NEW YORK APPELLATE DIGEST, LLC

Criminal Law
Reversal Report
February 2024

An Organized Compilation of Selected Decisions, Mostly Reversals, Addressing Criminal Law, Released by Our New York State Appellate Courts and Posted on the New York Appellate Digest Website in February 2024. The Entires in the Table of Contents Link to the Summaries Which Link to the Full Decisions on the Official New York Courts Website. Click on “Table of Contents” in the Header on Any Page to Return There. Right Click on the Citations to Keep Your Place in the Reversal Report.

Contents

ATTORNEYS, INEFFECTIVE ASSISTANCE.

THE MAJORITY AFFIRMED THE CONVICTION BUT A TWO-JUSTICE DISSENT ARGUED DEFENSE COUNSEL WAS INEFFECTIVE FOR ALLOWING PREJUDICIAL EVIDENCE TO COME IN WITHOUT A STRATEGIC JUSTIFICATION (FOURTH DEPT).

The Fourth Department majority affirmed defendant's conviction, but a two-justice dissent argument defense counsel allowed prejudicial evidence to come in without any strategic justification:

From the dissent:

Meaningful representation is "reasonable competence, not perfect representation" … . "However it is elementary that the right to effective representation includes the right to assistance by an attorney who has taken the time to review and prepare both the law and the facts relevant to the defense . . . and who is familiar with, and able to employ at trial basic principles of criminal law and procedure" … .

"Whether counsel has adequately performed these functions is necessarily a question of degree, in which cumulative errors particularly on basic points essential to the defense, are often found to be determinative" … .

Here, when the People sought to introduce the order of protection in evidence, defense counsel failed to seek removal of the portion of that order stating the crimes for which defendant had previously been convicted, despite the fact that Supreme Court previously denied the People's Sandoval application. Moreover, as a direct result of defense counsel's open-ended questions, a witness stated during cross-examination that defendant was previously incarcerated. Most critically, however, defense counsel's open-ended questioning of the victim during cross-examination revealed that defendant had, on a prior occasion, broken into her home through the basement window. In this prosecution for, inter alia, burglary in the first degree, we cannot foresee evidence being more prejudicial than testimony elicited by his own counsel that defendant previously committed the same criminal act against the same victim. People v Howard, 2024 NY Slip Op 00711, Fourth Dept 2-9-24

Practice Point: The majority affirmed, but two dissenting judges argued defense counsel unnecessarily put evidence which was highly prejudicial to his client before the jury.

FEBRUARY 9, 2024

CONSOLIDATED TRIALS, JURY INSTRUCTIONS.

THE CONSOLIDATED TRIAL OF TWO SEPARATE CRIMINAL TRANSACTIONS, COUPLED WITH THE ABSENCE OF LIMITING JURY INSTRUCTIONS, CONSTITUTED REVERSIBLE ERROR (FIRST DEPT).

The First Department, in a full-fledged comprehensive opinion by Justice Rodriguez, over a two-justice comprehensive concurring opinion, determined that the consolidated trial of two separate criminal transactions, without appropriate limiting jury instructions, was reversible error:

The first indictment charged defendant with, among other counts, attempted murder. In relation to the first indictment, no gun was recovered, the alleged victim was not injured, and the evidence showed that there was at least some degree of

animus between defendant and the alleged victim. The defense theory was thus that the discharged gun was in fact the victim's. The second indictment, concerning an incident nearly six months later at a different location, charged defendant with possession of a firearm that was recovered on the person of his companion. The principal evidence supporting the second indictment was a set of suggestive jail phone call recordings.

Consolidated trial of indictments like the two at issue here is not necessarily error. However, defendant suffered impermissible prejudice as a result of (1) the nature and quantum of the evidence presented and (2) the specific respective theories of the prosecution and the defense. Supreme Court thus abused its discretion and committed error in trying the indictments together.

Although prejudice may in general be adequately ameliorated by appropriate limiting instructions, the jury received no such instruction here. People v Davis, 2024 NY Slip Op 00746, First Dept 2-13-24

Practice Point: This comprehensive majority opinion and and the comprehensive concurring opinion cannot be fairly summarized here. Consult this opinion for the law associated with consolidation of indictments for trial.

FEBRUARY 13, 2024

FAMILY 0FFENSES, STALKING, HARASSMENT.

ALLEGATIONS THAT RESPONDENT INSTALLED SOFTWARE ON PETITIONER'S COMPUTER ALLOWING RESPONDENT TO CONTROL THE COMPUTER REMOTELY, AND ALLEGATIONS RESPONDENT MADE PHONE CALLS TO PETITIONER INTENDED TO BE THREATENING, SUFFICIENTLY ALLEGED THE FAMILY OFFENSES OF HARASSMENT AND STALKING (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined the petition sufficiently alleged harassment and stalking family offeses based upon allegations respondent, petitioner's estranged husband, installed software on petitioner's computer allowing him to control the computer remotely, and made phone calls to petitioner intended to be threatening:

… [P]etitioner alleged that respondent installed spyware on her Apple laptop computer and that petitioner first noticed in mid-April 2021 that her username had been changed to "Creep" and that all documents related to the divorce proceedings between the parties had been deleted. Petitioner further alleged that, after taking the laptop to a computer store to have the laptop reset, she noticed about a week later that the laptop began showing the matrimonial files, which then disappeared again. Petitioner alleged that respondent was again controlling her laptop remotely. Petitioner also alleged a series of other related incidents. For example, she noticed in late April 2021 that her iPhone password had changed; she received a "spoofed" text message in early May 2021 and she discovered about a day later that respondent had accessed her Dropbox account; and she received another alarming or annoying text message in mid-May 2021 that referred to respondent's pet name for her. Petitioner thus alleged more than an isolated incident and, upon " '[l]iberally construing the allegations of the [second] family offense petition and giving it the benefit of every possible favorable inference,' " we conclude that the second petition alleges acts that, if committed by respondent, would constitute the family offense of harassment in the second degree … . Matter of Dhir v Winslow, 2024 NY Slip Op 00531, Fourth Dept 2-2-24

Practice Point: Remotely controlling petitioner's computer and making phone calls intended to be threatening may constitute the family offenses of harassment and stalking.

