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Criminal Law
Reversal Report
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APPEALS, SENTENCING, POST RELEASE SUPERVISION, CONSTITUTIONAL LAW, PERSISTENT FELONY OFFENDER DESIGNATION.

WHEN DEFENDANT PLED GUILTY IN 2002 HE WAS NOT INFORMED OF THE PERIOD OF POST RELEASE SUPERVISION (PRS) AND HE DID NOT MOVE TO WITHDRAW THE PLEA IIN 2010 WHEN PRS WAS ADDED TO HIS SENTENCE; DEFENDANT DID NOT WAIVE HIS RIGHT TO CONTEST THE CONSTITUTIONALITY OF THE 2002 CONVICTION RE: A PERSISTENT FELONY OFFENDER DESIGNATION (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant should have been allowed to contest the constitutionality of his 2002 conviction because he was not informed of the period of post release supervision (PRS) before he pled guilty. Defendant's failure to move to withdraw the 2002 plea when he was resentenced in 2010 to add PRS to his sentence did not waive his right to claim prejudice in a challenge to the constitutionality of a predicate felony:

At the persistent violent felony offender proceeding in this case, defendant claimed that he would have gone to trial in the 2002 case had he known that PRS would ultimately be a consequence of his plea … . The sentencing court conducted a hearing on this claim, which included defendant's testimony. After the hearing, the court expressly declined to rule on this claim of prejudice. Instead, the court ruled that defendant was barred from making such a challenge because he declined an opportunity to withdraw his 2002 plea when he was resentenced in 2010. However, that opportunity, offered when defendant had only weeks left to serve on the 8½ year sentence imposed in 2002, would not have provided a remedy for the constitutional defect that defendant is claiming, which is that he would not have pleaded guilty in 2002 had he known of the ultimate PRS component of his sentence. Accordingly, we find that defendant's 2010 failure to withdraw the 2002 plea did not waive his right to claim prejudice in the context of a challenge to the constitutionality of a predicate felony, and we remand for a ruling on that claim. People v Graham, 2023 NY Slip Op 01852, First Dept 4-6-23

Practice Point: Defendant was not informed of the period of post release supervision (PRS) when he pled guilty in 2002 and did not move to withdraw his plea when PRS

was added in 2010. Defendant did not waive his right to attack the constitutionality of the 2002 conviction in this persistent felony offender proceeding.

APRIL 6, 2023

APPEALS, WEIGHT OF THE EVIDENCE.

DEFENDANT'S BURGLARY CONVICTION WAS BASED SOLELY ON A SODA CAN WITH HIS DNA ON IT; THE CONVICTION WAS AGAINST THE WEIGHT OF THE EVIDENCE (FIRST DEPT).

The First Department determined the burglary conviction was against the weight of the evidence:

The verdict convicting defendant of a burglary of a doctor's office that occurred in July 2015 was against the weight of the evidence … . Defendant was connected to this burglary solely through the presence of his DNA on an opened soda can in the reception area. The office manager's testimony failed to address whether there was any innocent explanation for the presence of defendant, or of the soda can, at that location. … . People v Taylor, 2023 NY Slip Op 01848, First Dept 4-6-23

Practice Point: Defendant was convicted of the burglary of a doctor's office based solely on the presence of a soda can with his DNA on it in the reception area. The testimony did not address whether there was an innocent explanation for the presence of the soda can. The conviction was against the weight of the evidence.

APRIL 6, 2023

ASSAULT, DANGEROUS INSTRUMENT.

THE ASSAULT SECOND CONVICTION WAS REVERSED BECAUSE PROOF A BAMBOO STICK WAS A "DANGEROUS INSTRUMENT" WAS LEGALLY INSUFFICIENT; ASSAULT THIRD CONVICTION VACATED AS AN INCLUSORY CONCURRENT COUNT OF ASSAULT SECOND (SECOND DEPT).

