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Criminal Law Reversal Report
October 2023

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APPEALS, SENTENCING.

DEFENDANT'S WAIVER OF APPEAL WAS INVALID; HER SENTENCE WAS FURTHER REDUCED PURSUANT TO THE DOMESTIC VIOLENCE SURVIVORS JUSTICE ACT (SECOND DEPT).

The Second Department determined defendant's appeal-waiver was invalid and further reduced her sentence pursuant to the Domestic Violence Survivors Justice Act:

The County Court did not discuss the appeal waiver with the defendant until after the defendant had already admitted her guilt as part of the plea agreement … . Further, when the court raised the issue of the appeal waiver, the defendant, who had no known prior contact with the criminal justice system, advised the court that she had not discussed the waiver with her attorney, which required a pause in the

proceedings to give her an opportunity to do so. These circumstances, including the defendant's experience and background, demonstrate that the purported waiver of the right to appeal was invalid … .

Pursuant to the Domestic Violence Survivors Justice Act (L 2019, ch 31, § 1; L 2019, ch 55, § 1, part WW, § 1 [eff May 14, 2019]; hereinafter the DVSJA), courts may "impose reduced alternative, less severe, sentences in certain cases involving defendants who are victims of domestic violence" … . Here, while the County Court granted the defendant's application for an alternative sentence under the DVSJA, we find that the sentence imposed should be reduced to the extent indicated herein … . People v Heft, 2023 NY Slip Op 05148, Second Dept 10-11-23

Practice Point: Defendant's appeal waiver was deemed invalid, in part because she had not discussed the waiver with her attorney and had no prior contact with the criminal justice system.

Practice Point: Here County Court had reduced defendant's sentence pursuant to the Domestic Violence Survivors Justice Act and the Second Department reduced it further.

OCTOBER 11, 2023

APPEALS, ATTORNEYS, SPEEDY TRIAL.

ALTHOUGH THE STATUTORY SPEEDY TRIAL RULES DO NOT APPLY TO STAND-ALONE TRAFFIC INFRACTIONS, THE PEOPLE AGREED TO DISMISS THE TRAFFIC INFRACTION ON SPEEDY TRIAL GROUNDS; THE PEOPLE THEN APPEALED; THE COURT OF APPEALS, OVER A DISSENT, HELD THE MATTER WAS NOT REVIEWABLE (CT APP).

The Court of Appeals, over a dissenting opinion, determined that the error was not reviewable because the People consented to it. In 2022 the Court of Appeals held that the statutory speedy trial rules do not apply to traffic infractions which stand alone, i.e., the traffic infraction is not charged along with a felony, misdemeanor or violation. The defendant's traffic infraction had been dismissed on speedy-trial grounds with the People's consent. The People then appealed the dismissal:

On appeal, the People contend that CPL 30.30 (1) (e)—which took effect more than a year before defendant was even charged—was enacted to clarify that CPL 30.30 (1) applies " 'to accusatory instruments charging traffic infractions jointly with a felony, misdemeanor, or violation,' " but that, as we stated in People v Galindo, " 'actions involving only traffic infractions would still not be covered by the speedy trial statute' " (quoting 38 NY3d 199, 201, 206 [2022] [emphasis added]). Thus, the instant appeal involves no intervening newly declared principle of law.

Because the People agreed in Town Court that CPL 30.30 applied to the simplified traffic information, the issue is unreviewable (see CPL 470.05 [2]). Contrary to the dissent's suggestion, we engender no unjust result by applying our well-settled principles governing reviewability to reject the People's attempt to reinstate the accusatory instrument against this pro se defendant, now almost two years after dismissal, by renouncing their express concession that CPL 30.30 applied. People v Lovett, 2023 NY Slip Op 05348, CtApp 10-24-23

Practice Point: If the People agree to an erroneous ruling and then appeal that ruling, the matter may not be reviewable by an appellate court.

OCTOBER 24, 2023

ARREST WARRANTS, JUDGES.

IN ORDER FOR THE ARREST IN CORTLAND COUNTY ON A JEFFERSON COUNTY WARRANT TO BE VALID THE WARRANT MUST BE ENDORSED BY A JUDGE IN CORTLAND COUNTY BEFORE THE ARREST; HERE THE WARRANT WAS ENDORSED AFTER THE ARREST (FOURTH DEPT).

The Fourth Department, reversing County Court, determined law enforcement in Cortland County did not have the authority to stop defendant's vehicle and "detain" him on a Jefferson County arrest warrant which had not yet been endorsed by a town justice in Cortland County. To constitute a valid arrest, the warrant must have been endorsed in Cortland County before, not after, the arrest:

… [T]he statute provides that an arrest warrant issued by a city court, a town court, or a village court may be executed "[a]nywhere else in the state upon the written endorsement thereon of a local criminal court of the county in which the arrest is to

be made" (CPL 120.70 [2] [b] …). As defendant correctly contends, inasmuch as "[t]he use of the future tense . . . indicates that the statute was intended to relate to [the] future act" of an arrest, the plain meaning of the statutory language indicates that the requisite endorsement must be obtained prior to execution of a subject arrest warrant in a non-issuing or non-adjoining county … . People v Burke, 2023 NY Slip Op 05083, Fourth Dept 10-6-23

Practice Point: When the counties are not contiguous, the arrest in one county on a warrant issued in another county will only be valid if the out-of-county warrant is first endorsed by a judge in the county where the arrest is made.