FEBRUARY 2, 2024

FREEDOM OF INFORMATION LAW (FOIL), CONVICTION RECORDS.

PETITIONER'S FOIL REQUEST FOR DOCUMENTS AND EVIDENCE RELATING TO HIS MURDER CONVICTION SHOULD NOT HAVE BEEN DENIED ON THE GROUND RESPONDING TO THE REQUEST WOULD INTERFERE WITH PETITIONER'S HABEAS CORPUS PROCEEDINGS IN FEDERAL COURT; THE FEDERAL COURT HAD ISSUED A STAY-IN-ABEYANCE ORDER TO ALLOW PETITIONER TO EXHAUST HIS STATE REMEDIES (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Wan, addressing a matter of first impression, determined petitioner's FOIL request for documents and evidence related to his murder prosecution should not have been denied on the ground that granting the request would interfere with petitioner's pending habeas corpus proceedings in federal court. The federal court issued a stay-and-abeyance order in the habeas corpus action to allow petitioner to exhaust his state remedies. Because the stay-and-abeyance order is in effect, the Second Department held that responding to the FOIL request would not interfere with the habeas corpus proceedings and the petition to compel production of the requested records should have been granted:

On July 12, 2020, the petitioner made a request to the Kings County District Attorney (hereinafter the District Attorney), pursuant to the Freedom of Information Law …, for "any and all material" related to the matter of People v Sarkodie, Indictment No. 2544/13, "including, but not limited to, any and all recordings, whether video or audio, DD-5's, medical reports, witness statements, police memo books, crime scene investigative reports, evidence vouchers, and ballistics reports." … On December 13, 2020, the petitioner's counsel filed a second habeas corpus petition in the EDNY, which was consolidated with the petitioner's pro se habeas petition In the federal habeas proceeding, the petitioner alleged both exhausted and unexhausted state law claims.

By order dated December 23, 2020 (hereinafter the stay-and-abeyance order), the EDNY acknowledged that the federal habeas proceeding "contains unexhausted claims that are not plainly meritless." Accordingly, the EDNY "f[ound] a stay to be appropriate and h[eld] the Petition [*2]in abeyance" to allow the petitioner to "exhaust his unexhausted claims and perfect the petition … . * * *

… [T]he District Attorney failed to establish that the records sought were exempt from disclosure pursuant to Public Officers Law § 87(2)(e)(i), since the District Attorney failed to establish that disclosure would interfere with the pending federal habeas proceeding … . Matter of Sarkodie v Kings County Dist. Attorney, 2024 NY Slip Op 00908, Second Dept 2-21-24

Practice Point: A FOIL request for documents and evidence related to defendant's murder conviction should not have been denied on the ground that responding to the request would interfere with petitioner's habeas corpus proceedings in federal court The federal court had issued a stay-and-abeyance order to allow petitioner to exhaust his state remedies. Therefore, the petition to compel production of the sought documents and evidence should have been granted.

FEBRUARY 21, 2024

JUROR DISQUALIFICATION, NEW DISCOVERY OBLIGATIONS.

THE DEFENSE CHALLENGE TO A JUROR WHO EXPRESSED SERIOUS DOUBTS ABOUT BEING ABLE SERVE SHOULD HAVE BEEN GRANTED, DESPITE HER ULTIMATE STATEMENT SHE COULD DO WHAT IS NECESSARY TO SERVE; THE NEW CPL ARTICLE 245 DISCOVERY STATUTES IMPOSE NEW BURDENS ON THE PEOPLE ENCOMPASSING ROSARIO AND BRADY MATERIAL AND EXTENDING TO DOCUMENTS WHICH ARE NOT IN THE PEOPLE'S POSSESSION, EVEN WHERE THE DEFENSE CAN ACCESS THOSE DOCUMENTS (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction and ordering a new trial, offered important, substantial discussions of (1) how to handle a juror who expresses doubt about the ability to serve on the jury, and (2) the new, much broader and far-reaching disclosure requirements imposed upon the People by the CPL Article 245. The juror expressed doubt about her ability to serve because of her family obligations, her indecisiveness and her inability to follow the orders and instructions of the court. Ultimately when asked if she thought she could do what is necessary to be a juror, she said "yes." The Fourth Department held the defense challenge to the juror should not have been denied. On the CPL Article 245 issue, the Fourth Department explained that the statute goes far beyond the old, pre-

statute, criteria for turning over Rosario and Brady material, to include collecting and turning over discovery from agencies outside the prosecutor's office, even if the defendant could gain access to those that discovery him or herself: The Fourth Department held the prosecutor committed numerous violations of CPL Article 245 and left it to the judge in the next trial to impose sanctions:

… [T]he prospective juror never stated, unequivocally or otherwise, that she would follow the court's instructions and apply the law to the facts. Nor did she state that her child care concerns had been alleviated such that she could devote her undivided attention to the trial.