The Second Department determined the assault second conviction was not supported by legally sufficient evidence that a bamboo stick was a "dangerous instrument:"

The defendant … contends that the evidence was legally insufficient to support her convictions of assault in the second degree pursuant to Penal Law § 120.05(2) …

and criminal possession of a weapon in the fourth degree based on the People's theory that a bamboo stick the defendant used to discipline the child was a dangerous instrument. Although the defendant's contention is unpreserved for appellate review (see CPL 470.05[2]), we reach the issue in the exercise our interest of justice jurisdiction (see id. § 470.15[6][a]). A "dangerous instrument" is defined as "any instrument . . . which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or other serious physical injury" (Penal Law § 10.00[13]). "Serious physical injury" is defined as "physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ" (Penal Law § 10.00[10]). Here, viewing the evidence in the light most favorable to the prosecution, it was legally insufficient to establish that the bamboo stick, which was not produced at trial, "was readily capable of killing or maiming [the child], or of causing any of the other severe harms described in Penal Law § 10.00(10)" … .

Further, the defendant's conviction of assault in the third degree pursuant to Penal Law § 120.00(1) must be vacated, and that count of the indictment dismissed, as an inclusory concurrent count of assault in the second degree pursuant to Penal Law § 120.05(9) … . People v Weng, 2023 NY Slip Op 02134, Second Dept 4-26-23

Practice Point: Here the assault second conviction was not supported by legally sufficient proof a bamboo stick was a "dangerous instruction." The assault third conviction was vacated as an inclusory concurrent count of assault second.

APRIL 26, 2023

FAMILY COURT, JUVENILES.

WHEN A JUVENILE PLEADS GUILTY TO AN OFFENSE FOR WHICH HE CANNOT BE HELD CRIMINALLY RESPONSIBLE, THE CONVICTION MUST BE VACATED AND DISMISSED (FIRST DEPT).

The First Department, vacating defendant's conviction by guilty plea, determined that because defendant, a juvenile, cannot be held criminally responsible for the crime to which he pled guilty, the conviction must be vacated rather than sent to Family Court:

The People are correct that where a juvenile is charged with a crime for which he may not be criminally responsible, as well as others for which he may be criminally responsible, Supreme Court may assume jurisdiction over the case … . However, if convicted of a crime for which he cannot be criminally responsible, Supreme Court then "must order that the verdict be deemed vacated and replaced by a juvenile delinquency fact determination," and remove the matter to Family Court … .

Here … defendant was convicted, by a plea of guilty to a crime to which he cannot be criminally responsible. This was not a case where a jury returned a verdict of guilty to the charge of criminal possession of a weapon in the second degree, thus requiring Supreme Court to transfer the case to Family Court for disposition … . Rather, the People specifically requested that in addition to the charge of attempted murder in the second degree, defendant enter a plea of guilty to the fifth count charging criminal possession of a weapon in the second degree, a crime for which the People now concede that defendant cannot be held criminally responsible. Given this, defendant's conviction for criminal possession of a weapon in the second degree must be vacated and that charge dismissed. People v Raul A., 2023 NY Slip Op 01970, First Dept 4-18-23

Practice Point: If a juvenile goes to trial on offenses which include those for which a juvenile cannot be held criminally responsible, the court can assume jurisdiction over all the offenses. If convicted after trial of an offense for which a juvenile is not criminally responsible, the conviction is vacated and the matter is sent to Family Court for disposition. But if, as here, the conviction is by guilty plea it must be vacated and dismissed.

APRIL 18, 2023

FAMILY OFFENSES, JUDGES.

THIS FAMILY OFFENSE PROCEEDING WAS REMITTED TO FAMILY COURT; APPELLATE REVIEW WAS NOT POSSIBLE IN THE ABSENCE OF FINDINGS OF FACT ADDRESSING CONFLICTING EVIDENCE AND THE CREDIBILITY OF WITNESSES (SECOND DEPT).

The Second Department, remitting the matter to Family Court in this family offense proceeding, noted that appellate review was impossible without findings of fact:

The determination of whether a family offense was committed is a factual issue to be resolved by the hearing court, and that court's determination regarding the credibility of witnesses is entitled to great weight on appeal unless clearly unsupported by the record … .

Effective appellate review requires that appropriate factual findings be made by the hearing court since it is the court best able to measure the credibility of the witnesses … . In granting or denying a petition for an order of protection, the Family Court must state the facts deemed essential to its determination (see CPLR 4213[b] …). Remittal is not necessary, however, where the record is sufficient for this Court to conduct an independent review of the evidence … .