OCTOBER 6, 2023

ATTORNEYS.

DEFENSE COUNSEL TOOK A POSITION ADVERSE TO DEFENDANT ON DEFENDANT'S PRO SE MOTION TO WITHDRAW HIS PLEA; THE MATTER WAS REMITTED FOR CONSIDERATION OF THE MOTION AFTER NEW COUNSEL IS ASSIGNED (FIRST DEPT).

The First Department sent the matter back for a ruling on defendant's pro se motion to withdraw his plea. Defendant's attorney took a position adverse to the defendant's by telling the judge the motion would not succeed. New counsel must be assigned:

Before sentencing, defendant made a written pro se motion to withdraw his guilty plea, asserting, among other things, deficiencies in defense counsel's performance with respect to the plea. The court assigned defendant new counsel, and the People opposed defendant's motion. At the outset of the sentencing hearing, the court asked counsel if he was seeking an adjournment to supplement defendant's pro se motion, and counsel responded: "No, I am not, and I am not adopting it because I read the People's [opposition] and reviewed the case law on this issue and it really doesn't seem to be worthy of asking for my client to take his plea back." Under the circumstances, counsel took a position adverse to defendant, requiring assignment of new counsel on the motion … . People v Rivera-Santana, 2023 NY Slip Op 05101, First Dept 19-10-23

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Practice Point: Here defense counsel told the judge defendant's pro se motion to withdraw his plea was weak, thereby taking a position adverse to defendant's. The First Department sent the matter back for assignment of new counsel and consideration of the motion.

OCTOBER 10, 2023

DNA, FAMILIAL DNA SEARCHES, ADMINISTRATIVE LAW, CONSTITUTIONAL LAW, EVIDENCE.

THE REGULATIONS ALLOWING FAMILIAL DNA SEARCHES WERE VALIDLY PROMULGATED; THE REGULATIONS ALLOW DNA SEARCHES WHICH REVEAL THE IDENTITY OF FAMILY MEMBERS OF PERSONS IN THE CRIMINAL DNA DATABASE (CT APP).

The Court of Appeals, reversing the Appellate Division, in a full-fledged opinion by Judge Wilson, over an extensive three-judge dissenting opinion, determined the Commission on Forensic Sciences properly promulgated the Familial DNA Search (FDS) Regulations. The regulations allow DNA searches which may reveal the identity of relatives of a persons whose DNA is in the database. The underlying Article 78 petition was brought by two men, never convicted of a crime, whose brothers were in the DNA database as a result of a felony conviction:

There is no provision in the FDS for an identified relative to be notified and/or challenge the search before law enforcement officials may proceed with an investigation based on a familial match from the Databank. Petitioners Terrence Stevens and Benjamin Joseph are two Black men living New York who have never been convicted of a crime. Each has a brother whose genetic information has been collected and stored in the DNA Databank as the result of a felony conviction, in accordance with Databank Act requirements. Mr. Stephens and Mr. Joseph brought this CLPR article 78 proceeding against respondents … alleging … that respondents lacked statutory authority to promulgate the FDS Regulations and therefore violated the separation of powers doctrine under the New York Constitution. Respondents denied petitioners' allegations and asserted that petitioners lacked standing to challenge the FDS Regulations. * * *

Given the clarity and specificity of the guidelines provided in the Databank Act, respondents acted within their delegated authority. The FDS Regulations are a result of "administrative rule-making," not "legislative policy-making" … . Here, the legislature made the policy determination that New York State should have well-developed DNA testing programs to assist law enforcement, that the use of the information should be limited, and the data and results secure. Matter of Stevens v New York State Div. of Criminal Justice Servs., 2023 NY Slip Op 05351, CtApp 10-24-23

Practice Point: The regulations allowing familial DNA searches which reveal the identity of relatives of persons in the criminal DNA database are constitutional. There was an extensive three-judge dissent.

OCTOBER 24, 2023

EVIDENCE, ATTORNEYS, JUDGES, APPEALS, ARGUMENT RENDERED MOOT BY DISMISSAL OF COUNT.

THE MAJORITY CONCLUDED THE ARGUMENT THAT DEFENSE COUNSEL SHOULD HAVE BEEN ALLOWED TO READ THE INDICTMENT TO THE JURY TO SHOW THE DISCREPANCY BETWEEN THE ALLEGATIONS OF COERCION IN THE INDICTMENT AND THE PROOF AT TRIAL WAS RENDERED MOOT BY THE DISMISSAL OF THE COERCION COUNT; THE DISSENT ARGUED THE PROHIBITION DEPRIVED DEFENDANT OF THE RIGHT TO PUT ON A DEFENSE (THIRD DEPT).

