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An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Addressing Criminal Law Released by Our New York Appellate Courts and Posted on the New York Appellate Digest Website in December, 2023. 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 Reversal Report.

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ASSAULT, SERIOUS DISFIGUREMENT.

THE EVIDENCE OF "SERIOUS DISFIGUREMENT" WAS LEGALLY INSUFFICIENT; ASSAULT FIRST REDUCED TO ASSAULT SECOND; THE ISSUE WAS NOT PRESERVED (NO TRIAL ORDER OF DISMISSAL MOTION?) BUT WAS CONSIDERED ON APPEAL IN THE INTEREST OF JUSTICE (FIRST DEPT).

The First Department, reducing defendant's assault first conviction to assault second, determined the evidence of serious disfigurement was legally insufficient. The issue was not preserved (no motion for a trial order of dismissal on the issue?) but was considered on appeal in the interest of justice:

The People failed to demonstrate that the victim, who sustained a two-to-three-centimeter laceration on her forehead, which required three stitches and resulted in a small scar, suffered a serious disfigurement … . Accordingly, the convictions on those counts must be vacated. However, because the evidence sufficed to prove that the victim suffered a physical injury (Penal Law § 10.00[9]), we reduce the second-degree assault conviction to third-degree assault (Penal Law § 120.00[1]). People v Murray, 2023 NY Slip Op 06454, First Dept 12-14-23

Practice Point: If there is a "legally insufficient evidence" issue, raise it on appeal even if the issue was not preserved by a motion for a trial order of dismissal. The issue may be addressed in the interest of justice.

DECEMBER 14, 2023

BATSON CHALLENGES, JURORS.

THE PROSECUTOR'S REASONS FOR STRIKING THREE BLACK PROSPECTIVE JURORS WERE EITHER NOT RELEVANT TO THE CASE OR INACCURATE AND WERE DEEMED PRETEXTUAL; NEW TRIAL ORDERED (SECOND DEPT).

The Second Department, reversing defendant's conviction and ordering a new trial, determined the prosecutor's reasons for striking three Black prospective jurors

were pretextual. The proffered reasons were deemed irrelevant and/or inaccurate. The court also noted that the prosecutor improperly told the jury the defendant was guilty:

Supreme Court improperly determined that the facially race-neutral reasons proffered by the prosecutor during step two were not pretextual. With respect to prospective juror no. 6, the prosecutor stated that since this prospective juror "lives on church property," there were concerns "as to religious reasons, sympathy reasons." However, during voir dire, this prospective juror was never questioned concerning her religious affiliation, or whether her living situation would make her more sympathetic to the defendant … . …

… "[T]he prosecutor did not offer any explanation for how [two of the] juror[s'] employment [situations] [working with mentally ill people] related to the factual circumstances of the case or the qualifications of the juror[s] to serve" … . People v Vera, 2023 NY Slip Op 06758, Second Dept 12-27-23

Practice Point: Here the prosecutor's reasons for striking three Black prospective jurors were not relevant to the facts of the case and/or were inaccurate. The Second Department deemed the reasons pretextual and ordered a new trial.

DECEMBER 27, 2023

CRIMINALLY NEGLIGENT HOMICIDE, TRAFFIC ACCIDENT.

IN THIS TRAFFIC ACCIDENT CASE, EVIDENCE DEFENDANT FAILED TO SEE THE CAR HE COLLIDED WITH AND FAILED TO TIMELY BRAKE IS NOT LEGALLY SUFFICIENT FOR A CRIMINALLLY NEGLIGENT HOMICIDE CONVICTION; THE LEGAL INSUFFICIENCY ARGUMENT WAS PRESERVED BY A MOTION TO DISMISS BROUGHT AT THE CLOSE OF THE PEOPLE'S CASE AND RULED ON AFTER THE DEFENDANT'S CASE; THE "LEGALLY INSUFFICIENT" VERSUS "AGAINST THE WEIGHT OF THE EVIDENCE" STANDARDS EXPLAINED (THIRD DEPT).

The Third Department, reversing defendant's criminally negligent homicide conviction in this traffic accident case, determined the evidence was legally insufficient. The Third Department noted the issue was preserved by a written

motion to dismiss submitted at the close of the People's case and ruled upon after the close of defendant's case. The Third Department also compared the criteria for a motion to dismiss for legal insufficiency and a determination a conviction is against the weight of the evidence. The trial evidence demonstrated only that defendant was inattentive when he rounded a turn and struck the back of the victim's car as it was waiting to make a turn while travelling about 45 mph. That was not enough to demonstrate criminal negligence:

Defendant preserved the claim of legal insufficiency when County Court reserved upon a written motion to dismiss presented at the close of the People's case and ultimately denied the motion at the close of defendant's case … .