Here, the Family Court, which was presented with sharply conflicting accounts by the parties regarding their allegations, issued mutual orders of protection without setting forth any findings with respect to the credibility of the parties or the facts deemed essential to its determinations (see CPLR 4213[b]). Since the record presents factual issues, including questions of credibility, and in light of the conflicting allegations made by the parties against each other, resolution thereof is best left to the court of first instance … . Matter of Sealy v Peart, 2023 NY Slip Op 02128, Second Dept 4-26-23

Practice Point: Here in this family offense proceeding appellate review was not possible because the Family Court judge did not make any findings addressing conflicting evidence and the credibility of witnesses. The matter was remitted because the record was not sufficient for an independent review.

APRIL 26, 2023

FAMILY OFFENSES.

THE EVIDENCE SUPPORTED HARASSMENT AS A FAMILY OFFENSE BUT DID NOT SUPPORT AGGRAVATED HARASSMENT OR DISORDERLY CONDUCT (FOURTH DEPT).

The Fourth Department, reversing (modifying) Family Court in this family offense proceeding, determined harassment was supported by the evidence but disorderly conduct and aggravated harassment were not:

The undisputed evidence at the fact-finding hearing established that the parties had dated more than a decade earlier and that, after petitioner terminated the relationship, respondent continued to contact her, prompting petitioner to obtain at least two orders of protection against him. After years of not seeing each other, respondent went to petitioner's house uninvited on October 28, 2021 and rang the doorbell. When petitioner answered the door, respondent said that she owed him a conversation. Petitioner responded that she did not want to talk to him and repeatedly asked him to leave. Respondent refused to leave, prompting petitioner to call the police. Respondent eventually left before the police arrived. Approximately six weeks later, respondent again went to petitioner's house uninvited and demanded to speak to her. Petitioner asked him to leave at least a dozen times, but respondent ignored those requests and entered her garage where she was standing. The police arrived shortly thereafter and took respondent into custody, charging him with trespass.

In our view, Family Court properly determined that respondent committed the family offense of harassment in the second degree by engaging in a course of conduct or repeatedly committing acts that alarmed or seriously annoyed petitioner while having the intent to harass, annoy or alarm petitioner (see Penal Law § 240.26 [3] …). We agree with respondent, however, that petitioner failed to meet her burden of establishing by a fair preponderance of the evidence that respondent committed the family offenses of disorderly conduct (§ 240.20) or aggravated harassment in the second degree (§ 240.30 [1]). Matter of Ohler v Bartkovich, 2023 NY Slip Op 02256, Fourth Dept 4-29-23

Practice Point: Here the facts supported harassment as a family offense but did not support aggravated harassment or disorderly conduct.

APRIL 28, 2023

INCLUSORY CONCURRENT COUNTS.

THE MURDER SECOND DEGREE COUNTS MUST BE DISMISSED AS INCLUSORY CONCURRENT COUNTS OF MURDER FIRST DEGREE (THIRD DEPT).

The Third Department determined the second degree murder counts must be dismissed as inclusory concurrent counts of defendant's murder first degree convictions:

… [W]e agree with defendant's contention that his convictions for second degree murder (counts 2 and 3) must be dismissed as inclusory concurrent counts of his convictions for murder in the first degree (counts 7, 8 and 9) (see CPL 300.40 [3] [b]). People v Burton, 2023 NY Slip Op 01919, Third Dept 4-13-23

Practice Point: Here the murder second degree convictions were reversed as inclusory concurrent counts of the murder first degree convictions.

APRIL 13, 2023

JURORS, JUDGES.

THE JUDGE IMPROPERLY DISMISSED A JUROR WHEN SHE DIDN'T APPEAR WITHOUT MAKING AN INQUIRY; NEW TRIAL ORDERED (THIRD DEPT).

