NEW YORK APPELLATE DIGEST, LLC

Criminal Law
Reversal Report
March 2024

An Organized Compilation of Summaries 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 March 2024. The Entries in the Table of Contents Link to the Summaries Which Link to the Full Decisions on the Official New York Courts Website. Click on “Table of Contents” in the Header on Any Page to Return There. Right Click on the Citations to Keep Your Place in the Reversal Report.

Table of Contents

Contents

AUTOMOBILE PRESUMPTION, POSSESSION OF CONTENTS BY OCCUPANTS.

STANDING OUTSIDE A VEHICLE AND REACHING INSIDE IS NOT "OCCUPYING" THE VEHICLE SUCH THAT THE AUTOMOBILE PRESUMPTION OF POSSESSION OF THE CONTENTS OF A VEHICLE CAN BE CHARGED TO THE JURY (SECOND DEPT).

The Second Department, reversing defendant's possession of a weapon conviction, determined the judge should not have charged the jury with the automobile presumption which ascribes possession of contraband inside a vehicle to the occupants of the vehicle. The evidence did not support the allegation that defendant "occupied" the vehicle. He was seen standing outside the vehicle and reaching inside through an open window. In addition the police officers should have been allowed to narrate the video saying the defendant could be seen inside the vehicle and reaching into the back seat:

… [T]he People admitted a surveillance video, which showed that the defendant briefly leaned his upper body through the open rear passenger side door of the Lincoln Navigator while standing on the vehicle's running board. However, the video reflected that the defendant never lifted his feet from the running board to climb into the Lincoln Navigator or take a seat inside the vehicle … . Under the circumstances presented, the People's contention that the defendant "occup[ied]" the vehicle within the meaning of Penal Law § 265.15(3) is without merit. … Supreme Court erred in charging the jury with respect to the automobile presumption. People v Lewis, 2024 NY Slip Op 01728, Second Dept 3-27-24

Practice Point: The automobile presumption of possession of the contents of a vehicle by the occupants of the vehicle does not apply to a person standing outside a vehicle and reaching inside through a window.

MARCH 27, 2024

BREATH TEST REFUSAL NOT A CRIME.

REFUSING TO SUBMIT TO A BREATH TEST IS NOT A CRIMINAL OFFENSE (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction on one count of the indictment, noted that "refusal to submit to a breath test" is not a criminal offense:

Defendant appeals from a judgment convicting him, upon a jury verdict, of … refusal to submit to a breath test (§ 1194 [1] [b]). As defendant contends and the People correctly concede, refusal to submit to a breath test mandated by Vehicle and Traffic Law § 1194 (1) (b) "is not a cognizable offense for which a person may be charged or convicted in a criminal court" … . Inasmuch as defendant was convicted by the jury of the nonexistent offense of refusal to submit to a breath test, we modify the judgment by reversing that part convicting him of count 3 of the indictment and dismissing that count … . People v Khadka, 2024 NY Slip Op 01402, Fourth Dept 3-15-24

Practice Point: Here in this DWI case, the defendant was convicted of refusing to submit to a breath test, which is not a criminal offense. Conviction reversed.

MARCH 15, 2024

DISCIPLINARY HEARINGS (INMATES), EVIDENCE.

THE HEARSAY MISBEHAVIOR REPORT, UNSUPPORTED BY ANY INVESTIGATION, DID NOT CONSTITUTE SUBSTANTIAL EVIDENCE OF PETITIONER'S GUILT; DETERMINATION ANNULLED (THIRD DEPT).

The Third Department, annulling the determination, held that the hearsay misbehavior report which was not substantiated by an investigation was insufficient to support guilty finding:

"[H]earsay misbehavior reports can constitute substantial evidence to support a determination of guilt so long as the evidence has sufficient relevance and probative value" … . Here, the correction officer who authored the misbehavior report testified at the hearing that no investigation into the allegation was conducted, explaining that the matter was reported toward the end of his shift and, therefore, there was no time for any investigation. Although the correction officer testified that the incarcerated individual who accused petitioner of making threats was "pretty convincing," he offered no further basis or details as to why he found the report of the threat to be credible. Further, the incarcerated individual who made the allegations against petitioner, and who is identified in the misbehavior report, refused to testify at the hearing. As such, the only evidence to support the charge is the hearsay misbehavior report reciting nothing more than an unverified and uninvestigated accusation that petitioner threatened a fellow incarcerated individual. Under these circumstances, the misbehavior report does not constitute substantial evidence of petitioner's guilt, and the determination must be annulled … . Matter of Alvarado v Annucci, 2024 NY Slip Op 01227, Third Dept 3-7-24

Practice Point: In inmate disciplinary hearings, a hearsay misbehavior report unsupported by any investigation does not constitute substantial evidence of guilt and will not support a guilty determination.