Just as a "general statement of impartiality that does not explicitly address the specific cause of the preexisting bias is not sufficient" … , a general statement from a prospective juror that they can do what it takes to be a juror is not sufficient to rehabilitate the prospective juror where, as here, the prospective juror had previously offered specific reasons for being unable to serve impartially. * * *

Although transcripts that are not in the People's possession and control are not subject to Brady and Rosario disclosure requirements … , that fact is of no moment for purposes of CPL 245.20. Even where documents are "beyond the prosecutor's control under Rosario and constructive possession under CPL 245.20 (2), the presumption of openness, … the duty to maintain the flow of information … , the continuing duty to disclose … , and, perhaps most importantly, the goals of article 245 require that when the prosecutor becomes aware [after making the requisite reasonable inquiries] that an agency outside their control holds information that relates to the subject matter of the case, best practice dictates that the People take steps . . . to obtain those records notwithstanding the fact [that] the information may be available to the defendant by equivalent process" … . People v Heverly, 2024 NY Slip Op 00524, Fourth Dept 2-2-24

Practice Point; A juror who expresses serious doubts about being able to serve, doubts which are not addressed by further questioning, should be excluded, even if the juror ultimately states he or she can do what is necessary to serve.

Practice Point: CPL Article 245 has drastically expanded the burden on the People to timely turn over discovery, including Rosario and Brady material and documents which are not in the People's possession, even where the defense also has access to those documents. The is an important discussion of the new criminal discovery rules which should be required reading for defense counsel, prosecutors and judges.

FEBRUARY 2, 2024

JURY NOTES, EXPERT WITNESS QUALIFICATION.

RE-READING THE ORIGINAL JURY INSTRUCTION DID NOT ADDRESS THE CONFUSION EXPRESSED IN THE NOTE FROM THE JURY; IN ADDITION, THE JUDGE FAILED TO MAKE THE INITIAL DETERMINATION WHETHER A WITNESS WAS QUALIFIED TO OFFER EXPERT OPINION EVIDENCE; CONVICTION REVERSED (THIRD DEPT).

The Third Department, reversing defendant's conviction, over a dissent, determined the judge's response to a jury note was inadequate and the judge did not make the required initial determination that a witness was qualified to offer expert-opinion evidence on the child sexual abuse accommodation syndrome (CSAAS). The jury wanted to know whether a guilty verdict required that the three alleged acts of sexual abuse take place within the three-month period described in the indictment. The answer was "es," but the judge merely re-read the original charge about which the jury was confused. With respect to the CSAAS witness, the judge left it up to the jury to decide whether she was qualified as an expert:

… [T]he jury had already been provided with a complete written copy of the court's original instructions for its reference during deliberations. Under these circumstances, County Court's response to the jury's inquiry was not meaningful, as it did nothing to clarify the very specific point on which the jury was confused. "[I]n our view, this is one of those rare cases where interest of justice review is warranted. Where the court fails to give information requested upon a vital point no appellate court may disregard the error" … . * * *

Although "[t]he court is not required to explicitly declare a witness an expert before permitting [expert] testimony" … , "the trial court is vested with the initial responsibility of evaluating whether an expert possesses the requisite skill, training, education, knowledge or experience from which it can be assumed that the information imparted or the opinion rendered is reliable" … . Here, County Court abdicated its responsibility to make the initial determination as to whether [the witness] qualified as an expert. People v Goff, 2024 NY Slip Op 00656, Third Dept 2-8-24

Practice Point: A response to a jury note must clarify the confusion expressed in the note. Here, re-reading the original instruction was not sufficient.

Practice Point: Although a judge is not required to explicitly declare a witness an expert, the judge must make the initial determination whether the witness is qualified to offer reliable testimony.

FEBRUARY 8, 2024

JURY NOTES.

THE JUDGE'S FAILURE TO READ THE NOTE FROM THE JURY VERBATIM WAS A MODE OF PROCEEDINGS ERROR REQUIRING REVERSAL OF DEFENDANT'S MURDER CONVICTION (FOURTH DEPT).

The Fourth Department, reversing defendant's murder conviction, determined the judge committed a mode of proceedings error by paraphrasing the note from the jury instead of reading it verbatim:

The jury note … stated … "[w]e, the Jury, request: to hear the read-back of [a restaurant worker's] cross-examination where she is asked how many times she had seen the defendant at the restaurant. She indicates that she had seen him 2 times while she was working at the counter, and multiple times while she was not at the counter but through the security camera play-back. We wish to hear this portion read back. We also request to hear the portion of the cross-examination where she is asked and answers when she identified [a shooter shown in the surveillance video] as the defendant to the police" … . The court did not read the note aloud verbatim and the record does not reflect that the court showed the note to the parties. Rather, the record reflects that the court addressed the note before counsel and the jury by stating, "the readback that you have requested of [the restaurant worker's] cross-examination where she is asked how many times she had seen the defendant at the restaurant will now be read back for you along with the second portion of that which reads, 'We also request to hear that portion of the cross-examination where she is asked and answers when she identified [the shooter] as the defendant to the police.' We'll read both those portions." The court failed to read the second and third sentences contained within the jury note. We conclude that by improperly paraphrasing the jury note, the court failed to give

meaningful notice of the note … . People v Crawford, 2024 NY Slip Op 00528, Fourth Dept 2-2-24

Practice Point: Here the judge's failure to read the note from the jury verbatim was deemed a mode of proceedings error requiring reversal of a murder conviction.

FEBRUARY 2, 2024

JURY NOTES.