The Third Department, reversing defendant's conviction and ordering a new trial, over a concurrence, determined judge improperly dismissed a juror in the absence of an adequate inquiry:

After juror No. 1 was selected and sworn in, but before jury selection had concluded, County Court made a record that juror No. 1 "needed to go home due to some health issues" but was advised, and agreed, to return the next day at 9:00 a.m. However, as of 9:28 a.m. the next morning, the court noted that juror No. 1 had not returned and, because the juror had left ill the prior day, the court found it "necessary to just replace her with the first alternate at this point." Defense counsel then registered an exception to the court's replacement of juror No. 1 … . Thereafter, County Court failed to conduct any inquiry regarding the absence of

juror No. 1. When asked whether the court had received any notification from the juror, the court responded, "No. Basically, I don't have juror number one. She's just plain not here. She left early yesterday ill . . . . So, we are going to replace juror number one." Although replacement of a juror is generally left to the court's discretion, "[w]ithout a reasonably thorough inquiry, . . . the exercise of the court's discretion on the ultimate issue of whether or not to replace the juror [was] uninformed" … .. County Court was certainly not required to wait two hours before substituting juror No. 1, but, on the record before us, it impermissibly presumed that she was "unavailable for continued service without conducting the requisite reasonably thorough inquiry and determining that [the] juror [was] not likely to appear within two hours" … . People v Watts, 2023 NY Slip Op 02144, Third Dept 4-27-23

Practice Point: Here a juror didn't show up at 9:30 a.m. and the judge replaced her without making an inquiry. Defense counsel preserved the error by registering an exception. A new trial was ordered.

APRIL 27, 2023

SENTENCING, JUDGES, CIVIL PROCEDURE, CONTRACT LAW.

THE BRAKES FAILED ON A LIMOUSINE OWNED BY PETITIONER AND 20 PEOPLE DIED; PETITIONER PLED TO 20 COUNTS OF CRIMINALLY NEGLIGENT HOMICIDE AND, PURSUANT TO A PLEA AGREEMENT, WAS SENTENCED TO PROBATION AND COMMUNITY SERVICE; BECAUSE OF A TECHNICAL DEFECT IN THE SENTENCE, PETITIONER APPEARED FOR RESENTENCING BEFORE A DIFFERENT JUDGE WHO DECIDED TO IMPOSE PRISON TIME; PETITIONER WITHDREW HIS PLEA, THE MATTER WAS SET FOR TRIAL AND PETITIONER BROUGHT THIS ARTICLE 78 PROCEEDING TO REINSTATE THE ORIGINAL SENTENCE; THE PETITION WAS DENIED OVER A DISSENT (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Ceresia, over a dissent. denied the petition to reinstate the original sentence in the prosecution of the owner of a limousine service. The brakes failed on one of petitioner's limousines and the driver, 17 passengers and two pedestrians were killed. Petitioner pled guilty to 20

counts of criminally negligent homicide and was sentenced to two years of interim probation, community service, followed by a period of probation. When it was discovered that the two-year interim probation was illegal, petitioner appeared before a different judge for resentencing, the respondent in this proceeding. The respondent refused to abide by the plea agreement and informed the petitioner he would impose a prison sentence. Petitioner withdrew his plea and the case was set down for trial. Petitioner then brought this Article 78 petition seeking a writ of mandamus, a writ of prohibition and specific performance of the plea agreement. In a complex ruling too detailed to fairly summarize here, the relief was denied. The dissenter argued petitioner was entitled to specific performance of the plea agreement:

Mandamus to compel is an extraordinary remedy, commanding "an officer or body to perform a specified ministerial act that is required by law to be performed. It does not lie to enforce a duty that is discretionary" … . * * *

"… [I]mposing a criminal sentence is never ministerial" … . * * *

… [A] review of the merits leads us to conclude that the issuance of a writ [of prohibition] is unwarranted … . A "defendant [is not] entitled to specific performance of [a] plea bargain unless he [or she has] been placed in a 'no-return position' in reliance on the plea agreement" … . Matter of Hussain v Lynch, 2023 NY Slip Op 02049, Third Dept 4-20-23

Practice Point: This opinion should be consulted for the criteria for a writ of mandamus versus a writ of prohibition in the context of requiring a judge to abide by a plea agreement.

APRIL 20, 2023

SENTENCING.

CONSECUTIVE SENTENCES SHOULD NOT HAVE BEEN IMPOSED RE: CERTAIN WEAPONS-POSSESSION COUNTS (THIRD DEPT).

The Third Department concluded that the sentences on certain weapons-possession counts should not have been imposed consecutively:

The conviction on count 2 stemmed from defendant's possession and intent to use an operable, loaded .357 caliber revolver in violation of Penal Law § 265.03 (1) (b) and his

conviction on count 3 was based upon his mere unlawful possession of that same firearm in violation of Penal Law § 265.03 (3), regardless of any intent to use the weapon. Insofar as defendant's possession of the weapon was a material element of both weapon possession counts, was part of the same act resulting in the murder, and there was no evidence that defendant possessed the weapon with purposes unrelated to his intent to shoot the victim, the sentence imposed on count 3 is modified to run concurrently with the sentence imposed on count 2 … .