MARCH 7, 2024

DOUBLE JEOPARDY PRECLUDED RETRIAL, REQUEST TO CONTINUE TRIAL WITH 11 JURORS DENIED.

UNDER THE CIRCUMSTANCES, THE PETITIONER'S REQUEST TO CONTINUE THE TRIAL WITH ELEVEN JURORS SHOULD HAVE BEEN GRANTED; IN ADDITION IT WAS AN ABUSE OF DISCRETION TO DECLARE A MISTRIAL ON ALL COUNTS WITHOUT INQUIRING WHETHER A VERDICT HAD BEEN REACHED ON ANY OF THE COUNTS; RETRIAL OF THIS MURDER CASE PROHIBITED ON DOUBLE JEOPARDY GROUNDS; WRIT OF PROHIBITION GRANTED (FOURTH DEPT).

The Fourth Department, granting petitioner's request for a writ of prohibition, determined retrial of this murder case was prohibited on double jeopardy grounds. Apparently one juror (juror number five) had done independent research on the charge of murder in the second degree and jurors had complained about racial tension in the jury room, implicating the same juror. There was an indication that jurors had agreed on verdicts for five of six charges. Petitioner asked to continue the trial with 11 jurors, which requires the judge's consent. The judge denied the request. Defense counsel asked that the jury be polled on the counts for which verdicts had apparently been reached. The judge refused the request and declared a mistrial:

… [T]he People have not met their burden of demonstrating that the declaration of a mistrial was manifestly necessary. Assuming, arguendo, that juror number five was grossly unqualified to continue serving, we conclude that the court abused its discretion in declaring a mistrial without considering other alternatives. Petitioner expressed his desire to waive trial by a jury of 12 individuals and proceed with the remaining 11 jurors, an option that has been endorsed by the Court of Appeals "if circumstances arise that warrant such a request" … . Although the court has discretion to deny a request to proceed with 11 jurors—as the court did here—that discretion is limited … . The record here is devoid of evidence that petitioner's request was not tendered in good faith, that the request was " 'a stratagem to procure an otherwise impermissible procedural advantage' " … , or that deliberation with 11 jurors could not "produce a fair verdict" … . Under the

circumstances presented, as urged by defense counsel, "it would have been appropriate to poll the remainder of the jurors to ascertain whether they could render an impartial verdict" … .

Moreover, "it was an abuse of discretion to have declared a mistrial on all of the counts in the indictment without inquiring whether a decision had been reached on any of the charges" … . Although there was not "overwhelming evidence" that a partial verdict had been reached … , the jury's note asking for guidance on next steps "[i]f we have a decision on five counts but not on one of them" presented more than a mere inference that the jury may have reached a partial verdict, and the subsequent communications with the jury did not indicate otherwise … . Under these circumstances, the court was required to make an inquiry "as to whether a verdict had been reached on any of the counts . . . before declaring a mistrial over the petitioner's objection" … .

On this record, "[n]either physical impossibility to proceed nor manifest necessity to declare a mistrial as to the entire indictment has been demonstrated" … because the court failed "to obtain enough information" whether a mistrial was actually necessary as to all counts … . Matter of Shipmon v Moran, 2024 NY Slip Op 01424, Fourth Dept 3-15-24

Practice Point: Under these facts, it was an abuse of discretion to deny petitioner's request to continue the trial with 11 jurors. Retrial prohibited on double jeopardy grounds.

Practice Point: Under these facts, it was an abuse of discretion to fail to inquire whether the jury had reached a verdict on any counts. Retrial prohibited on double jeopardy grounds.

MARCH 15, 2024

DUPLICITOUS INDICTMENT COUNTS.

THE TRIAL TESTIMONY RENDERED THE COUNT DUPLICITOUS, NEW TRIAL REQUIRED (FOURTH DEPT).

