPPRESSION, APPEALS.

THE WAIVER OF APPEAL WAS INVALID; THE SUPPRESSION MOTION SHOULD NOT HAVE BEEN DENIED ON A GROUND NOT RAISED BY THE PEOPLE; AND AN APPELLATE COURT CAN NOT CONSIDER ARGUMENTS ON ISSUES NOT RULED ON BELOW (FIRST DEPT).

The First Department, reversing defendant's conviction by guilty plea and the denial of defendant's motion to suppress, over an extensive dissent, determined defendant's waiver of appeal was invalid, the motion to suppress should not have been denied on a ground not raised by the parties, and the appellate court cannot rule on issues not decided below:

… [T]he court conflated defendant's appellate and trial rights by asking the defendant "[i]s that what you wish to do to waive your right to appeal and your

other rights . . . by pleading guilty[?]" Instead, the majority of the court's colloquy of defendant's appellate rights focused on sentencing, on which the court itself needed clarification, not in differentiating trial from appellate rights.

… [T]he court made other errors in its oral colloquy that further justify invalidating defendant's waiver of his appellate rights. Specifically, the court failed to advise defendant of the nature of the right to appeal … , erroneously mischaracterized the finality of the waiver … , and failed to discuss the written waiver form with defendant … . The detailed written waiver that defendant executed with counsel cannot save the numerous errors in the court's oral colloquy, as "'a written waiver is not a complete substitute for an on-the-record explanation of the nature of the right to appeal'" … . * * *

… [A]bsent "on-the-record acknowledgements of [defendant's clear] understanding" … of his appellate rights waiver, the presumption of defense counsel's competent representation during the plea negotiations is simply insufficient to overcome the court's deficient colloquy … . * * *

… [T]he People never disputed that defendant had standing to challenge the search warrant. Therefore, the court should not have denied the motion "based on a ground not raised by the People" … . … [T]he People's current arguments on appeal are precluded by People v LaFontaine (92 NY2d 470, 474 [1998]) because the suppression court did not rule upon these issues, and this Court may not affirm on those alternative grounds … . People v Bonilla, 2022 NY Slip Op 07304, First Dept 12-22-22

Practice Point: Here the waiver of appeal was deemed invalid and there was an extensive dissent on that issue. The motion to suppress should not have been denied on a ground not raised by the People. An appellate court cannot consider issues not ruled on below.

DECEMBER 22, 2022

TEMPORARY AND LAWFUL USE OF A WEAPON.

THE DEFENDANT, THINKING THAT THE PERSON TRYING TO BREAK-IN WAS HER ESTRANGED HUSBAND WHO HAD BROKEN IN AND ATTACKED HER BEFORE, FIRED A SINGLE SHOT THROUGH THE METAL DOOR, KILLING THE VICTIM (WHO WAS NOT HER ESTRANGED HUSBAND); BECAUSE HER USE OF THE WEAPON WAS DEEMED DANGEROUS AND RECKLESS, DEFENDANT WAS NOT ENTITLED TO THE TEMPORARY AND LAWFUL USE OF A WEAPON JURY INSTRUCTION (CT APP).

The Court of Appeals, reversing the appellate division, determined the defendant was not entitled to the temporary and lawful possession of a weapon jury instruction in this murder case. Defendant thought the person trying to get into her house was her estranged husband who had broken in and attacked her before. She fired one shot through the metal door, killing the victim (who was not her estranged husband). Defendant was convicted of criminal possession of a weapon and acquitted of murder and tampering with evidence. The appellate division reversed, finding defendant was entitled to the temporary and lawful possession of a weapon instruction. The Court of Appeals reversed, finding that the jury instruction was not warranted:

A defendant is entitled to a jury charge on the defense of temporary and lawful possession when there is evidence presented at trial "'showing a legal excuse for . . . possession as well as facts tending to establish that, once possession has been obtained, the weapon had not been used in a dangerous manner'" … . Here, defendant used the weapon in a dangerous manner … . Although no single fact is dispositive, she fired the gun blindly through a closed, windowless door, endangering anyone who might have been on the other side, striking and killing the victim, and creating a risk that the bullet would ricochet off the metal door and potentially injure her children.

Viewing the evidence adduced at trial in the light most favorable to defendant, as we must … , we conclude that "'no reasonable view of the evidence would support a finding of the tendered defense'" of temporary and lawful possession and, thus, County Court was "'under no obligation to submit the question to the jury'" … . Inasmuch as defendant's actions were reckless and dangerous, she was not entitled

to the temporary and lawful possession charge. People v Ruiz, 2022 NY Slip Op 07092, CtApp 12-15-22

Practice Point: Use of a weapon which is deemed dangerous and reckless, here shooting through a metal door, precludes instructing the jury on the temporary and lawful use of a weapon.