THE JURY NOTE REQUESTED THE "DEFINITIONS" OF THE CHARGED OFFENSES; DEFENSE COUNSEL ASKED THE JUDGE TO ALSO REREAD THE JUSTIFICATION INSTRUCTION IN THIS MURDER CASE; THE JUDGE REFUSED; BECAUSE THE JURY'S NOTE WAS SPECIFIC AND DID NOT REQUEST THE JUSTIFICATION INSTRUCTION, THE JUDGE PROPERLY DENIED DEFENSE COUNSEL'S REQUEST (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Singas, with a concurrence, affirming defendant's convictions in this murder, attempted murder and assault case, determined the judge did not err by denying defense counsel's request to reread the justification jury instruction after the jury sent out a note asking for the definitions of the charged offenses. The jury asked for "[a]ll definitions discussed: Murder II, Manslaughter I, Depraved Murder II, etc.," Because the request was deemed specific the justification instruction was not reread because the jury didn't request it:

… "[T]he form of the jury's" note indicated a request that the jury be recharged on the elements of the crimes … . The jury note asked for "all definitions" contained in the charges: the jury did not simply ask for "all definitions" to be read back but instead chose to limit which "definitions" it sought by providing an exemplary list containing the first three of the ten criminal offenses on which the trial court had originally instructed the jury and ending the list with "etc." The usage of "etc." in this context corroborates this interpretation of the note because et cetera at the end of a list signals "others especially of the same kind" … . That the jury did not seek further instruction or clarification after the recharge also supports our conclusion that the trial court correctly interpreted the jury note and responded meaningfully

and with the complete information sought … . People v Aguilar, 2024 NY Slip Op 00849, CtApp 2-20-24

Practice Point: A judge must respond "meaningfully" to a jury note. Here the note requested definitions of the charged crimes. The judge properly denied defense counsel's request to reread the justification instruction because the jury's not was specific and did not mention justification.

FEBRUARY 20, 2024

JURY SELECTION, COVID, MASKED JURORS, DEFENDANT'S RIGHT TO BE PRESENT.

THE COVID PROTOCOLS WERE IN EFFECT DURING DEFENDANT'S TRIAL; THE JURORS WERE REQUIRED TO WEAR FACE MASKS WHEN THEY WERE NOT BEING INDIVIDUALLY QUESTIONED DURING VOIR DIRE; THE INABILTY TO SEE THE JURORS' FULL FACES DID NOT DEPRIVE DEFENDANT OF HIS RIGHT TO BE PRESENT DURING JURY SELECTION AND DID NOT VIOLATE HIS DUE PROCESS RIGHTS (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Cannataro, affirming defendant's convictions, determined defendant's inability to see jurors' facial expressions during voir dire, because of the COVID mask-wearing requirement, did not deprive him of the opportunity to be present during jury selection and did not deprive him of due process of law. Although the jurors wore masks when not questioned during voir dire, the mask was removed when each juror was questioned individually:

… [D]efendant maintains that safety protocols implemented during the COVID-19 pandemic—namely social distancing and the requirement that prospective jurors cover their mouths and noses with a face mask when not being questioned individually—violated these rights because defendant could not see each prospective juror's entire face throughout the jury selection process. Because neither a defendant's right to be present during jury selection nor due process

require that defendant have a simultaneous, unobstructed view of the entirety of every prospective juror's face during jury selection, we affirm. * * *

… D]efendant was present at all phases of jury selection. … [D]efendant was able to hear the questions posed to prospective jurors and to observe their responses including their "facial expressions, demeanor and other subliminal responses." * * *

… [T]he safety protocols in use at defendant's jury selection were permissible as they did not impede defendant's ability to be present and observe the selection process. A defendant's right to be present at jury selection does not entail the absolute or unlimited ability to observe each prospective juror's facial expressions. After all, there is much more to body language than a person's nose or mouth; defendant could still observe a great deal about prospective jurors including their posturing, the position of their arms, and their eyes and eyebrows … . People v Ramirez, 2024 NY Slip Op 00848, CtApp 2-20-24

Practice Point: Here, during voir dire, the jurors who were not being questioned wore face masks. Defendant's inability to see the full faces of the jurors when they were not being questioned did not deprive defendant of his right to be present during jury selection and did not deprive defendant of due process of law.

FEBRUARY 20, 2024

LESSER INCLUDED OFFENSES, BURGLARY AS A SEXUALLY MOTIVATED FELONY.

ALTHOUGH DEFENDANT WAS CHARGED WITH BURGLARY AS A SEXUALLY MOTIVATED FELONY, WHICH REQUIRES PROOF THE CRIME WAS MOTIVATED BY SEXUAL GRATIFICATION, THE PEOPLE WERE ENTITLED TO A JURY INSTRUCTION ON THE LESSER INCLUDED OFFENSE OF BURGLARY SECOND, WHICH NEED NOT BE MOTIVATED BY SEXUAL GRATIFICATION (CT APP).

The Court of Appeals, reversing the Appellate Division, determined the People were entitled to a jury instruction on the lesser included offense (burglary second degree) where the indictment charged burglary second degree as a sexually

motivated offense. Defense counsel objected arguing defendant was not given notice of the need to defend against a burglary charge which did not include the "sexual gratification" element. The Appellate Division agreed with defense counsel's argument, but the Court of Appeals rejected it, noting that a burglary could be motivated by "sexual harassment" but not by "sexual gratification:"

Defendant confronted, assaulted, and groped several women outside of a New York University dormitory, including grabbing a student by the throat and sexually assaulting her. The students managed to run from defendant and into their dormitory. Shortly thereafter, defendant entered the dormitory and had an altercation with the building's security guard who tried to block his way, but defendant pushed through the turnstiles that separated the dormitory's public lobby from the elevator bank that led to the private residences. The security guard was able to return defendant to the lobby, where defendant continued to harass students until police arrived and arrested him. * * *

… [C]harging burglary as a sexually motivated felony does not … limit the People to proving that a defendant intended to commit what is traditionally considered a "sex crime" when he or she entered the dwelling. … [T]he People must prove that, regardless of the crime the defendant intended to commit inside the dwelling, the burglary was motivated in substantial part by personal sexual gratification. For example, the People may charge a sexually motivated burglary based on a theory that the defendant intended to commit larceny once inside of a dwelling, but still maintain the motivation for the burglary was sexual gratification.