The Fourth Department, reversing the conviction and ordering a new trial, determined the trial testimony rendered the count duplicitous:

"Even if a count facially charges one criminal act, that count is duplicitous if the evidence makes plain that multiple criminal acts occurred during the relevant time period, rendering it nearly impossible to determine the particular act upon which the jury reached its verdict" … . Here, count 2 of the indictment charged defendant with sexual abuse in the first degree regarding an alleged instance, occurring between July 2012 and January 2013, in which she subjected the victim to sexual contact when he was less than 11 years old. At trial, however, the victim testified to multiple acts of sexual contact during the relevant time frame, any one of which could serve as the sexual contact necessary to prove defendant's guilt of count 2.

Because each act of alleged sexual contact constitutes "a separate and distinct offense" … , the victim's testimony that numerous such acts occurred during the relevant time frame rendered count 2 of the indictment duplicitous. Indeed, " 'it is impossible to verify that each member of the jury convicted defendant for the same criminal act' " in connection with count 2 … . People v Zona, 2024 NY Slip Op 01652, Fourth Dept 3-22-24

Practice Point: If the indictment charges one incident during the described time-frame and the trial testimony reveals more than one incident, it is impossible to know whether the jury reached a unanimous verdict on any one incident.

MARCH 22, 2024

EMPLOYMENT LAW, NEGLIGENT HIRING, FORMER INMATE.

IT WAS ALLEGEDLY EVIDENT FROM THE EMPLOYEE'S JOB APPLICATION THAT HE HAD BEEN IN PRISON; THE ALLEGED FAILURE TO INVESTIGATE RAISED QUESTIONS OF FACT IN SUPPORT OF THE NEGLIGENT HIRING AND SUPERVISION CAUSE OF ACTION; THE CORRECTION LAW DOES NOT PROHIBIT CONSIDERATION OF PRIOR CONVICTIONS (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined the negligent hiring and supervision cause of action against defendant LLC stemming from an altercation between plaintiff and the LLC's employee (McIntosh) should not have been dismissed. It was allegedly evident from McIntosh's employment application that he had been in prison:

… [P]laintiff raised triable issues of fact as to whether the LLC "should have known of the employee's propensity for the conduct which caused the injury" … . It is well settled that "an employer has a duty to investigate a prospective employee when it knows of facts that would lead a reasonably prudent person to investigate that prospective employee" … . McIntosh's handwritten job application provided facts that should have led the LLC to investigate, as he indicated that he worked at the address of a state prison, he earned a "stipend" instead of the typical hourly wage, and one of his supervisors was a corrections officer, or "C.O." Although "the depth of inquiry prior to hiring, irrespective of convictions, may vary in reasonable proportion to the responsibilities of the proposed employment," the record shows that the LLC made no effort to investigate … . Its owner-witness admitted that no background check was performed. She did not know whether a restaurant manager called McIntosh's past employers, and she had no knowledge of his criminal background, as would have been revealed by a call to the past employer … . Contrary to the LLC's contention, the Correction Law does not prohibit consideration of a job applicant's prior convictions, but instead provides a balancing test to determine whether there was a "direct relationship between" a prior offense and the job or whether the employment "would involve an unreasonable risk . . . to the safety or welfare of . . . the general public" (Correction

Law §§ 752[1]- Darbeau v 136 W. 3rd St., LLC, 2024 NY Slip Op 01672, First Dept 3-26-24

Practice Point: Where an applicant's job application indicates the applicant had been incarcerated, an employer's failure to investigate may support a negligent hiring and supervision cause of action. The Correction Law does not prohibit an inquiry into prior convictions.

MARCH 26, 2024

FAMILY LAW, FAMILY OFFENSES, ATTORNEYS, APPEALS.

THE RECORD WAS NOT SUFFICIENT TO CONCLUDE APPELLANT IN THIS FAMILY OFFENSE PROCEEDING VALIDLY WAIVED HIS RIGHT TO COUNSEL; NEW HEARING ORDERED (SECOND DEPT).

The Second Department, reversing Family Court in this family offense proceeding, determined the record was insufficient to conclude the appellant had validly waived his right to counsel:

A party in a Family Court Act article 8 proceeding has the right to be represented by counsel (see Family Ct Act § 262[a][ii] …). That party, however, may waive the right to counsel, provided that the waiver is knowing, voluntary, and intelligent … . To ensure a valid waiver, the court must conduct a "searching inquiry" of that party … . While there is no rigid formula to be followed in such an inquiry, and the approach is a flexible one … , the record must demonstrate that the party "'was aware of the dangers and disadvantages of proceeding without counsel'" … .