County Court also erred in running the sentences on counts 1 and 3 consecutively to one another. "[W]here a defendant is charged with criminal possession of a weapon pursuant to Penal Law § 265.03 (3), as well as a crime involving use of that weapon . . . consecutive sentencing" is allowed "so long as the defendant knowingly unlawfully possesses a loaded firearm before forming the intent to cause a crime with that weapon" … . Here, however, the People's theory of the case, which the jury ultimately believed, was that defendant had already formed the specific intent to kill the victim when he procured the revolver … . People v Graham, 2023 NY Slip Op 01819, Third Dept 4-6-23

Practice Point: Here consecutive sentences should not have been imposed re: certain weapons-possession counts.

APRIL 6, 2023

SEX OFFENDER REGISTRATION ACT (SORA), APPEALS.

BURGLARY AS A SEXUALLY MOTIVATED FELONY IS NOT AN ENUMERATED OFFENSE UNDER SORA, THEREFORE DEFENDANT WAS NOT REQUIRED TO REGISTER AS A SEX OFFENDER; THE WAIVER OF APPEAL WAS INVALID (THIRD DEPT).

The Third Department determined defendant was not required to register as a sex offender because the offense to which he pled guilty, burglary as a sexually motivated felony, is not one of offenses to which SORA applies. In addition, the Third Department held defendant's waiver of appeal was invalid:

… [W]e agree with the analysis of our colleagues in the First and Second Departments concluding that registerable offenses subject to SORA are, by application of the clear statutory text, limited to those crimes expressly identified as "[s]ex offense[s]" pursuant to Correction Law § 168-a (2) … . As burglary in the third degree as a sexually motivated felony is not among the offenses enumerated therein, we agree that defendant was improperly required to register as a sex offender pursuant to SORA … .

…

During the plea colloquy, County Court did not explain that certain appellate rights would survive the waiver of appeal and instead improperly described the rights to be waived as encompassing "any argument" that defendant might take to a higher court … . The written waiver, in turn, states that "[i]t is [defendant's] understanding and intention that [his] plea agreement and sentence will be a complete and final disposition of this case." Although the written appeal waiver also includes qualifying language limiting its application "to all legal issues that can be waived under the law[,]" and the court confirmed that defendant had discussed the waiver with counsel … , we find that the "totality of the circumstances" presented here fails to confirm that defendant understood that some appellate review would survive the waiver … . People v Winter, 2023 NY Slip Op 01820, Third Dept 4-6-23

Practice Point: A defendant may not be required to register as a sex offender if convicted of a crime not listed in the Correction Law. Burglary as a sexually motivated felony is not listed.

Practice Point: The failure to inform the defendant that, despite the waiver of appeal, certain issues remain appealable, renders the waiver of appeal invalid.

APRIL 6, 2023

SEX OFFENDER REGISTRATION ACT (SORA), APPEALS.

DEFENDANT'S "PROMOTING A SEXUAL PERFORMANCE BY A CHILD" CONVICTION WAS REVERSED ON THE LAW; THE DEFENDANT CANNOT BE CLASSIFIED AS A "SEX OFFENDER" (FOURTH DEPT).

The Fourth Department noted that if the underlying conviction has been reversed and the indictment dismissed it can no longer be the basis for classifying the defendant as a "sex offender:"

While this appeal was pending, this Court reversed the judgment convicting defendant of eight counts of promoting a sexual performance by a child as a sexually motivated felony (Penal Law §§ 130.91, 263.15) on the law and dismissed the indictment … .

A "sex offender" includes a person who is convicted of an offense described in Correction Law § 168-a (2) or (3). However "[a]ny [such] conviction set aside pursuant to law is not a conviction" for purposes of the statute (§ 168-a [1]; see § 168-d [1] [a]). Inasmuch as defendant's judgment of conviction has been "set aside pursuant to law" (§ 168-a [1]) by reversal of this Court …, defendant does not

qualify as a "sex offender" within the meaning of SORA, and the risk level determination must be vacated … . People v Congdon, 2023 NY Slip Op 02228, Fourth Dept 4-28-23

Practice Point: Where a sexual-offense conviction has been reversed on the law and the indictment dismissed, the defendant cannot be classified as a "sex offender."