The Third Department, over a partial dissent, determined defense counsel was properly prohibited from reading the indictment to the jury. Defense counsel sought to show that the allegations of coercion in the indictment differed from the proof presented by the People. Both the majority and the dissenter agreed that the proof of coercion was legally insufficient. Therefore the majority held defendant's argument he should have been allowed to read the indictment to the jury was rendered moot. The dissent argued the prohibition deprived defendant of his right to present a defense:

In light of our conclusion, defendant's contention that County Court erred in declining to charge the jury with certain lesser included offenses of coercion in the

first degree has been rendered moot. The same is true with respect to defendant's assertion that he was improperly prevented from reading the indictment to the jury during his opening statement and closing argument. That is, as limited by his appellate brief, the only particular claim articulated by defendant concerning this issue is that he should have been allowed to highlight for the jury the discrepancy between the allegation listed in the indictment relative to the coercion count and the proof expected to be presented or actually presented at trial, which is the very basis upon which that count has now been dismissed.

From the dissent:

… [D]efendant's trial strategy hinged on showing that the People had not proven the factual allegations in the indictment, and that County Court stymied that strategy by repeatedly refusing to allow defense counsel to read the indictment to the jury. County Court's refusal to allow defense counsel to read the indictment to the jury in his opening statement violated defendant's statutory right to "present[ ] his view of the case" in an opening statement that highlighted what he believed would be weaknesses in the People's proof … . People v Knapp, 2023 NY Slip Op 05168, Third Dept 10-12-23

Practice Point: Defense counsel wanted to read the indictment to the jury to show the discrepancy between the allegations of coercion and the proof presented at trial. County Court ruled defense counsel could not read the indictment to the jury. The majority held the issue was moot because the coercion count was dismissed because the evidence was deemed legally insufficient. The dissent argued the prohibition deprived defendant of his right to put on a defense.

OCTOBER 12, 2023

EXPERT EVIDENCE, DRUGS AFFECT ABILITY TO FORM INTENT.

EXPERT EVIDENCE ABOUT THE EFFECT OF A DRUG MIXED WITH ALCOHOL ON DEFENDANT'S ABILITY TO FORM THE INTENT TO COMMIT MURDER AND ASSAULT SHOULD HAVE BEEN ADMITTED; DEFENDANT SHOULD HAVE BEEN ALLOWED TO LAY A FOUNDATION TO QUALIFY AN EMAIL WHICH INCLUDED HEARSAY AS A BUSINESS RECORD; NEW TRIAL ORDERED.

The Third Department, reversing defendant's attempted murder and assault convictions, determined expert testimony explaining the effects of a drug taken by the defendant along with alcohol should have been admitted. In addition, an email in which a police officer, who was not at the scene, referred to the defendant's condition as "highly intoxicated" should not have been excluded as hearsay. If the document had been qualified as a business record, it would have been admissible. The defendant should have been given an opportunity to establish a foundation for the admissibility of the email:

As a general rule, the admissibility and limits of expert testimony lie primarily in the sound discretion of the trial court" … . The criteria to be used is "whether the proffered expert testimony 'would aid a lay jury in reaching a verdict' " … , however, and the testimony proffered here regarding the effect of combined clonazepam and alcohol use would undoubtedly be useful to a lay jury in assessing "the ability of a defendant to form the intent to commit a crime following drug and alcohol consumption" … . As the Court of Appeals explained when presented with a comparable situation, while "jurors might be familiar with the effects of alcohol on one's mental state, the combined impact of" alcohol and other drugs "on a person's ability to act purposefully cannot be said as a matter of law to be within the ken of the typical juror" … . * * *

County Court erred in refusing to allow defendant to question the author of the preliminary investigation report describing defendant as "highly intoxicated" and then declining to admit the document into evidence on hearsay grounds because its author was not present on the night of the incident. Defendant must be afforded an opportunity to establish the proper foundation to qualify the email as a business record within the meaning of CPLR 4518 and, if defendant is successful in that effort, the fact that its author lacked personal knowledge of defendant's

intoxication goes to the weight, not the admissibility, of the statements therein … . People v Mawhiney, 2023 NY Slip Op 05289, Third Dept 10-19-23

Practice Point: Where an issue is beyond the ken of an average juror, here the effect of a drug and alcohol combination on the defendant's ability to form intent, expert testimony should be admitted.

Practice Point: Here an email by a police officer who was not at the scene of the shooting referred to the defendant as "highly intoxicated." Although the statement is hearsay, the email may be admissible if it is demonstrated to be a business record.

OCTOBER 19, 2023

FALSIFIYING A BUSINESS RECORD, APPEALS.