…[T]he inverse is also possible: the People may argue that the intended crime was obviously sexual in nature, but the jury may find that, although the defendant entered or remained in the dwelling intending to commit that crime, the motivation was something other than sexual gratification. In that situation … the proof may be insufficient to convict defendant of the sexually motivated felony but sufficient as to the lesser included offense of burglary in the second degree. People v Seignious, 2024 NY Slip Op 00927, CtApp 2-22-24

Practice Point: Although it may be possible for defense counsel to ask for a more limited jury instruction, here the People, who had charged defendant with burglary second degree as a sexually motivated felony (with a sexual-gratification element), were entitled to a jury instruction on the the lesser included offense of burglary second degree (with no sexual-gratification element).

FEBRUARY 22, 2024

MODIFICATION OF SECURING ORDERS (BAIL) BASED ON COMMISSION OF FELONIES WHILE ON BAIL, FULL EVIDENTIARY HEARING.

WHERE MODIFICATION OF A SECURING ORDER (RELEASE ON BAIL) IS NOT BASED UPON RISK OF FLIGHT, BUT RATHER IS BASED UPON THE COMMISSION OF FELONIES WHILE RELEASED ON BAIL, A FULL EVIDENTIARY HEARING MUST BE HELD, OR, IN THE ALTERNATIVE, THE PEOPLE CAN SUBMIT TRANSCRIPTS OF GRAND JURY TESTIMONY (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, clarified the appropriate procedures for modifying a securing order when a defendant who has been released on bail is alleged to have committed other crimes:

While out on bail after his arrest for a felony, defendant was arrested three times for additional violent felonies. The court modified his securing order by remanding defendant. This appeal concerns the overlap between statutory provisions governing modifications to securing orders under these circumstances. We now hold that, where otherwise applicable, courts may modify a securing order when a defendant is charged with additional class A or violent felonies pursuant to either CPL 530.60 (1) or 530.60 (2) (a), but that, where the Court proceeds under CPL 530.60 (1), the record must reflect that the decision was based on the risk of flight factors and criteria in CPL 510.30. Where, as here, the record does not demonstrate that the court's decision was based on defendant's increased risk of flight, it will be assumed that the court proceeded pursuant to CPL 530.60 (2) (a) and a failure to follow the procedural requirements of CPL 530.60 (2) (c) will be considered error.
* * *

Where a court modifies a securing order on [a]reasonable cause finding, and so determines that a defendant poses a danger to the community, the court must ensure that the procedural requirements of subdivision (2) (c) are followed (see e.g. People ex rel. Ryan v Warden, 113 AD2d 116, 117 [1st Dept 1985] [subdivision (2) (c) hearing required where "(p)etitioner's remand without bail was, concededly, based solely upon his arrest for a new charge as provided for in CPL 530.60 (2) (a)

and not on any finding that there was a likelihood he might not return to court (under) CPL 530.60 (1)"]). These prerequisites—a hearing with relevant, admissible evidence and the cross-examination of witnesses, or the submission of grand jury testimony transcripts—are designed to provide the court with a basis for a reasonable cause determination and to ensure that a defendant receives due process. While the procedural prerequisites provide for a more formal hearing with witness testimony, they also provide the People with the option, as they did upon remittal here, to submit transcripts of grand jury testimony—a streamlined approach that may provide the support needed for a reasonable cause finding. People ex rel. Rankin v Brann, 2024 NY Slip Op 00850, CtApp 2-20-24

Practice Point: Before bail is revoked because the defendant is alleged to have committed felonies while released on bail, a full evidentiary hearing must be held to flesh out the alleged crimes, or the People may submit transcripts of grand jury testimony. The mere allegation that defendant committed additional crimes while on bail is not enough.

FEBRUARY 20, 2024

POSSESSION OF A WEAPON, TEMPORARY INNOCENT.

DEFENDANT'S INNOCENT TEMPORARY POSSESSION OF A WEAPON WAS THE RESULT OF HIS DISARMING A MAN WHO WAS ASSAULTING THE MAN'S WIFE; THE POSSESSION-OF-A-WEAPON CONVICTION REVERSED (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Mendez, over a two-justice dissenting opinion, determined defendant's temporary possession of a weapon was not "criminal." Defendant took the weapon from his friend, Moscoso, who was assaulting his (Moscoso's) wife in an effort to protect her:

… [T]he evidence established that defendant's possession of the weapon after disarming Moscoso was incidental, temporary, and lawful, and that he did not use the weapon in a dangerous manner. The trial court instructed the jury on "temporary and lawful possession of a weapon" by giving the charge as it appears in the Criminal Jury Instructions … which states in relevant part:

"A person has innocent possession of a weapon when that person comes into possession of the weapon in an excusable manner, and maintains possession, or intends to maintain possession, of the weapon only long enough to dispose of it safely."

The charge does not define "safely." Instead, it provides a list of non-dispositive factors for the jury to consider — essentially an "amalgam of elements" — with only some relating to how the defendant disposed of the weapon, suggesting that trial courts should expand on or alter the charge where necessary to fit the facts of the case … . People v Ramirez, 2024 NY Slip Op 00390, First Dept 1-30-24

Practice Point: This case has everything you could ever need to know about innocent temporary possession of a weapon.