Here, the record is inadequate to demonstrate that the appellant validly waived his right to counsel … . The deprivation of a party's right to counsel guaranteed by Family Court Act § 262 requires reversal without regard to the merits of the unrepresented party's position … . Matter of Mendez-Emmanuel v Emmanuel, 2024 NY Slip Op 01180, Second Dept 3-6-24

Practice Point: In a family offense proceeding the respondent has a right to counsel. If the record doesn't demonstrate a valid waiver of the right to counsel, a new hearing will be ordered.

MARCH 6, 2024

FAMILY LAW, FAMILY OFFENSES, SUBJECT MATTER JURISDICTION.

FAMILY COURT DID NOT HAVE SUBJECT MATTER JURISDICTION IN THIS FAMILY OFFENSE CASE BECAUSE THE APPELLANT DID NOT HAVE AN "INTIMATE RELATIONSHIP" WITH THE SUBJECT CHILDREN WITHIN THE MEANING OF FAMILY COURT ACT 812 (SECOND DEPT).

The Second Department, reversing Family Court, determined the court did not have subject matter jurisdiction in this family offense case because the appellant did not have an "intimate relationship" with the subject children within the meaning of Family Court Act 812:

The "Family Court is a court of limited jurisdiction, constrained to exercise only those powers granted to it by the State Constitution or by statute" … . Pursuant to Family Court Act § 812(1), the Family Court's jurisdiction in family offense proceedings is limited to certain prescribed acts that occur "between spouses or former spouses, or between parent and child or between members of the same family or household" … . "[M]embers of the same family or household" include, among others, "persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time" … . "Expressly excluded from the ambit of 'intimate relationship' are 'casual acquaintance[s]' and 'ordinary fraternization between two individuals in business or social contexts'" … . "Beyond those delineated exclusions, what qualifies as an intimate relationship within the meaning of Family Court Act § 812(1)(e) is determined on a case-by-case basis, and the factors a court may consider include 'the nature or type of relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between the persons; and the duration of the relationship'" … .

Here, the appellant and the subject children have no direct relationship, and the appellant was only connected to the subject children through her children, who were the half-siblings of three of the subject children. The appellant and the subject children do not reside together and there was no evidence that they have any direct interaction with each other. Accordingly, there is no "intimate relationship"

between the appellant and the subject children within the meaning of Family Court Act § 812(1)(e) … . Matter of Watson v Brown, 2024 NY Slip Op 01191, Second Dept 3-6-24

Practice Point: In order for Family Court to have subject matter jurisdiction over a family offense proceeding, the respondent must have an "intimate relationship" with the victims within the meaning of Family Court Act 812. The criteria for an "intimate relationship," which was absent here, are explained in some detail.

MARCH 6, 2024

FIRST DEGREE MURDER, PROOF REQUIREMENTS.

FIRST DEGREE MURDER, PROOF REQUIREMENTS. EVIDENCE THE DEFENDANT ACTED OUT OF ANGER WAS NOT INCOMPATIBLE WITH THE FINDNG THAT DEFENDANT "RELISHED" THE INFLICTION OF EXTREME PAIN WITHIN THE MEANING OF THE FIRST DEGREE MURDER STATUTE (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, affirming defendant's first degree murder conviction, determined the evidence demonstrated defendant "relished" the infliction of extreme pain within the meaning of the first degree murder statute. The defendant argued the evidence demonstrated he acted out of anger, and did not demonstrate he relished or enjoyed inflicting pain. But the Court of Appeals found proof of both anger and enjoyment, noting that the two emotions are not mutually exclusive:

We reject defendant's argument that he acted only out of anger or a desire to get information from the victim. … [W]here the requisite motivation is at least a "substantial factor" in the murder, the statute is satisfied, even if the defendant "may have had mixed motives" … . Certainly, the goal of extracting information is not incompatible with relishing the infliction of extreme pain, and proof that a defendant acted out of anger in harming the victim does not preclude the jury from finding that defendant took pleasure in doing so. Here, defendant is heard on the recording continuing to attack the victim even after stating that her response was

"good enough." On this record, there was sufficient evidence for the jury to find that while defendant may have also acted in anger or sought information from the victim, taking pleasure in inflicting extreme pain upon her was a substantial motivation. People v Bohn, 2024 NY Slip Op 01500, Ct App 3-19-24

Practice Point: Here the defendant argued his actions which resulted in the death of the victim were motivated solely by anger, and that there was no proof he "relished" the infliction of extreme pain as required by the first degree murder statute. The Court of Appeals held that the two emotional states, anger and relishing or enjoying the infliction of pain, are not mutually exclusive.