LYING TO AN INVESTIGATOR WHO RECORDS THE LIE IN A REPORT CANNOT BE THE BASIS OF A "FALSIFYING A BUSINESS RECORD" CHARGE; ALTHOUGH THE ISSUE WAS NOT PRESERVED THE APPEAL WAS CONSIDERED IN THE INTEREST OF JUSTICE (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction after considering the unpreserved issue in the interest of justice, determined the People did not present legally sufficient evidence of the "falsifying a business record" charge. The People alleged defendant lied to the sheriff who interviewed him resulting in a false entry in the sheriff's report. The report itself was not entered into evidence:

… [T]o meet its burden, the prosecution relied on testimony from a county sheriff's office sergeant that, during the investigation into a shooting incident, he recorded his conversation with defendant in a report and the report became part of the business records for the sheriff's office. The sergeant as well as additional sheriff's deputies testified that defendant's version of events conflicted with the concurrent observations of defendant's gunshot wound by the members of the sheriff's office. The People's theory was that, by lying to the sergeant, defendant caused a false entry in the business records of the sheriff's office. The trial testimony established, however, that the sergeant's report was written to record the "condition or activity" of the sheriff's office's investigation into the shooting (Penal Law § 175.00 [2]). We conclude that there is no valid line of reasoning and

permissible inferences from which a rational jury could have concluded beyond a reasonable doubt that the sergeant's report contained a false record of that investigation. Indeed, the sergeant testified that the report accurately documented defendant's responses to the sergeant's investigatory questions. People v Andrews, 2023 NY Slip Op 05085, Fourth Dept 10-6-23

Practice Point: The Appellate Division can consider an unpreserved "legally insufficient evidence" issue.

Practice Point: Lying to an investigator who records the lie in the investigation report cannot be the basis for a "falsifying a business record" charge.

OCTOBER 6, 2023

PLEA ALLOCUTION, POSSIBLE INSANITY DEFENSE RAISED BY.

THE PLEA ALLOCUTION DID NOT DEMONSTRATE DEFENDANT MADE AN INFORMED DECISION TO WAIVE A VIABLE INSANITY DEFENSE; THE FIRST DEPARTMENT VACATED THE PLEA AND DISMISSED THE INDICTMENT; DEFENDANT WAS RETURNED TO AN ASSISTED LIVING FACILITY UNDER A CIVIL GUARDIANSHIP ORDER (FIRST DEPT).

The First Department, vacating defendant's plea and dismissing the indictment, determined defendant's plea was invalid because it was not clear he made an informed decision to waive a viable insanity defense:

As the People concede, the circumstances of this unique case warrant vacating the plea and dismissing the indictment. The plea allocution did not address whether defendant was making an informed decision to waive a potentially viable insanity defense … , and the record as a whole casts significant doubt on defendant's mental competence and ability to understand the proceedings or the terms of his plea … .

Under these circumstances, the appropriate remedy is dismissal rather than a remand for further proceedings. Among other things, this 68-year-old, severely mentally ill defendant lives in a secured unit of an assisted living facility under a civil guardianship order. People v Cosme, 2023 NY Slip Op 05207, First Dept 10-12-23

Practice Point: Here it was apparent defendant suffered from mental health issues. The plea was vacated and the indictment dismissed because the allocution did not make it clear that defendant had made an informed decisions to waive a viable insanity defense. Defendant was returned to an assisted living facility under a civil guardianship order.

OCTOBER 12, 2023

PLEA COLLOQUY, JUDGES, WAIVER OF DEFENSE.

DEFENDANT, IN THE PLEA COLLOQUY, SAID SHE ACTED IN SELF DEFENSE; AT THAT POINT THE JUDGE SHOULD HAVE MADE SURE SHE WAS AWARE SHE WAS WAIVING THE JUSTIFICATION DEFENSE (FIRST DEPT).

The First Department, vacating defendant's guilty plea, determined the judge, based on the plea colloquy, should have questioned the defendant about her waiver of her right to present a justification defense:

The trial court failed to determine defendant's understanding and waiver of her right to present a defense of justification after defendant stated, during the plea colloquy, "I had to defend myself" and "I wasn't just the aggressor in the situation" (see People v Muniz-Cayetano, 186 AD3d 1169, 1171-1172 [1st Dept 2020] …). The People concede that the particulars of this case are indistinguishable from those of Muniz-Cayetano and that defendant's guilty plea should be vacated. People v Williams, 2023 NY Slip Op 05195, First Dept 10-12-23

Practice Point: Here the defendant said she acted in self defense during the plea colloquy. At that point the judge should have made sure she knew about and was waiving the justification defense.

OCTOBER 12, 2023

RAPE SHIELD LAW NOT APPLICABLE, RIGHT TO CONFRONT WITNESSES.

FORENSIC EVIDENCE OF COMPLAINANT'S SEXUAL ACTIVITY SHOULD NOT HAVE BEEN EXCLUDED UNDER THE RAPE SHIELD LAW; DEFENDANT'S RIGHT TO PUT ON A DEFENSE WAS VIOLATED; TWO-JUDGE DISSENT (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Lynch, reversing the Appellate Division, determined forensic evidence of the complainant's sexual activity should not have been excluded pursuant to the Rape Shield Law. Under the circumstances, by excluding forensic evidence of sexual activity which did not implicate the defendant deprived defendant of the right to present a defense. The complainant alleged defendant inserted his finger in her vagina and fondled her breasts. A forensic analysis of a vaginal swab and complainant's underwear revealed the presence of complainant's saliva and fluids from two unidentified males:

… [T]he legislature enumerated five exceptions to CPL 60.42's [the Rape Shield Law's] evidentiary proscriptions. The first four exceptions "allow evidence of a complainant's prior sexual conduct in narrowly defined factual circumstances," whereas the fifth "is a broader 'interest of justice' provision vesting discretion in the trial court" (Williams, 81 NY2d at 311). "The exceptions . . . recognize that any law circumscribing the ability of the accused to defend against criminal charges remains subject to limitation by constitutional guarantees of due process and the right to confront the prosecution's witnesses" … .