A review of legal sufficiency requires this Court to "view the facts in the light most favorable to the People and examine whether there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime proved beyond a reasonable doubt" … . Whereas, a review of whether a verdict is against the weight of the evidence requires the court to "view the evidence in a neutral light and determine first whether a different verdict would have been unreasonable and, if not, weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony to determine if the verdict is supported by the weight of the evidence" … . * * *

"The unexplained failure of a driver to see the vehicle with which he subsequently collided does not, without more, support a conviction for the felony of criminally negligent homicide" … . Here, the People argue that a failure to brake — for what is alleged to be a period of 10 to 18 seconds — constitutes criminal negligence. But even taking the facts in the light most favorable to the People, a failure to brake, without more, does not constitute criminal negligence … . People v Munise, 2023 NY Slip Op 06562, Third Dept 12-21-23

Practice Point: Here the victim died after a rear-end collision. Proof that defendant failed to see the victim's car and failed to timely brake does not support a criminally negligence homicide conviction.

Practice Point: Making a motion to dismiss at the close of the People's case which is ruled on after the defendant's case preserves the legal insufficiency argument for appeal.

Practice Point: The decision includes a comparison of the "legal insufficiency" and "against the weight of the evidence" analytical criteria.

DECEMBER 21, 2023

DISCOVERY, CERTIFICATE OF COMPLIANCE.

THE PEOPLE DID NOT EXERCISE DUE DILIGENCE IN PROVIDING DISCOVERY; THE CERTIFICATE OF COMPLIANCE WAS INVALID AND DID NOT STOP THE SPEEDY-TRIAL CLOCK (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Halligan, determined the People did not exercise due diligence in providing discovery to the defense. Therefore the certificate of compliance (COC) was invalid and did not stop the speedy trial clock. The prosecution was time-barred:

In 2019, the New York State Legislature enacted sweeping reforms that expanded and restructured disclosure obligations in criminal cases, effective at the start of 2020 (see L 2019, ch 59, § 1, pt LLL). This appeal concerns a new requirement set forth in CPL article 245 that the People file a certificate of compliance (COC) with their statutory disclosure obligations (see CPL 245.50 [1], [3]). * * *

Due diligence is a mixed question of fact and law, and thus we consider whether the fact finder's conclusions are supported by the record … . Viewed under the proper legal standard, there is no record support for the conclusion of the courts below that prior to filing the initial COC, the People exercised due diligence and made reasonable inquiries to identify mandatory discovery items relating to this case.

The belated disclosure here consisted of routinely produced disclosure materials—the creation of at least one of which was mandated by law … . The absence of such significant items of disclosure was readily noticed by the defense, which then brought it to the attention of the People and the court. The prosecution had two opportunities to establish that they had exercised due diligence, but failed to do so. At the appearance on May 26th, in which defense counsel first called attention to the missing items, the prosecutor simply asserted that he had "checked" without any elaboration as to what efforts were made to verify whether there was any outstanding discovery or whether the disclosure requested by the defense—which

was in the possession of the People (see CPL 245.20 [2])—actually existed. The prosecutor speculated that such disclosure items did not exist and had not been created, and otherwise stated in a cursory fashion that all discovery had been turned over. When the parties appeared on July 6th following Bay's CPL 30.30 motion, the People again made no mention of any efforts taken to ascertain the existence of discovery materials before the COC was filed, nor did they explain why some discovery was initially missing or how it came into their possession. People v Bay, 2023 NY Slip Op 06407, CtApp 12-14-23

Practice Point: Here the People did not exercise due diligence in complying with their discovery obligations. Therefore the certificate of compliance (COC) was invalid and did not stop the speedy trial clock. If the People can demonstrate they exercised due diligence in providing discovery, the COC will not be deemed improper.

DECEMBER 14, 2023

DOMESTIC VIOLENCE SURVIVORS JUSTICE ACT.

DEFENDANT IN THIS MANSLAUGHTER CASE WAS ENTITLED TO A REDUCED SENTENCE UNDER THE DOMESTIC VIOLENCE SURVIVORS JUSTICE ACT (DVSJA); TWO DISSENTERS ARGUED DEFENDANT'S SENTENCE WAS NOT UNDULY HARSH (THIRD DEPT).