APRIL 28, 2023

SEX OFFENDER REGISTRATION ACT (SORA), ATTORNEYS.

DEFENDANT'S ATTORNEY ESSENTIALLY FAILED TO TAKE ANY POSITION ON THE SORA RISK ASSESSMENT; NEW HEARING ORDERED (SECOND DEPT).

The Second Department, reversing Supreme Court and ordering a new SORA hearing, determined defendant did not receive effective assistance of counsel:

"A sex offender facing risk level classification under SORA has a right to the effective assistance of counsel" … . Here, the defendant's counsel failed to provide "meaningful representation" … , as he "failed to litigate any aspect of the adjudication" … , essentially declining to take any position on the matter. People v Motta, 2023 NY Slip Op 01908, Second Dept, 4-12-23

Practice Point: A defense attorney who fails to take a position in the SORA risk-assessment proceedings does not provide effective assistance of counsel.

APRIL 12, 2023

SEX OFFENDER REGISTRATION ACT (SORA), MENTAL HYGIENE LAW, CONSTITUTIONAL LAW.

THE PROVISION OF MENTAL HYGIENE LAW SECTION 10 THAT ALLOWS A COURT TO DETERMINE WHETHER THERE IS PROBABLE CAUSE TO BELIEVE PETITIONER, WHO HAD BEEN RELEASED TO A STRICT AND INTENSIVE SUPERVISION AND TREATEMENT (SIST) REGIMEN, IS A DANGEROUS SEX OFFENDER REQUIRING CONFINEMENT IS NOT UNCONSTITUTIONAL (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court in this habeas corpus proceeding, determined the "provision of Mental Hygiene Law § 10.11(d)(4) that directs the court to determine whether there is probable cause to believe that a respondent in a proceeding pursuant to Mental Hygiene Law article 10 is a dangerous sex offender requiring confinement based upon a review of the allegations in a petition for confinement and any accompanying papers does not violate that respondent's federal or state rights to due process." The court further determined the issue raised here might recur so the appeal was not rendered moot by the petitioner's release "to a regimen of strict and intensive supervision and treatment (… SIST):

Mental Hygiene Law § 10.11 permits the court to revoke a regimen of SIST upon a violation of SIST conditions and sets forth the required procedures for such a revocation … . The statute provides, as relevant here, that if a parole officer has "reasonable cause to believe" that a sex offender requiring SIST has violated a condition thereof, the offender can be taken into custody for five days for an evaluation by a psychiatric examiner, and the attorney general and the Mental Hygiene Legal Service (hereinafter MHLS) are to be promptly notified … . The attorney general may then file a petition for confinement within five days after the offender is taken into custody, which petition must be served promptly on MHLS, and counsel must be appointed for the offender … . If a petition for confinement is filed, "the court shall promptly review the petition and, based on the allegations in the petition and any accompanying papers, determine whether there is probable cause to believe that the [offender] is a dangerous sex offender requiring confinement" … . There is no provision permitting the offender an opportunity to be heard prior to the probable cause determination. Once the probable cause determination is made, the offender may be retained pending the conclusion of the

proceeding … . "Within thirty days after a petition for confinement is filed . . . , the court shall conduct a hearing" to make a final determination, but the failure to commence the hearing within that time period does not result in dismissal of the petition or "affect the validity of the hearing or the determination" … . People ex rel. Neville v Toulon, 2023 NY Slip Op 02015, Second Dept 4-19-23

Practice Point; The provision of Mental Hygiene Law section 10 that allows a court to determine whether there is probable cause to believe petitioner, who had been released to a SIST regimen, is a dangerous sex offender requiring confinement is not unconstitutional.

Practice Point: Although at the time of this appeal in this habeas corpus proceeding petitioner had been released to a SIST regimen, the issue is likely to recur so the "exception to the mootness doctrine" doctrine was invoked.

APRIL 19, 2023

SEX OFFENDER REGISTRATION ACT (SORA).