Defendant argues that the forensic evidence was admissible under several of the exceptions set forth in CPL 60.42. We need not address every basis raised because we conclude that the trial court erred in denying admission of the evidence under CPL 60.42 (5). Under this subdivision, evidence of a victim's sexual conduct may be admitted in evidence during a sex crime prosecution when it "is determined by the [trial] court after an offer of proof by the accused . . . to be relevant and admissible in the interests of justice" (CPL 60.42 [5]). "Offer of proof is not a term of art but its generally accepted meaning . . . is to summarize the substance or content of the evidence" … . In his motion in limine, defense counsel delineated the findings contained in the forensic reports and explained how they constituted "evidence of something other than . . . defendant having engaged in inappropriate and unlawful sexual activity with [the complainant]." This was a sufficient offer of

proof under Williams (81 NY2d at 314). People v Cerda, 2023 NY Slip Op 05305, CtApp 10-19-23

Practice Point: Here the interest-of-justice exception to the Rape Shield Law applied. The majority found that the exclusion of forensic evidence of complainant's sexual activity (which did not implicate the defendant) violated defendant's right to put on a defense.

OCTOBER 19, 2023

SEARCHES AND SEIZURES, INVENTORY-SEARCH PROTOCOL, CONSTITUTIONAL LAW.

NYPD'S WRITTEN INVENTORY SEARCH PROTOCOL IS CONSTITUTIONAL; HERE THE INVENTORY SEARCH OF THE TRUNK OF DEFENDANT'S VEHICLE TURNED UP A FIREARM (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Singas, over an extensive dissent, determined the New York City Police Department's (NYPD's) written inventory search protocol was constitutional. Defendant was arrested after a traffic stop for possession of a gravity knife. A subsequent inventory search of defendant's vehicle turned up a firearm from the trunk:

Defendant moved to suppress the firearm, arguing that the NYPD's inventory search protocol was unconstitutional because it gives officers too much discretion in conducting inventory searches and that the searching officers failed to create a meaningful inventory of defendant's items. At the suppression hearing, the People introduced the NYPD's written inventory search protocol as set forth in section 218-13 of the NYPD Patrol Guide. The protocol instructs officers to first "[s]earch the interior of the vehicle thoroughly," "includ[ing] any area that may contain valuables." The protocol lists 10 areas within the car that must be searched, such as the glove compartment and trunk, but does not limit the searching officers to those spaces. Second, section 218-13 directs officers to force open the "trunk, glove compartment, etc. only if it can be done with minimal damage" except in particular situations including where officers "[r]easonably suspect that the item contains weapons, explosives, hazardous materials or contraband." Lastly, the protocol requires officers to remove the valuables from the vehicle and invoice, or "voucher," the property on a specifically referenced invoice form. Section 218-13

instructs officers to list property of little value inside the vehicle, "within reason," in their activity log and cross reference the property "to the invoice number covering any valuables removed." Both officers testified that the purpose of an inventory search is, in part, to secure a defendant's items. The arresting officer further testified that it is an officer's duty to safeguard a defendant's recovered items prior to vouchering the items. People v Douglas, 2023 NY Slip Op 05350, CtApp 10-24-23

Practice Point: Here the NYPD's written inventory search protocol for vehicles was found constitutional. Defendant was arrested after a traffic stop for possession of a gravity knife. A subsequent inventory search of defendant's vehicle turned up a firearm. There was an extensive dissenting opinion.

OCTOBER 24, 2023

SENTENCING, WITHDRAWAL OF PLEA, JUDGES, APPEALS.

DEFENDANT'S WAIVER OF APPEAL WAS INVALID; BASED UPON DEFENDANT'S STATEMENTS AT SENTENCING, THE JUDGE SHOULD HAVE INQUIRED ABOUT WHETHER DEFENDANT WISHED TO WITHDRAW HIS PLEA (THIRD DEPT).

The Third Department, reversing defendant's conviction by guilty plea, determined defendant's waiver of appeal was invalid and, based upon defendant's statements at sentencing, the judge should have inquired about whether defendant wished to withdraw his plea:

The People concede … that defendant's waiver of the right to appeal is invalid, as County Court's explanation of the waiver "failed to make clear to defendant that the appeal waiver was not a total bar to defendant taking an appeal, and the written waiver was similarly overbroad and did not clarify or supplement the court's defective colloquy" … . … [D'efendant contends that his plea was not knowing, intelligent and voluntary based upon certain statements that he made at sentencing that raised potential defenses. "A trial court should conduct a hearing or further inquiry when at plea-taking or upon sentencing it appears the defendant misapprehends the nature of the charges or the consequences of the plea" … . "[S]tatements made by a defendant that negate an element of the crime to which a plea has been entered, raise the possibility of a particular defense or otherwise

suggest an involuntary plea require the trial court to then conduct a further inquiry or give the defendant an opportunity to withdraw the plea" … .