The Third Department, reversing County Court, over a two-justice dissent, determined defendant was entitled to resentencing in this manslaughter case under the Domestic Violence Survivors Justice Act (DVSJA). The dissenters agreed that defendant met the DVSJA criteria for a reduced sentence, but argued the sentence that was imposed was not unduly harsh:

… [W]e disagree with County Court's determination that defendant's abuse was anything less than "substantial," as defendant's own account of the specific acts of violence, which is largely corroborated by various witnesses in the record, and the injuries suffered as well as the psychological abuse that came alongside such violence was sufficient to fall under the ambit of the DVSJA. Although the court accurately concluded that the relationship between defendant and the victim was mutually abusive, that does not foreclose a determination that defendant was a victim of abuse … . Moreover, such conduct is readily explained in Lesswing's

[the forensic psychologist's] report as typical of those persons suffering from battered person syndrome, particularly in the case of defendant who had a lengthy history of exposure to domestic violence over the course of her life … . People v Brenda WW., 2023 NY Slip Op 06564, Third Dept 12-21-23

Practice Point: Here in this manslaughter case the defendant met the criteria for a reduced sentence under the Domestic Violence Survivors Justice Act (DVSJA). Two dissenters agreed that defendant met the criteria but argued the imposed sentence was not unduly harsh.

DECEMBER 21, 2023

DRIVER'S LICENSE SUSPENSION REFORM ACT (DLSRA).

THE DRIVER'S LICENSE SUSPENSION REFORM ACT (DLSRA), WHICH ELIMINATED LICENSE SUSPENSIONS FOR FAILURE TO PAY A FINE, DOES NOT VACATE UNLICENSED-OPERATION CONVICTIONS BASED UPON THE FAILURE TO PAY A FINE AND DOES NOT APPLY RETROACTIVELY; THE APPEAL WAIVER HERE WAS INVALID BECAUSE IT SUGGESTED DEFENDANT COULD NOT FILE A NOTICE OF APPEAL (FIRST DEPT).

The First Department, affirming defendant's unlicensed operation of a vehicle conviction, in a full-fledged opinion by Justice Webber, determined the Driver's License Suspension Reform Act (DLSRA) did not vacate defendant's conviction. The DLSRA eliminated the failure to pay a fine as a basis for suspension of a driver's license and does not apply retroactively. Defendants' waiver of appeal was deemed invalid because the written waiver indicated a notice of appeal could not be filed:

… [T]he written waiver of appeal contained language … suggesting that the defendant was barred from even filing a notice of appeal … . The People contend that because they did not enforce the language stating that defendant's appeal would be deemed a motion to vacate, the oral colloquy at the sentencing hearing cures the defect in the written waiver or otherwise renders defendant's waiver valid. This contention is without merit … . …

The DLSRA amended Vehicle and Traffic Law § 510(4-a) to remove the failure to pay a fine as a basis for the suspension of a driver's license … . The Legislative

intent was to lift suspensions of licenses and lessen the financial burdens on the defendants by structuring an affordable installment payment plan … .

Nothing in the statutory language, which is the "clearest indicator of legislative intent" suggests that there was any intent to authorize the vacatur of convictions under Vehicle and Traffic Law § 511 that arose from license suspensions predicated on failures to pay a fine … . People v Castro, 2023 NY Slip Op 06452, First Dept 12-14-23

Practice Point: The Driver's License Suspension Reform Act (DLSRA) does not vacate unlicensed-operation convictions stemming from a failure to pay a fine and does not apply retroactively.

Practice Point: A written waiver of appeal which indicates a notice of appeal cannot be filed is invalid.

DECEMBER 14, 2023

ENDANGERING THE WELFARE OF A CHILD, NEGLECT.

A FACTUAL NEXUS BETWEEN THE ENDANGERING THE WELFARE OF A CHILD CONVICTION AND THE ALLEGATIONS IN THE NEGLECT PETITION WAS NOT DEMONSTRATED; FAMILY COURT SHOULD NOT HAVE GRANTED SUMMARY JUDGMENT ON THE NEGLECT ALLEGATIONS BASED ON THE CRIMINAL CONVICTION (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined the record was not sufficient to support summary judgment on the neglect allegations based upon respondent's plea to endangering the welfare of a child:

… [A] criminal conviction may be given collateral estoppel effect in a Family Court proceeding where (1) the identical issue has been resolved, and (2) the defendant in the criminal action had a full and fair opportunity to litigate the issue of his or her criminal conduct" … . "It is well settled that [t]he party seeking the benefit of collateral estoppel has the burden of demonstrating the identity of the issues in the present litigation and the prior determination" … . * * *

"[I]t is not enough to merely establish the existence of the criminal conviction; the petitioner must prove a factual nexus between the conviction and the allegations

made in the neglect petition" … . Matter of Clarissa F. (Rex O.), 2023 NY Slip Op 06680, Fourth Dept 12-22-23

Practice Point: Here a factual nexus between the endangering the welfare of a child conviction and the allegations of neglect was not demonstrated. Summary judgment on the neglect allegations based solely on the criminal conviction should not have been granted.