A SEX OFFENDER MAY PETITION ANNUALLY FOR A MODIFICATION OF THE RISK LEVEL CLASSIFICATION; SUCH A PETITION IS NOT PRECLUDED BY PRIOR PETITIONS WITHIN A YEAR SEEKING OTHER RELIEF UNDER THE CORRECTION LAW (SECOND DEPT),

The Second Department, reversing Supreme Court, noted that a sex offender can petitioner annually for a modification of the risk level classification, notwithstanding prior petitions within a year seeking other relief:

… [T]he petition … sought a downward modification of the defendant's risk level classification. Pursuant to Correction Law § 168-o(2), any sex offender required to register or verify under SORA may petition annually for modification of his or her risk level classification … . As the defendant had not petitioned for a modification of his risk level classification within the prior year, he was not procedurally barred from seeking such relief in the instant petition. Therefore, upon receipt of the petition, the court should have followed the procedures set forth in Correction Law § 168-o(4) and conducted a hearing on the petition. People v Ghose, 2023 NY Slip Op 02021, Second Dept 4-19-23

Practice Point: A sex offender may petition annually for a modification of the risk level classification. Such a petition is not precluded by prior petitions within a year seeking other relief under the Correction Law.

APRIL 19, 2023

SEX OFFENDER REGISTRATION ACT (SORA).

BURGLARY AS A SEXUALLY MOTIVATED FELONY IS NOT A REGISTRABLE OFFENSE UNDER SORA; THE JUDGMENT REQUIRING DEFENDANT TO REGISTER AS A SEX OFFENDER VACATED (THIRD DEPT).

The Third Department determined burglary as a sexually motivated felony is not a registrable offense under SORA:

… [W]e agree with defendant, as well as the People's concession, that burglary in the second degree as a sexually motivated felony is not a registerable offense under SORA because it is not expressly identified as a "[s]ex offense" pursuant to Correction Law § 168-a (2) (a) … .

… [T]he judgment is modified, on the law, by vacating the provisions thereof certifying defendant as a sex offender pursuant to the Sex Offender Registration Act and requiring him to register as a sex offender and pay the related sex offender registration fee … . People v Vakhoula, 2023 NY Slip Op 02034, Third Dept 4-20-23

Practice Point: Burglary as a sexually motivated felony is not a registrable offense under SORA. Conviction does not require registration as a sex offender.

APRIL 20, 2023

SUPERIOR COURT INFORMATION, EXCEPTIONS.

THE SUPERIOR COURT INFORMATION (SCI) DID NOT AFFIRMATIVELY PLEAD THE EXCEPTION IN THE CRIMINAL MISCHIEF STATUTE; THEREFORE THE CRIMINAL MISCHIEF COUNT WAS JURISDICTIONALLY DEFECTIVE (THIRD DEPT).

The Third Department, reversing defendant's criminal mischief conviction, determined the underlying statute includes an exception which must be affirmatively pleaded. The exception was not affirmatively pleaded in the Superior Court Information (SCI):

"In order to determine whether a statute defining a crime contains an exception that must be affirmatively pleaded as an element in the accusatory instrument or a proviso that need not be pleaded but may be raised by the accused as a bar to prosecution or a defense at trial, a court must look to the language of the statute itself" … . To that end, "legislative intent to create an exception that must be affirmatively pleaded has generally been found when the language of exclusion is contained entirely within a Penal Law provision" … . Penal Law § 145.05 (2) provides that "[a] person is guilty of criminal mischief in the third degree when, with intent to damage property of another person, and having no right to do so nor any reasonable ground to believe that he or she has such right, he or she . . . damages property of another person in an amount exceeding [$250]" … . Inasmuch as the qualifying language is contained within the statute itself, we agree that such language constitutes an exception. Given that count 1 of the 2016 SCI did not allege that defendant had neither a right to cause the property damage at issue nor a reasonable ground to believe that she had such right, that count — charging defendant with criminal mischief in the third degree — is jurisdictionally defective … . People v West, 2023 NY Slip Op 01921, Third Dept 4-13-23

Practice Point: If a criminal statute includes language which is deemed an "exception," the exception must be affirmatively pled. The failure to affirmatively plead an exception renders the count jurisdictionally defective.

APRIL 13, 2023

SUPERIOR COURT INFORMATION.