DECEMBER 15, 2022

TRAFFIC STOPS.

THE MAJORITY CONCLUDED THE TRAFFIC STOP, THE 40-MINUTE DETENTION, THE CALLING OF DEFENDANT'S PAROLE OFFICER, AND THE SEARCH OF DEFENDANT'S CAR BY THE PAROLE OFFICER, WERE VALID; TWO DISSENTERS ARGUED THE JUSTIFICATION FOR FURTHER DETENTION AROSE ONLY AFTER THE JUSTIFICATION FOR THE LIMITED DETENTION BASED ON THE TRAFFIC STOP HAD DISSIPATED (THIRD DEPT).

The Third Department, over a two-justice dissent, determined the traffic stop for rolling through a stop sign and the extended 40-minute detention and the search of the vehicle were valid. The dissenters argued that rolling through the stop sign justified only a limited detention. The facts described by the majority are too detailed to fairly summarize. When the officers stopped the car, they were aware of defendant's legal history and parole status. The defendant was outside the geographical limit of his parole conditions: The defendant's parole officer was called to the scene and he conducted a search of the car pursuant to parole rules:

Defendant's multiple and inconsistent explanations about his travels, which the police officers knew were false, coupled with his parole situation and his nervous demeanor throughout the encounter, combined to give the officers a founded suspicion of criminality … . As such, the police officers were authorized to extend the scope of the stop beyond its original justification by requesting consent to search defendant's vehicle and, upon denial, detaining defendant to await a canine sniff of the vehicle's exterior … . * * *

Given that defendant was placed on lifetime parole in 1999 due to illegal narcotics activity, we conclude that Pirozzolo's [the parole officer's] decision to search the vehicle was reasonable and substantially related to the performance of his duties … .

From the dissent:

Defendant did give conflicting answers in response to [officer] Linehan's inquiry, and County Court found that such answers, coupled with defendant's nervous demeanor and parole status, gave Linehan founded suspicion that criminality was afoot. These answers and behavior by defendant, however, came after the initial justification for stopping and detaining defendant had already dissipated … . Indeed, between the time when Linehan effectuated the traffic stop and processed defendant's license and registration, Linehan did not observe anything suspicious by defendant so as to give him founded suspicion that criminality was afoot in order to continue defendant's detention … . People v Thomas, 2022 NY Slip Op 07263, Third Dept 12-22-22

Practice Point: Here the majority concluded the traffic stop, the 40-minute detention, calling the defendant's parole officer, and the search of the car by the parole officer, were valid. Two dissenters argued only the limited initial detention related to the traffic stop for rolling through a stop sign was justified.

DECEMBER 22, 2022

VEHICLE AND TRAFFIC LAW, SPEEDING, VISUAL ESTIMATE OF SPEED.

THE PEOPLE DID NOT DEMONSTRATE THE POLICE OFFICER HAD SUFFICIENT TRAINING AND EXPERIENCE TO VISUALLY ESTIMATE THE SPEED OF DEFENDANT'S CAR; SUPPRESSION SHOULD HAVE BEEN GRANTED IN THIS SPEEDING CASE (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction, determined the People did not demonstrate the defendant was speeding. No radar gun was used and the

officer estimated defendant's speed. The People did not demonstrate the officer had sufficient training and experience to support the speed-estimate:

At the suppression hearing, the officer testified that he stopped the vehicle after he visually estimated defendant's speed at 82 miles per hour in a 65 mph zone, and there was no testimony that the officer used a radar gun to establish defendant's speed. While it is well-settled that a qualified police officer's testimony that he or she visually estimated the speed of a defendant's vehicle may be sufficient to establish that a defendant exceeded the speed limit … , here, the People failed to establish the officer's training and qualifications to support the officer's visual estimate of the speed of defendant's vehicle … . Thus, inasmuch as the People failed to meet their burden of showing the legality of the police conduct in stopping defendant's vehicle in the first instance, we conclude that the court erred in refusing to suppress the physical evidence and defendant's statements obtained as a result of the traffic stop. Because our determination results in the suppression of all evidence supporting the crime charged, the indictment must be dismissed … . People v Reedy, 2022 NY Slip Op 07397, Fourth Dept 12-23-22

Practice Point: Although a police officer's visual estimate of a vehicle's speed may be sufficient to support a speeding conviction, the People must show the officer had sufficient training and experience to make the speed-estimate, which was lacking in this case.

DECEMBER 23, 2022