DECEMBER 22, 2023

GUILTY PLEAS, RISK OF DEPORTATION.

DEFENDANT'S MOTION PAPERS AND EXHIBITS RAISED A QUESTION OF FACT ABOUT WHETHER HE WOULD HAVE PLED GUILTY IF HE WERE AWARE HE COULD BE DEPORTED BASED ON THE PLEA; THEREFORE THE JUDGE SHOULD NOT HAVE DENIED THE MOTION WITHOUT HOLDING A HEARING (SECOND DEPT).

The Second Department, remitting the matter, determined the judge should not have denied defendant's motion to vacate his plea without holding a hearing. Defendant alleged he would not have pled guilty if he had been informed of the deportation consequences:

According to the defendant's motion and exhibits, he allegedly immigrated to the United States at approximately 17 years of age, resided here for approximately 26 years, was employed in the United States, and had two children here. Under the circumstances of this case, the defendant's allegations in his motion that he would not have pleaded guilty and would instead have gone to trial had the court warned him of the possibility of deportation, were sufficient to raise an issue of fact in that regard … . Therefore, the County Court erred in deciding the defendant's motion to vacate his plea without a hearing. People v Hernandez, 2023 NY Slip Op 06752, Second Dept 12-27-23

Practice Point: If a defendant, in a motion to vacate his plea, raises a question of fact about whether he would have pled guilty if he had know he could be deported, the judge should not deny the motion without holding a hearing.

DECEMBER 27, 2023

GUILTY PLEAS, RISK OF DEPORTATION.

THE RECORD DOES NOT DEMONSTRATE DEFENDANT WAS AWARE HE COULD BE DEPORTED BASED UPON HIS GUILTY PLEAS, A VIOLATION OF DUE PROCESS; THE ISSUE NEED NOT BE PRESERVED FOR APPEAL; MATTER REMITTED TO ALLOW DEFENDANT TO MOVE TO VACATE THE GUILTY PLEAS (SECOND DEPT).

The Second Department, remitting the matter, determined defendant was not warned about the possibility of deportation based upon his guilty pleas. The matter was sent back to allow defendant to move to vacate the pleas:

The defendant's contention that his due process rights were violated due to the Supreme Court's failure to warn him that his pleas could subject him to deportation is excepted from the requirement of preservation because the record does not demonstrate that the defendant was aware that he could be deported as a consequence of his pleas of guilty … . Indeed, here, the record shows that the court failed to address the possibility of deportation as a consequence of the defendant's pleas of guilty … .

… [W]e remit the matters to the Supreme Court … to afford the defendant an opportunity to move to vacate his pleas of guilty and for a report by the Supreme Court thereafter … . Upon such motion, the defendant will have the burden of establishing that there is a "reasonable probability" that he would not have pleaded guilty had the court warned him of the possibility of deportation … . In its report to this Court, the Supreme Court shall set forth whether the defendant moved to vacate his pleas of guilty and, if so, its determination as to whether the defendant made the requisite showing or failed to make the requisite showing … . People v Jean, 2023 NY Slip Op 06380, Second Dept 12-13-23

Practice Point: If the record does not demonstrate a defendant was aware of the deportation consequences of a guilty plea, the matter will be remitted to give the defendant the opportunity to move to vacate the plea. The issue need not be preserved for appeal.

DECEMBER 13, 2023

IDENTIFICATION FOR FIRST TIME AT TRIAL.

HERE A WITNESS TO THE SHOOTING IDENTIFIED THE DEFENDANT AS THE SHOOTER FOR THE FIRST TIME AT TRIAL; UNDER THE FACTS, THE DEFENDANT WAS NOT PREJUDICED; THE COURT OFFERED GUIDANCE ON HOW TO HANDLE OR AVOID THE SITUATION (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Singas, over a comprehensive dissenting opinion, affirming the Appellate Division, determined defendant was not prejudiced by a witness to the shooting who identified him as the shooter for the first-time at trial. The opinion takes note of the suggestiveness of a first-time identification at trial and offers instructions on how the situation should be handled and/or avoided. Here, however, the the defendant was aware of the witness and did not request any identification procedures, surveillance video captured both the shooter and the victim, the victim knew the shooter, and the victim identified the shooter. The court noted that any error was clearly harmless:

Concerning identifications made at trial, this Court and many others have recognized the inherent suggestiveness of the traditional in-court identification procedure, with a single defendant sitting at a table with defense counsel … . As with an unduly suggestive pretrial identification, it will often be immediately clear to the witness who the accused defendant is, especially if the witness has a rudimentary knowledge of courtroom seating arrangements. The principal danger is that, faced with the pressures of testifying at trial, the witness will identify the defendant as the perpetrator simply because the defendant is sitting in the appropriate spot, and not because the witness recognizes the defendant as the same person that they observed during the crime. Inasmuch as the traditional courtroom seating arrangement may itself suggest to the witness who should be identified, trial courts must be vigilant to ensure that where a witness has not previously identified the defendant in a properly conducted pretrial identification procedure such as a photo array or lineup, the suggestiveness of a first-time, in-court identification procedure does not create an unreasonable danger of a mistaken identification. People v Perdue, 2023 NY Slip Op 06404, CtApp 12-14-23

Practice Point: Here, under the unique facts of the case, defendant was not prejudiced by allowing a witness to identify him as the shooter for the first time at trial. The court offered guidance on how the situation should be handled and/or avoided.

DECEMBER 14, 2023

JUDGES, DELEGATION OF JUDICIAL AUTHORITY TO ADDRESS JURY.

THE JUDGE HAD A COURT OFFICER COMMUNICATE WITH THE JURY ABOUT A SUBSTANTIVE MATTER OUTSIDE OF THE DEFENDANT'S PRESENCE; DEFENSE COUNSEL DID NOT OBJECT; CONVICTION REVERSED (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined the judge should not have communicated with the jury outside of the defendant's presence and should not have delegated the court's duty to a court officer. When the jury sent out the verdict sheet, the judge noticed a mistake. The jury had indicated "guilty on all counts," including count 2, but the jury should have been instructed to skip count 2 if it found defendant guilty of count 1. The judge sent a court officer to the jury to explain the mistake. The jury came back with a verdict of guilty on count 2. Defense counsel did not object to the procedure:

"[A] defendant has the right to be present during all critical stages of a trial and . . . this includes the right to be present when the jury is given instructions or information by the court" … . "Equally true is that the court may not delegate to a nonjudicial staff member its authority to instruct the jury on matters affecting their deliberations" … . While "[a] Trial Judge may properly authorize a court officer to speak to a deliberating jury when the subject of the communication is administerial[,] . . . a Trial Judge who authorizes a court officer to communicate with a jury on matters which are not administerial not only errs, but commits an error so grave as to warrant reversal even though the defendant's attorney might have consented to the occurrence of the error" … .

… Supreme Court improperly delegated a judicial duty to a nonjudicial staff member at a critical stage of the proceedings. … [T]he instruction was not a mere ministerial matter. Under the circumstances, where the jury was deliberating and had expressed confusion about the relationship between counts one and two, the court's rejection of the verdict sheet and the instruction to correct it was an instruction regarding the jury's deliberation … . Thus, the defendant was absent during a critical stage of the trial, and the court improperly delegated a judicial

duty to a nonjudicial staff member … . People v Fulton, 2023 NY Slip Op 06750, Second Dept 12-27-23

Practice Point: It is reversible error for a judge to communicate with the jury outside the defendant's presence.

Practice Point: It is reversible error for a judge to allow a court officer to communicate with the jury about a substantive matter.

DECEMBER 27, 2023

SEARCH AND SIEZURE, DOG SNIFF.

A CANINE SNIFF FOR DRUGS IS A SEARCH; ALTHOUGH THE APPELLATE DIVISION HAD ALSO RULED THE CANINE SNIFF WAS A SEARCH, THE APPELLATE DIVISION WENT ON TO APPLY THE "REASONABLE SUSPICION" STANDARD AND FOUND THAT STANDARD HAD BEEN MET BY THE FACTS; THE COURT OF APPEALS DETERMINED THE APPELLATE DIVISION DID NOT HAVE THE AUTHORITY TO RULE ADVERSELY TO THE DEFENDANT ON THE STANDARD BECAUSE COUNTY COURT HAD NOT RULED ON THAT ISSUE (COUNTY COURT HELD THE SNIFF WAS NOT A SEARCH); THE MATTER WAS SENT BACK TO COUNTY COURT FOR RULINGS ON THE STANDARD FOR A SNIFF SEARCH (CT APP).

The Court of Appeals, in a comprehensive opinion by Judge Cannataro, determined that a canine sniff of a person to detect drugs is a search. The Fourth Department had reversed County Court and held that the canine sniff constituted a search. But the Fourth Department went on to apply the "reasonable suspicion" standard to whether the search was justified and found that standard had been met by the facts. Because County Count had not ruled on the correct standard for a sniff-search (County Court held the sniff was not a search), the Fourth Department did not have the authority rule against the defendant on that issue. The matter was sent back to County Court for rulings on what the correct standard is and whether that standard was met by the events preceding the sniff-search in this case:

… [W]e conclude that the canine sniff of defendant's person qualified as a search under the Fourth Amendment. * * *