At sentencing, defendant stated that he was "extremely remorseful and ashamed" for his actions in injuring the victim, but asserted that this occurred after he and the victim had consumed significant amounts of alcohol and the victim became "combative and physical . . . gouging my eyes and face with her fingernails, and then biting my lips, face and hands." In explanation of his statement, defendant stated that he had wanted "to present evidence and [the] sequence of events." Despite County Court's agreement with the People's voiced concerns that such statements raised the possibility of a defense, the court proceeded to sentence defendant without conducting a further inquiry and without providing him with an opportunity to withdraw his plea. People v Van Alstyne, 2023 NY Slip Op 05423, Third Dept 10-26-23

Practice Point: If the judge does not make it clear that an appeal waiver is not a complete bar to taking an appeal the waiver of appeal is invalid.

Practice Point: Here the defendant's statements at sentencing raised the possibility of a defense to the charges. The judge should have inquired whether defendant wanted to withdraw his plea.

OCTOBER 26, 2023

SEX OFFENDER REGISTRATION ACT (SORA), EVIDENCE.

DEFENDANT WAS NOT GIVEN NOTICE OF SOME OF THE EVIDENCE RELIED ON BY COUNTY COURT FOR THE SORA RISK ASSESSMENT; THE MATTER WAS REMANDED FOR A NEW HEARING (THIRD DEPT).

The Third Department, reversing (modifying) County Court, determined defendant was not given notice of some of the grounds County Court relied upon for an upward departure re: defendant's SORA risk-level assessment. That constituted a violation of defendant's right to due process:

While … defendant [was] on notice that his persistent sexually-motivated criminal conduct would be relied upon by the People as a factor for upward departure, there is no similar indication that his concurrent conviction for failure to register along with the facts underlying his juvenile delinquency adjudication would be

considered … . … "[D]efendant was entitled to a sufficient opportunity to consider and muster evidence in opposition to the request for an upward departure" on the specific bases upon which the People, and consequently County Court, would rely in considering that relief … . … [T]the matter must be remanded for a new hearing, upon proper notice to defendant of the justifications relied upon by the People specific to their request for such relief. People v Maurer, 2023 NY Slip Op 05290, Third Dept 10-19-23

Practice Point: Due process requires that a defendant be notified of all of the evidence which will be relied upon by the People and the court for a SORA risk assessment.

OCTOBER 19, 2023

SEX OFFENDER REGISTRATION ACT (SORA), EVIDENCE.

DEFENDANT WAS NOT GIVEN AN OPPORTUNITY TO RESPOND TO A RISK-ASSESSMENT THEORY RAISED FOR THE FIRST TIME AT THE HEARING; MATTER REMANDED (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant should not have been assessed risk-factor points based on a theory which defendant was unable to respond to because it was raised for the first time at the SORA risk-assessment hearing. The matter was remanded:

… [T]he court should have found that the People acted improperly in raising, for the first time at the hearing, as the basis for scoring defendant 15 points for inflicting physical injury under risk factor 1, a new reason or theory that differed from the basis for that scoring specified in the Board's case summary and in the People's prehearing submissions. This deprived defendant of the proper advance, informative notice of "the reasons" and "basis" for the People seeking the 15-point determination to which he was entitled under Correction Law § 168-n (3) and due process, so as to afford him a meaningful opportunity to respond to the assessment … People v Jackson, 2023 NY Slip Op 05043, First Dept 10-5-23

Practice Point: If the People present a new risk-assessment theory at the SORA hearing, the court must give the defendant a meaningful opportunity to respond before issuing a ruling.

OCTOBER 5, 2023

SEX OFFENDER REGISTRATION ACT (SORA), RIGHT TO BE PRESENT AT RISK-LEVEL HEARING, APPEALS.

THERE WAS NO EVIDENCE DEFENDANT WAIVED HIS DUE PROCESS RIGHT TO BE PRESENT AT THE SORA RISK-LEVEL HEARING; RISK-ASSESSMENT REVERSED; ALTHOUGH NOT PRESERVED, THE ISSUE WAS CONSIDERED IN THE INTEREST OF JUSTICE (SECOND DEPT).

The Second Department, reversing the SORA risk assessment, determined the People did not demonstrate defendant had waived his due process right to be present at the hearing. Although the error was not preserved, the Second Department considered the appeal in the interest of justice:

A sex offender facing risk level classification under SORA has a due process right to be present at the SORA hearing … . "To establish whether a defendant, by failing to appear at a SORA hearing, has waived the right to be present, evidence must be shown that the defendant was advised of the hearing date, of the right to be present at the hearing, and that the hearing would be conducted in his or her absence" … . Reliable hearsay evidence, such as an affidavit, is admissible to establish waiver … . Here, the record is silent as to whether the defendant received notice of the SORA hearing and there was no evidence, hearsay or otherwise, that the defendant expressed a desire to forego his presence at the hearing. People v Perez, 2023 NY Slip Op 05161, Second Dept 10-11-23

Practice Point: Although a defendant can waive the due process right to be present at the SORA risk-assessment hearing, and the waiver can be proved by hearsay, here there was no evidence of a waiver and the risk assessment was reversed.