A SUPERIOR COURT INFORMATION (SCI) FILED AFTER INDICTMENT IS A NULLITY (CT APP).

The Court of Appeals noted that a superior court information (SCI) filed after indictment is a nullity:

A defendant may waive their constitutional right to grand jury presentment and indictment and proceed by SCI in accordance with the strict technical requirements of CPL 195.10 (2). Here, the SCI was filed after the grand jury indicted defendant and thus the SCI failed to comply with the statutory prerequisites. Accordingly, the SCI is a nullity and was properly dismissed (see CPL 195.10 [2] …). People v Solomon, 2023 NY Slip Op 02030, CtApp 4-20-23

Practice Point: A superior court information (SCI) filed after indictment is a nullity.

APRIL 20, 2023

VACATE CONVICTION, NEWLY DISCOVERED EVIDENCE.

TEXT EXCHANGES WITH AND PHOTOGRAPHS OF THE RAPE AND SEXUAL-ABUSE VICTIM DELETED BY DEFENDANT FROM HIS CELL PHONE AND SUBSEQUENTLY RECOVERED DO NOT CONSTITUTE "NEWLY DISCOVERED" EVIDENCE WHICH WILL SUPPORT A MOTION TO VACATE THE CONVICTION (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over a two-judge dissent, determined defendant's motion to vacate his conviction based on newly discovered evidence was properly denied without a hearing. Defendant was convicted of multiple counts of rape and sexual abuse of the fifteen-year-old victim. The newly discovered evidence was deleted by the defendant and subsequently recovered on defendant's cell phone:

… [T]he evidence proffered is far from newly discovered—it is evidence the defendant knew about, was involved in the creation of, and believed he destroyed well before trial in an effort to conceal criminal activity. As defendant affirmed, he "deleted the photographs and/or text messages because [he] did not want anyone to see them." This is unsurprising given that the material, including nude photographs

he took of the victim, was compelling evidence of his sexual contact with a minor. Defendant cannot now claim that because certain "technology" was not available to recover the incriminating texts and photographs that he attempted to destroy, that material, now recovered, somehow qualifies as "newly discovered evidence."

Nor has defendant met CPL 440.10 (g)'s due diligence prong, which requires that defendant show that the evidence could not have been produced at the trial even with due diligence on the part of defendant. Nowhere in defendant's conclusory submissions is there any showing that the evidence was inaccessible before trial, or any indication that defendant tried to obtain it. People v Hartle, 2023 NY Slip Op 02029, CtApp 4-20-23

Practice Point: Text messages and photos of the sexual abuse and rape victim deleted from defendant's cell phone and subsequently recovered cannot be deemed "newly discovered" evidence which will support a motion to vacate the conviction.

APRIL 20, 2023

WAIVER OF INDICTMENT.

THE RECORD DID NOT DEMONSTRATE THE WAIVER OF INDICTMENT WAS SIGNED IN OPEN COURT, A JURISDICTIONAL DEFECT (THIRD DEPT).

The Third Department, dismissing the superior court information, noted the record did not indicate the waiver of indictment was signed in open court, which is a jurisdictional defect:

A defendant "may waive indictment by a grand jury and consent to be prosecuted on an information filed by the district attorney" provided that "such waiver shall be evidenced by written instrument signed by the defendant in open court in the presence of his or her counsel" … . Although the record reflects that defendant orally agreed to waive indictment in open court and contains a written waiver of indictment bearing the date of that appearance, which defendant and defense counsel acknowledged signing, the minutes do not demonstrate that defendant signed the waiver in open court, as constitutionally mandated. "Compliance with this unequivocal dictate is indispensable to a knowing and intelligent waiver and the failure to adhere to this strict procedure is a jurisdictional defect which survives a guilty plea and appeal waiver and need not be preserved for review by a motion to withdraw the plea" … . Moreover, neither the written waiver of indictment, to which the District Attorney executed consent … , nor County Court's undated order approving the waiver, indicates that the waiver was signed in open court … . In light of this jurisdictional defect, defendant's guilty plea must be

vacated and the superior court information must be dismissed …. People v Camlin, 2023 NY Slip Op 01821, Third Dept 4-6-23

Practice Point: If the record does indicate the waiver of indictment was signed in open court, the superior court information will be dismissed.

APRIL 6, 2023