The second question presented by this appeal is whether the Appellate Division could decide that a canine sniff search of a person requires reasonable suspicion and was justified in this case. We conclude that the Appellate Division lacked jurisdiction to resolve those issues because County Court did not decide them adversely to defendant (see LaFontaine, 92 NY2d at 473-474). * * *

County Court held that the canine sniff of defendant's person did not qualify as a search. The court did not decide the standard that would govern if the canine sniff did so qualify, much less whether that standard was met. Those questions present "separate" and "analytically distinct" issues from the threshold question of whether the sniff implicated constitutional protections or prohibitions … . The Appellate Division therefore erred in deciding those questions adversely to defendant….
. People v Butler, 2023 NY Slip Op 06468, CtApp 12-19-23

Practice Point: A canine sniff for drugs on a person is a search. The correct standard justifying such a search has not been determined.

Practice Point: If an issue has not been addressed by the lower court, the appellate court is powerless to rule adversely to the defendant on that issue. Here County Court had held that a canine sniff is not a search and therefore never ruled on the correct standard for such a search. The Appellate Division (which reversed County Court on whether the sniff is a search) could not decide what the correct standard for the search was and then rule that the standard had been met, because that ruling was adverse to the defendant. The matter was sent back to the County Court for a ruling.

DECEMBER 19, 2023

SENTENCING, ENHANCEMENT WITH FEDERAL CRIME.

THE FEDERAL CRIME WHICH WAS USED TO ENHANCE DEFENDANT'S SENTENCE WAS NOT A FELONY IN NEW YORK; DEFENDANT'S SECOND FELONY ADJUDICATION VACATED (SECOND DEPT).

The Second Department, vacating defendant's second felony offender adjudication, noted that federal conviction did not constitute a felony in New York for the purpose of enhanced sentencing:

… [T]he defendant was improperly adjudicated as a second felony offender based on his federal conviction of assault with a dangerous weapon in aid of racketeering, because that predicate crime does not require actual injury as one of its elements (see 18 USC § 1959[a][3]) and, thus, does not constitute a felony in New York for the purpose of enhanced sentencing … . People v Odom, 2023 NY Slip Op 06756, Second Dept 12-27-23

Practice Point: If a federal crime does not meet the definition of a felony in New York it cannot be used to enhance defendant's sentence. Here the federal crime did not include actual injury as one of its elements and therefore did not constitute a felony in New York. Defendant's second felony offender adjudication was vacated.

DECEMBER 27, 2023

SENTENCING, ENHANCEMENT.

THE JUDGE, SUA SPONTE, DECIDED TO ENHANCE DEFENDANT'S AGREED-UPON SENTENCE BASED UPON HER RESPONSES TO QUESTIONS POSED BY PROBATION FOR THE PRESENTENCE REPORT; THE PROSECUTOR DID NOT ASK FOR THE ENHANCED SENTENCE; THE DEFENSE WAS NOT GIVEN AN OPPORTUNITY TO ADDRESS THE ISSUE, THEREBY DEPRIVING DEFENDANT OF DUE PROCESS (THIRD DEPT).

The Third Department, vacating defendant's sentence, over a dissent, determined that the defense was not given an opportunity to address the sentencing judge's sua sponte decision to enhance the agreed-upon sentence based on defendant's responses to questions posed by probation for the presentence report. The prosecutor did not see any conflict between defendant's plea allocution and her responses in the report and did not call for an enhanced sentence: So the defense was taken by surprise.. Defense counsel requested a hearing but the request was denied:

After the parties had an opportunity to state their arguments, the court engaged in a lengthy colloquy before … stating that it disagreed with the People's conclusion that there was no violation of the plea agreement and determining that it would enhance defendant's sentence to the maximum allowable term of imprisonment. It

was at this point that defendant first had any indication that she was facing a potential sentencing enhancement and, in response, defense counsel immediately requested a hearing, which County Court summarily denied…. .In effect, that determination precluded defendant and her counsel an opportunity to refute the accuracy of the officer's statements in the PSR that were relied upon by the court in finding that she had violated a condition of her plea by failing to answer the probation officer's questions truthfully … . Moreover, County Court made no further inquiry as to whether defendant understood the questions asked during her Probation Department interview and whether she had answered them untruthfully or contrary to her statements at her plea proceedings … .

While a hearing is not necessarily required in all instances, the circumstances before us warranted some form of inquiry before County Court could impose an enhanced sentence … . People v Dibble, 2023 NY Slip Op 06411, Third Dept 12-14-23

Practice Point: When the judge, sua sponte, decided to enhance defendant's agreed-upon sentence because of defendant's responses to questions posed by probation for the presentence report, defense counsel immediately requested a hearing to address the issue (which had not been raised by the prosecution). The request was denied. The Third Department agreed that a hearing was required in this case and vacated the sentence.