Practice Point: At issue here was defendant's constitutional right to be present at the SORA risk-assessment hearing. Although the issue (his absence from the hearing) was not preserved, the appellate court considered the appeal in the interest of justice.

OCTOBER 11, 2023

SEX OFFENDERS, MENTAL HYGIENE LAW.

PETITIONER SEX OFFENDER WAS ENTITLED TO A HEARING WITH LIVE WITNESSES AT WHICH HE MAY TESTIFY IN THE ANNUAL REVIEW OF HIS CONFINEMENT UNDER THE MENTAL HYGIENE LAW; SUPREME COURT HAD ORDERED A HEARING CONDUCTED BY WRITTEN SUBMISSIONS (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined petitioner-sex-offender was entitled to a live hearing on his petition for discharge from confinement pursuant to the Menta Hygiene Law. Supreme Court had ordered that the hearing be conducted by written submissions:

… Mental Hygiene Law § 10.09 (d) requires the court to "hold an evidentiary hearing as to retention of [an offender] . . . if it appears from one of the annual submissions to the court under [§ 10.09 (c)] . . . that the [offender] has petitioned, or has not affirmatively waived the right to petition, for discharge." Petitioner here has petitioned for annual review, and he is therefore entitled to an evidentiary hearing with live witness testimony where he "may, as a matter of right, testify in his . . . own behalf, call and examine other witnesses, and produce other evidence in his . . . behalf" … . Matter of Charles L. v State of New York, 2023 NY Slip Op 05075, Fourth Dept 10-6-23

Practice Point: Supreme Court had ordered the annual review of petitioner-sex-offender's confinement be conducted by written submissions. Petitioner, however, pursuant to the Mental Hygiene Law, was entitled to a hearing with live witnesses at which he may testify.

OCTOBER 6, 2023

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SPEEDY TRIAL, ATTORNEYS.

DEFENDANT APPEARED IN COURT WITH A SUBSTITUTE COUNSEL WHO INFORMED THE COURT ANOTHER LEGAL AID LAWYER WAS BEING ASSIGNED TO DEFENDANT'S CASE; DEFENDANT WAS NOT "WITHOUT COUNSEL" WITHIN THE MEANING OF CPL 30.30; THE ASSOCIATED SPEEDY-TRIAL TIME-PERIOD SHOULD HAVE BEEN CHARGED TO THE PEOPLE, NOT THE DEFENDANT (CT APP).

The Court of Appeals, reversing the Appellate Term. determined the defendant was not "without counsel" during an eight-day period. Therefore that eight-day period must be charged to the People and the People were not ready for the trial within the statutory 90 days:

Under CPL 30.30 (4) (f), a "period during which the defendant is without counsel through no fault of the court" must be excluded when calculating the time within which the People must be ready for trial. However, a defendant is not "without counsel" within the meaning of the statute when appearing with substitute counsel … .

Here, defendant was assigned an attorney from The Legal Aid Society during his arraignment. On November 5, 2018, the date that defendant's case was calendared for trial, defendant appeared in court with a different attorney from that office, who informed the court that defendant's original attorney was leaving the office and the case was being reassigned to another attorney from Legal Aid. Defendant plainly was represented at that appearance and was therefore not "without counsel" … . People v Justice A., 2023 NY Slip Op 05306, CtApp 10-19-23

Practice Point: Appearing with substitute counsel is not appearing "without counsel" within the meaning of CPL 30.30 (4)(f). The associated time should not have been charged to the defendant. The People therefore were not ready for trial within the statutory 90-day period.

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SPEEDY TRIAL, COVID-19.

PURSUANT TO EXECUTIVE ORDERS RESPONDING TO THE COVID-19 PANDEMIC, THE TIME BETWEEN THE FILING OF A FELONY COMPLAINT AND ARRAIGNMENT ON AN INDICTMENT WAS EXCLUDED FROM THE SPEEDY TRIAL CLOCK; HERE THE DEFENDANT'S MOTION TO DIMSISS SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing County Court, determined the COVID-19 toll specific to CPL 30.30 and 190.80 applied and the People, therefore, did not violate the speedy trial statute:

In response to the COVID-19 pandemic, on December 30, 2020, former Governor Andrew Cuomo issued Executive Order No. 202.87, which provided that "[s]ection 30.30 and [s]ection 190.80 of the criminal procedure law are suspended to the extent necessary to toll any time periods contained therein for the period during which the criminal action is proceeding on the basis of a felony complaint through arraignment on the indictment or on a superior court information and thereafter shall not be tolled" (9 NYCRR 8.202.87). Successive executive orders extended Executive Order No. 202.87 through May 23, 2021 (see 9 NYCRR 8.202.87-8.202.106).