JANUARY 30, 2024

SEARCH AND SEIZURE, CELL SITE LOCATION WARRANT.

THE SEARCH WARRANT SEEKING CELL SITE LOCATION INFORMATION (CSLI) FROM THE NEW JERSEY CELL PHONE COMPANY WAS FAXED TO NEW JERSEY FROM NEW YORK; THEREFORE THE WARRANT WAS "EXECUTED" IN NEW YORK AND DID NOT VIOLATE THE NEW YORK CONSTITUTION OR CPL ARTICLE 690 (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice LaSalle, determined the search warrant for cell site location information (CSLI) was executed in New York, where the warrant was faxed from, not in New Jersey, where the T-Mobile records were located. Therefore there was no violation of the New York Constitution or Criminal Procedure Law 690.2-(1). The CSLI was used to place the defendant at the location of the stabbing at the time of the stabbing:

Just as the term "executed" is not defined in CPL article 700, it is also not defined in the New York Constitution or CPL article 690. Nevertheless, in determining where a warrant is "executed" within the meaning of CPL 700.05(4), the Court of Appeals looked to where the actions of the law enforcement officers took place. It follows that in determining where a search warrant is "executed" within the meaning of the New York Constitution and CPL 690.20(1), we similarly must look to where the actions of the law enforcement officers took place. Here, the action of

the subject law enforcement officer—the act of faxing the search warrant to T-Mobile—took place in New York … .

The "core" of the Fourth Amendment is to "protect the right of privacy from arbitrary police intrusion" … . A service provider accessing and retrieving its subscribers' CSLI and call detail information located in the service provider's own business records does not implicate its subscribers' right to privacy protected by the Fourth Amendment … . It is only when agents of the government act that the subscribers' Fourth Amendment rights are implicated. Since the actions of the government's agents that encroached on the defendant's Fourth Amendment rights—the faxing of the warrant—took place in New York, we conclude that this is where the search warrant was executed. People v Riche, 2024 NY Slip Op 00785, Second Dept 2-14-24

Practice Point: Here a search warrant seeking cell site location information (CSLI), which was faxed from New York to the cell phone company in New Jersey, was "executed" in New York and therefore did not violate the New York Constitution or Criminal Procedure Law Article 690.

FEBRUARY 14, 2024

SEARCH AND SEIZURE, EMERGENCY EXCEPTION TO WARRANT REQUIREMENT.

THE EMERGENCY EXCEPTION TO THE WARRANT REQUIREMENT DID NOT JUSTIFY THE OFFICER'S ENTRY OF THE RESIDENCE AND SEIZURE OF A SWITCHBLADE; SWITCHBLADE AND STATEMENTS RELATING TO THE SWITCHBLADE SUPPRESSED; IN ADDITION, AN INCLUSORY CONCURRENT COUNT WAS DISMISSED (FOURTH DEPT).

The Fourth Department determined (1) the search of defendant's premises and the seizure of switchblade was not justified by the emergency exception to the warrant requirement and (2) the criminal possession of a weapon conviction must be dismissed as an inclusory concurrent count of criminal possession of a weapon third:

The court reasoned that the officer's entry into defendant's residence was justified under the emergency exception to the warrant requirement, which permits a warrantless search where " '(1) the police . . . have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property and this belief [is] grounded in empirical facts; (2) the search [is] not . . . primarily motivated by an intent to arrest and seize evidence; and (3) there [is] some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched' " … . … [T]he first and third elements of the emergency exception were not present at the time the officer entered defendant's residence because defendant had been secured prior to that time and the officer who conducted the search testified that he did not believe there was anyone else in the residence at that time … .

We therefore modify the judgment by granting that part of defendant's omnibus motion seeking to suppress the switchblade knife and defendant's statements relating to the switchblade knife, reversing that part of the judgment convicting defendant of CPW in the third degree as it relates to the switchblade knife, and dismissing count 4 of the indictment … . People v Lee, 2024 NY Slip Op 00718, Fourth Dept 2-9-24

Practice Point: At the time the officer entered defendant's residence and seized a switchblade all parties had been secured and removed from the residence. The emergency exception to the warrant requirement did not apply.

FEBRUARY 9, 2024

SEARCH AND SEIZURE, INVENTORY SEARCH.

THE PEOPLE DID NOT DEMONSTRATE AN INVENTORY LIST WAS CREATED FOR THE SEARCH OF DEFENDANT'S CAR; THEREFORE THE PEOPLE DID NOT PROVE THE SEARCH WAS A VALID "INVENTORY SEARCH" (FIRST DEPT).

The First Department, reversing Supreme Court, determined the People did not prove the search of a car which turned up a firearm and marijuana was a valid "inventory search:"

The People failed to carry their initial burden of establishing a valid inventory search of defendant's vehicle. Court of Appeals precedent "requires that a police officer prepare a meaningful inventory of the contents of an accused's car" … . Although the People failed to establish that the officers prepared the prescribed inventory search form, such failure is considered a mere "technical defect" and "is not fatal to the establishment of a valid search as long as (1) the search, in accordance with the 'standardized procedure,' is designed to produce an inventory and (2) the search results are fully recorded in a usable format" … . Here, the People failed on this latter point, since there was no evidence offered to show that the officers created the "hallmark of an inventory search: a meaningful inventory list" … . * * *

Ultimately, no form, list, or usable record was produced before the hearing court, and there is otherwise no basis on which to conclude that an inventory list or record of the search results was ever created, either during the search or after its completion. People v Cabrera, 2024 NY Slip Op 00685, First Dept 2-8-24

Practice Point: In order to prove items were seized from a car pursuant to a valid "inventory search," some sort of inventory list must have been created during the search.