DECEMBER 14, 2023

SEX OFFENDER REGISTRATION ACT (SORA), DOWNWARD DEPARTURE.

DEFENDANT, WHO WAS 19 WHEN ARRSTED FOR HAVING CHILD PORNOGRAPHY ON HIS PHONE, AND WHO HAD NEVER COMMITTED ANY OTHER OFFENSES, WAS ENTITLED TO A DOWNWARD DEPARTURE TO SORA RISK-LEVEL ONE; COUNTY COURT APPLIED THE WRONG EVIDENTIARY STANDARD (FOURTH DEPT).

The Fourth Department, reversing County Court, determined (1) County Court erred when it applied the "clear and convincing" evidentiary standard, as opposed to the "preponderance of the evidence" standard to the SORA risk assessment proceeding, and (2) defendant in this child pornography case was entitled to a

downward departure to level one. Defendant, who was 19, had child pornography on his phone but had never committed a sexual offense or any other crime. He was sentenced to probation. He was assessed 90 points (level two) by the People (including 30 points for three or more victims [risk factor 3] and 20 points because the victims were strangers [risk factor 7]).

As the Court of Appeals has stated, "in deciding a child pornography offender's application for a downward departure, a SORA court should, in the exercise of its discretion, give particularly strong consideration to the possibility that adjudicating the offender in accordance with the guidelines point score and without departing downward might lead to an excessive level of registration" … . "The departure process is the best way to avoid potentially 'anomalous results' for some child pornography offenders that 'the authors of the Guidelines may not have intended or foreseen' " … .

Here, defendant established by a preponderance of the evidence that there are mitigating factors "not otherwise adequately taken into account by the guidelines" … The mitigating factors include the fact that defendant was assessed points under risk factors 3 and 7, without which he would have scored as a level one risk. Further, weighing the mitigating factors against any aggravating factors, we conclude that the totality of the circumstances warrants a downward departure to risk level one to avoid an over-assessment of "defendant's dangerousness and risk of sexual recidivism" … . People v Stagles, 2023 NY Slip Op 06613, Fourth Dept 12-22-23

Practice Point: The correct evidentiary standard for a SORA risk-level assessment is "preponderance of the evidence."

Practice Point: For offenders convicted of possession of child pornography, who are assessed SORA risk-level points for "three of more victims" and "strangers as victims" based solely on the images, may be entitled to a downward departure.

DECEMBER 22, 2023

STREET STOPS, STOP AND FRISK.

HERE THE LEVEL-THREE STOP AND FRISK FOR A SUSPECTED FIREARM WAS VALID; CRITERIA EXPLAINED (FIRST DEPT).

The First Department, affirming the denial of defendant's suppression motion, explained the criteria for a level-three stop and frisk for a suspected firearm:

In assessing the propriety of a level-three stop and frisk of a defendant for a suspected firearm the court must consider three factors: First, whether there was proof of a describable object or of describable conduct that provides a reasonable basis for the police offer's belief that the defendant had a gun in his possession … .

A stop and frisk for a firearm is justifiable in cases where the officer identifies the outline of a pistol in the defendant's pocket … . Here, the officer described in detail the distinct pistol shape of the bulge in defendant's jeans pocket, including the orientation of the barrel and pistol grip, that he observed over the course of approximately a minute. Pursuant to the first Prochilo factor, these observations constituted proof of a "describable object" that "provide[d] a reasonable basis for the police officer's belief that the defendant had a gun in his possession," justifying the officer's immediate frisk of defendant's pocket (Prochilo, 41 NY2d at 761).

The second Prochilo factor is whether the manner of the officer's approach to the defendant and the seizure of the gun was reasonable under the circumstances (41 NY2d at 761). Following the observation of a gun-shaped bulge in a defendant's pocket, an officer is generally justified in conducting a minimally invasive pat-down of the bulge to confirm that it is indeed a firearm … . Here, after observing the pistol-shaped bulge in defendant's right rear jeans pocket, the officer conducted a pat-down of the bulge and confirmed that it was a gun. … Upon confirming that the object was a firearm, the officer had probable cause to effectuate an arrest and reasonably tackled defendant to the ground. People v Bowman, 2023 NY Slip Op 06494, First Dept 12-19-23

Practice Point: This decision explains the criteria for a valid level-three stop and frisk for a suspected firearm.

DECEMBER 19, 2023

STREET STOPS.