Upon renewal, the County Court should have denied that branch of the defendant's omnibus motion which was to dismiss the indictment on the ground that he was deprived of his statutory right to a speedy trial. Contrary to the determination of the court, Executive Order No. 202.87, while in effect, constituted a toll of the time within which the People must be ready for trial for the period from the date a felony complaint was filed through the date of a defendant's arraignment on the indictment, with no requirement that the People establish necessity for a toll in each particular case … . People v Marino, 2023 NY Slip Op 05273, Second Dept 10-18-23

Practice Point: Here the time between the filing of the felony complaint and arraignment on the indictment was excluded from the speedy trial clock pursuant to COVID-19 pandemic Executive Orders.

OCTOBER 18, 2023

SUPPRESSION OF STATEMENTS, EVIDENCE.

DEFENDANT GAVE TWO STATEMENTS, ONE IN THE MORNING TO THE POLICE, ONE IN THE AFTERNOON TO THE DISTRICT ATTORNEY; THE FIRST STATEMENT WAS INDUCED BY MISINFORMATION ABOUT WHETHER THE STATEMENT COULD BE USED AGAINST THE DEFENDANT AND WAS SUPPRESSED BY THE MOTION COURT; THE SECOND STATEMENT, AND THE KNIFE AND DNA RECOVERED BASED UPON THE SECOND STATEMENT, SHOULD ALSO HAVE BEEN SUPPRESSED (FIRST DEPT).

The First Department, reversing Supreme Court, determined both statements by the defendant, the first in the morning to detectives, the second in the afternoon to the district attorney, should have been suppressed. The first statement was suppressed by Supreme Court because the police told the defendant that any statement he made would not necessary be used against him and could help him if confessed. The second statement, although also preceded by the Miranda warnings, should have been suppressed because nothing was done to correct the misinformation from the police which preceded the first statement:

… Statement #2, along with the knife and DNA evidence recovered from the knife, should have been suppressed as there was not a sufficient break in the interrogation to dissipate the taint from the initial Miranda violation. This is not a case where defendant initially received improper warnings prior to giving Statement #1 and then later received proper warnings prior to giving Statement #2. Instead, defendant received complete and proper Miranda warnings prior to giving Statement #1, but they were undermined by the additional commentary and misleading statements made by the police officers … thereby violating defendant's Miranda rights and requiring the suppression of Statement #1. Moreover, after the officers made the misleading statements, nothing was specifically done to correct any resulting misunderstanding to ensure that the defendant understood the import and effect of the Miranda warnings and that his statements could, and would, be used against him. This misunderstanding cannot be assumed to have simply dissipated after the Assistant District Attorney gave defendant the second Miranda warnings, even though the second warnings took place hours later and in a different room. As the second Miranda warnings did not dissipate the taint, they did not effectively protect defendant's rights. Although it "is not the business of the police or the courts" to "provid[e] a general legal education" … , those institutions

also cannot be allowed to proliferate misleading information in situations where a suspect is entitled to be advised of his rights. People v Savage, 2023 NY Slip Op 05452, First Dept 10-26-23

Practice Point: Although both the initial tainted statement to the police and the subsequent statement to the DA were preceded by Miranda warnings, because nothing was done to correct the misinformation provided by the police prior to the first statement, the second statement, made the same day, and the knife and DNA located based on the second statement, should have been suppressed.

OCTOBER 26, 2023

TRAFFIC STOPS, EVIDENCE, REASONABLE SUSPICION.

VIDEO SURVEILLANCE SHOWING DEFENDANT ENTERING THE MALL WITH EMPTY BAGS FROM A STORE THAT WAS NOT IN THE MALL AND LEAVING WITH ITEMS IN THE BAGS DID NOT AMOUNT TO "REASONABLE SUSPICION" JUSTIFYING THE VEHICLE STOP; TWO-JUSTICE DISSENT (FOURTH DEPT).

The Fourth Department, reversing County Court, over a two-justice dissent, determined the sheriffs did not have the requisite "reasonable suspicion" to justify the stop of defendant's vehicle in a mall parking lot. A deputy had seen a surveillance video showing defendant going into the mall with empty bags from a store which was not in the mall and leaving a few minutes later with items in the bags:

The deputies readily acknowledged … that bringing outside bags into the mall was not unlawful or violative of mall policy, that it was not uncommon for mall visitors to return merchandise in bags that were not from the original store, and that mall visitors could properly put merchandise into personal, non-store bags if it was paid for. The first deputy conceded that, while viewing the live surveillance video, he did not observe defendant or the other individuals stealing anything from the subject store, and the second deputy likewise acknowledged that, prior to the vehicle stop, he had not made any observations to indicate that defendant or the other individuals had failed to pay for the merchandise. Additionally, the first deputy observed defendant and the other individuals walking, not running, back to the vehicle after exiting the store, and conceded that it was possible that they had

purchased the merchandise during their time in the store … . People v Mcmillon, 2023 NY Slip Op 05064, Fourth Dept 10-6-23

Practice Point: Here the deputies conceded people do bring bags from other stores into the mall and can use those bags for purchases. Therefore, without more, video surveillance of the defendant entering the mall with empty bags from a "non-mall" store and then leaving with items in the bags did not justify the subsequent vehicle-stop.

OCTOBER 6, 2023

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