FEBRUARY 8, 2024

SEARCH AND SEIZURE, SEARCH INCIDENT TO ARREST.

THE SEARCH OF A CAR AFTER DEFENDANT HAS BEEN REMOVED FROM THE CAR CANNOT BE CONSIDERED A SEARCH INCIDENT TO ARREST; SUPPRESSION GRANTED AND INDICTMENT DISMISSED (FIRST DEPT).

The First Department, reversing defendant's conviction and dismissing the indictment, determined the search of defendant's car was not a valid search incident to arrest because defendant and the driver had already been removed from the car. The People elected not to rely on the appeal waiver because of the erroneous suppression ruling:

The court improperly denied defendant's motion to suppress the PCP recovered from the vehicle. As the People concede, the search of the vehicle could not be

justified as a search incident to arrest because, at the time of the search, defendant and the driver had already been removed from the car and were in handcuffs. Anything inside of the car was no longer in defendant's grabbable area or immediate control, and the People failed to demonstrate the existence of exigent circumstances to justify the search … . People v Ortiz, 2024 NY Slip Op 00745, First Dept 2-13-24

Practice Point: Once a defendant has been removed from a car, a search of the car cannot be a search incident to arrest because the interior of the car is no longer in defendant's grabbable area or immediate control.

FEBRUARY 13, 2024

SENTENCING, CORRECTION MADE IN DEFENDANT'S ABSENCE.

THE ATTEMPT TO CORRECT A SENTENCING MISTAKE IN THE DEFENDANT'S ABSENCE VIOLATED DEFENDANT'S CONSTITUTIONAL AND STATUTORY RIGHT TO BE PRESENT (FIRST DEPT).

The First Department, vacating defendant's sentence, determined the attempt to correct a mistake in the term of postrelease supervision in defendant's absence violated defendant's constitutional and statutory rights:

As the People concede, defendant's constitutional and statutory rights to be present at sentencing were violated when the court resentenced defendant in his absence to correct a mistake in the term of postrelease supervision imposed (see CPL 380.40[1] …). Accordingly, the sentence is vacated and the matter is remanded for resentencing with defendant present. On remand, the court shall also address the discrepancy between the five-year term of postrelease supervision imposed on the weapon possession count at the original sentencing and the three-year term of postrelease supervision count reflected in the amended sentence and commitment sheet … . People v McCallum, 2024 NY Slip Op 00816, First Dept 2-15-24

Practice Point: Here the attempt to correct a mistake in the period of postrelease supervision in the defendant's absence required vacation of the sentence.

FEBRUARY 15, 2024

SEX OFFENDER REGISTRATION ACT (SORA), RISK LEVEL ASSESSMENT HEARING MUST BE 30 DAYS BEFORE RELEASE, MENTAL HYGIENE LAW.

THE SORA RISK-LEVEL ASSESSMENT PROCEEDINGS MUST BE CONDUCTED 30 DAYS BEFORE DEFENDANT'S RELEASE FROM CONFINEMENT, REGARDLESS WHETHER THE STATE IS CONSIDERING OR IS IN THE PROCESS OF INSTITUTING CIVIL COMMITMENT PROCEEDINGS (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Curran, over a comprehensive two-judge dissenting opinion by Judge Wilson, determined that the sex offender risk-level assessment proceedings must be held 30 days prior to a defendant's release from confinement, regardless whether the state is considering instituting, or already has instituted, proceedings to civilly commit the defendant pursuant to the Sex Offender Management and Treatment Act (SORA):

The Sex Offender Registration Act (SORA) (Correction Law § 168 et seq.) provides that a sex offender "shall" be classified into one of three risk level categories "[30] days prior to discharge, parole or release" (Correction Law § 168-n [2]). The central question presented by these appeals is whether, for purposes of SORA, this deadline is properly measured from the date an offender is released from confinement by the Department of Corrections and Community Supervision (DOCCS), despite pending or contemplated proceedings to civilly commit the offender under the Sex Offender Management and Treatment Act (SOMTA) (Mental Hygiene Law § 10.01 et seq.). We hold that, under a plain reading of SORA, the 30-day deadline for conducting a risk level classification hearing must be measured from an offender's release by DOCCS upon the completion of a prison sentence, irrespective of whether the state is considering instituting, or has already instituted, proceedings under SOMTA. We further hold that offenders are not denied due process by having a SORA hearing at a time when they may be civilly committed under SOMTA. People v Boone, 2024 NY Slip Op 00928, CtApp 2-22-24

Practice Point: SORA risk-level-assessment proceedings are to be held 30 days prior to defendant's release from confinement and cannot be delayed because the state is considering or has instituted proceedings for civil commitment.

FEBRUARY 22, 2024

SEX OFFENDER REGISTRATION ACT (SORA), RISK LEVEL ASSESSMENT HEARING, MENTAL HYGIENE LAW.

EVEN WHERE IT IS POSSIBLE DEFENDANT LACKS THE CAPACITY TO UNDERSTAND THE SORA RISK-LEVEL PROCEEDINGS, THE RISK-LEVEL ASSESSMENT CAN BE MADE WITHOUT AN INDEPENDANT ASSESSMENT OF DEFENDANT'S MENTAL CAPACITY (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Cannaturo, over a two-judge dissenting opinion by Judge Rivera, and a dissent by Judge Halligan, determined the SORA risk-level proceedings can proceed without an assessment of the defendant's mental health, even where, as here, there is a possibility defendant make lack the capacity to fully comprehend the risk-level proceedings:

The Sex Offender Registration Act (SORA) requires that every person convicted of a sex offense be given a risk-level classification corresponding to their assessed likelihood of recidivism and potential danger to the community. This risk level, in turn, determines the scope of information available to the public concerning the offender. To protect against erroneous classification, judicial determination of an offender's risk level can occur only after the offender has been provided notice, counsel, disclosure of relevant information, and an opportunity to object and present evidence at a hearing, at which the People must prove the appropriateness of the classification by clear and convincing evidence. An offender's risk level is also subject to re-evaluation on an annual basis.