IN THIS STREET STOP CASE, THE POLICE OFFICER'S CLAIM TO HAVE SEEN THE OUTLINE OF A GUN UNDER DEFENDANT'S SWEAT PANTS WAS DEEMED INCREDIBLE AS A MATTER OF LAW; THE PEOPLE THEREFORE DID NOT MEET THEIR "BURDEN OF GOING FORWARD" AT THE SUPPRESSION HEARING; THE GUN SHOULD HAVE BEEN SUPPRESSED (SECOND DEPT).

The Second Department, reversing defendant's possession-of-a-weapon conviction, determined the People did not meet their burden of going forward at the suppression hearing because the police officer's (Desposito's) testimony was not credible. The court went on to say that, even if Desposito's testimony were true, the evidence did not provide reasonable suspicion for the street stop. Defendant was walking on the sidewalk. Desposito was in a moving car. Desposito claimed he saw the outline of a gun under defendant's sweat pants and told defendant to stop. Defendant ran, was captured, and a gun was found. Because Desposito was in a moving car and his view of defendant was obscured by parked cars and another pedestrian, the court found his testimony insufficient to meet the "going forward" burden of proof:

… [T]he People failed to establish the legality of the police conduct in the first instance, as Desposito's testimony was incredible as a matter of law and patently tailored to meet constitutional objections … . Desposito's testimony that he was able to observe an "L-shaped object" beneath the defendant's sweatpants as the police vehicle drove past the defendant strains credulity and defies common sense … . …

… [E]ven if Desposito's testimony is credited as true, his observations did not constitute specific circumstances indicative of criminal activity so as to establish the reasonable suspicion necessary to lawfully pursue the defendant, even when coupled with the defendant's flight … . People v Leon, 2023 NY Slip Op 06754, Second Dept 12-27-23

Practice Point: If a police officer's suppression-hearing testimony attempting to demonstrate reasonable suspicion for a street stop is incredible as a matter of law, the People fail to meet their "burden of going forward" and the motion to suppress must be granted.

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DECEMBER 27, 2023

WAIVER OF INDICTMENT, CLASS A FELONY.

A DEFENDANT CHARGED WITH A CLASS A FELONY CANNOT WAIVE INDICTMENT AND PLEAD TO A SUPERIOR COURT INFORMATION PURSUANT TO CPL 195.10 (THIRD DEPT).

The Third Department, reversing County Court, vacating defendant's guilty plea and dismissing the superior court information, determined defendant was not eligible to waive the indictment and plead to a superior court information because the controlling statute does not apply to A felonies. Defendant was charged with an A-II felony:

Defendant's primary contention is that the waiver of indictment and SCI were jurisdictionally defective … . CPL 195.10 provides, in relevant part, that "[a] defendant may waive indictment and consent to be prosecuted by [SCI] when . . . the defendant is not charged with a class A felony punishable by death or life imprisonment" (CPL 195.10 [1] [b]). To this end, the Court of Appeals has held that "when an accused is held for [g]rand [j]ury action upon a felony complaint that charges a class A felony, . . . a waiver of indictment with respect to that felony complaint is unauthorized" … . Here, defendant was held for grand jury action upon a felony complaint charging him with predatory sexual assault against a child, a class A-II felony that is punishable by an indeterminate sentence with a mandatory maximum term of life imprisonment … . Defendant's waiver of indictment encompassed this charge and, thus, was expressly prohibited under CPL 195.10 and is invalid, "render[ing] the resulting procedure employed to procure defendant's guilty plea unauthorized" … . People v Smith, 2023 NY Slip Op 06563, Third Dept 12-21-23

Practice Point: Defendants charged with a class A felony are not eligible, pursuant to CPL 195.10, to waive indictment and plead to a superior court information.

DECEMBER 21, 2023

WAIVER OF INDICTMENT, NO INDICATION WAIVER WAS IN OPEN COURT.

HERE THERE WAS NO INDICATION THE WAIVER OF INDICTMENT WAS SIGNED IN OPEN COURT, A JURISDICTIONAL DEFECT (THIRD DEPT).

The Third Department, dismissing the superior court information, determined the waiver of indictment was invalid because there was not evidence it was signed in open court:

A defendant "may waive indictment by a grand jury and consent to be prosecuted on an information filed by the district attorney," and "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 on November 19, 2020, the written waiver of indictment, which defendant and defense counsel acknowledged signing, is dated November 17, 2020, and 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 on [October 14, 2020], nor County Court's undated order approving the waiver, indicates that the waiver was signed in open court" on November 19, 2020 … . "In light of this jurisdictional defect, defendant's guilty plea must be vacated and the superior court information must be dismissed" … . People v Berry, 2023 NY Slip Op 06410, Third Dept 12-14-23

Practice Point: Here the waiver of indictment was deemed invalid because there was no indication the waiver was signed in open court, which is a jurisdictional defect. The superior court information was therefore dismissed.

DECEMBER 14, 2023