The primary question on this appeal is whether due process precludes a court from determining a sex offender's risk level when there is a possibility that the offender—although represented by counsel and provided the other protections listed above—may lack capacity to fully comprehend risk-level assessment proceedings. We hold that the many safeguards already provided under SORA minimize the risk of inaccurate risk-level classification and adequately balance the competing private and State interests in these civil proceedings. People v Watts, 2024 NY Slip Op 00926, CtApp 2-22-24

Practice Point: The safeguards in place for SORA-risk-level-assessment proceedings are sufficient to protect the rights of a defendant who may lack the capacity to comprehend the proceedings. There is no need for an independent assessment of defendant's mental capacity before making the risk-level assessment.

FEBRUARY 22, 2024

SUPPRESSION OF STATEMENTS INVOLUNTARLY MADE.

THE STATEMENT GIVEN BY THE DEFENDANT WHEN HE WAS UNDER MEDICATION AT THE HOSPITAL SHOULD HAVE BEEN SUPPRESSED; AT TRIAL THE JURY SHOULD HAVE BEEN INSTRUCTED TO REJECT THE STATEMENT IF THEY FOUND IT WAS INVOLUNTARILY MADE; AND THE DEFENSE BATSON CHALLENGE TO THE EXCLUSION OF FOUR AFRICAN-AMERICAN PROSPECTIVE JURORS SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined: (1) the statement given by the defendant when he was under medication at the hospital should have been suppressed; (2) at trial the judge should have instructed the jury to reject the statement if they found the statement was not voluntarily made; and (3) the defense Batson challenge to the prosecutor's exclusion of four African-American prospective jurors should have been granted:

At the time of the interrogation, the defendant had recently been in a medically induced coma, had come out of surgery only hours before, and his condition "was still sufficiently serious that he was in the intensive care unit" … . The defendant "was lying on his back on a hospital bed, encumbered by tubes, needles, and breathing apparatus" when the detective approached him … . At the time of the police questioning, the defendant was drowsy from painkillers administered to him, his right arm was handcuffed to the hospital bed, and his left arm was bandaged and immobilized from the earlier surgery. The defendant was positioned upright so that the detective could question him, and when the defendant expressed that this caused him pain and requested medical assistance, the detective denied the

request and coerced the defendant by stating that he would obtain medical assistance after he had questioned the defendant. * * *

Where, as here, the defendant has placed in issue the voluntariness of his statements to law enforcement officials, "the court must submit such issue to the jury under instructions to disregard such evidence upon a finding that the statement was involuntarily made" … . * * *

… [T]he record demonstrates that the articulated reasons were not applied equally to exclude other prospective jurors … . Under these circumstances, the prosecutor's explanations as to the four prospective jurors were pretextual, and the defendant is entitled to a new trial on this ground … . People v Parker, 2024 NY Slip Op 00783, Second Dept 2-14-24

Practice Point: The statement given by defendant when he was under medication at the hospital should have been suppressed.

Practice Point: At trial, where defendant has placed the voluntariness of his statement in issue, the jury must be instructed to reject the statement if they find it was not voluntarily made.

Practice Point: Here the prosecutor accepted a juror who was a college student living at home but who was not African-American, and the prosecutor rejected four African-American prospective jurors because they were college students living at home with limited life experience. The Batson challenge should have been granted.

FEBRUARY 14, 2024

TRAFFIC STOPS.

AN OFFICER'S OBSERVATION OF DEFENDANT'S CAR FOLLOWING ANOTHER CAR TOO CLOSELY (A TRAFFIC INFRACTION) PROVIDED PROBABLE CAUSE FOR A TRAFFIC STOP, EVEN IF THERE WERE OTHER MOTIVATIONS FOR THE STOP (FOURTH DEPT).

The Fourth Department, reversing County Court, determined defendant's motion to suppress in this traffic stop case should not have been granted. The traffic stop was based upon the deputy sheriff's observation of defendant's car less than one car length from the car in front while both cars were going 65 mph, which constitutes a

traffic infraction (following too closely). The Fourth Department noted that a traffic infraction provides probable cause for traffic stop, even if the officer has another motive for the stop (apparently the case here):

The deputy, having personally observed defendant violate Vehicle and Traffic Law § 1129 (a), thus had probable cause to stop defendant's vehicle … .

… [T]o the extent the court's decision also found the stop unlawful on the basis that it was pretextual, that was error. It is well settled that " 'where a police officer has probable cause to believe that the driver of an automobile has committed a traffic violation, a stop does not violate [the state or federal constitutions, and] . . . neither the primary motivation of the officer nor a determination of what a reasonable traffic officer would have done under the circumstances is relevant' " … . In light of the deputy having personally observed defendant commit a traffic violation, the stop was properly based upon probable cause, and the deputy's other motivations in stopping the vehicle, if any, were irrelevant to determining whether the stop was lawful … . People v Williams, 2024 NY Slip Op 00581, Fourth Dept 2-2-24

Practice Point: If a police officer observes a driver commit a traffic infraction (here following too closely), the officer has probable cause to stop the car, even if the officer has other motivations for the stop.

FEBRUARY 2, 2024