MARCH 19, 2024

FIRST DEGREE MURDER, PROOF REQUIREMENTS.

THE APPELLATE DIVISION'S VACATION OF DEFENDANT'S FIRST DEGREE MURDER CONVICTION WAS AFFIRMED; THE PEOPLE DID NOT PROVE THE "RELISHING THE INFLICTION OF EXTREME PAIN" ELEMENT (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Troutman, over two concurring opinions, affirmed the appellate division's vacation of the defendant's first degree murder conviction. The appellate division concluded two elements of first degree murder had not been proven: (1) a "course of conduct" which inflicted extreme physical pain; and (2) defendant's "relishing" the infliction of extreme physical pain upon the victim. The majority agreed with the People that the "course of conduct" element had been proven. But the majority agreed with the appellate division that the "relishing the infliction of extreme pain" element was not proven. The victim was attacked and stabbed multiple times by a group of gang members, including defendant. Defendant inflicted the fatal stab wound to the victim's neck which caused him to bleed to death. The stab wounds inflicted by others in the gang were deemed "superficial:"

A rational jury could have concluded that [the victim's] other wounds, inflicted pursuant to a course of conduct during which [the victim] was dragged from the store to the street, and then while on the ground subjected to several stab wounds

of varying degrees from multiple assailants, caused him extreme physical pain before his death. * * *

The People's evidence with respect to this mens rea element consisted of testimony that, shortly after attacking [the victim], defendant stated in a boastful tone that [the victim] was "not gonna eat for a good long time because [defendant] hit him in the neck." The People also presented evidence that defendant sought out [gang] leadership after the attack to claim responsibility for stabbing [the victim] in the neck.

This evidence demonstrates, at most, that defendant took pride in having killed [the victim], not that he took pleasure in causing [the victim] extreme physical pain before his death. The statute is clear that the defendant must relish or take pleasure in inflicting extreme physical pain, not simply in killing the victim … . People v Estrella, 2024 NY Slip Op 01499, CtApp 3-19-24

Practice Point: The "course of conduct" to inflict extreme pain and the "relishing" the infliction of extreme pain elements of first degree murder explained and debated. Here the "relishing" element was not proven.

MARCH 19, 2024

GUILTY PLEAS, FAILURE TO INFORM OF THE FINE.

DEFENDANT WAS NOT INFORMED OF ALL THE DIRECT CONSEQUENCES OF THE GUILTY PLEA, INCLUDING THE FINE; GUILTY PLEA VACATED (FOURTH DEPT).

The Fourth Department, vacating defendant's conviction to driving while ability impaired by drugs, determined the sentencing judge did not inform defendant of the direct consequences of the guilty plea:

"It is well settled that, in order for a plea to be knowingly, voluntarily and intelligently entered, a defendant must be advised of the direct consequences of that plea" … . "The direct consequences of a plea—those whose omission from a plea colloquy makes the plea per se invalid—are essentially the core components of a defendant's sentence: a term of probation or imprisonment, a term of

postrelease supervision, a fine" … , and the failure to advise a defendant at the time of the guilty plea of all of the potential direct consequence of that plea "requires that [the] plea be vacated" … . Here, the court advised defendant that, upon a violation of interim probation, he could be sentenced "to anything allowable by law which . . . is up to two and a third to seven years in the department of corrections," but failed to advise him of any other potential direct consequences of the plea, including a fine (see Vehicle and Traffic Law § 1193 [1] [c] [ii]). We note that defendant's challenge to the voluntariness of his plea is not encompassed in an appeal waiver … , and that preservation of defendant's contention was not required under the circumstances of this case inasmuch as "defendant did not have sufficient knowledge of the terms of the plea at the plea allocution and, when later advised, did not have sufficient opportunity to move to withdraw [his] plea" … . People v Abraham, 2024 NY Slip Op 01419, Fourth Dept 3-15-24

Practice Point: If a judge fails to inform a defendant of the direct consequences of a guilty plea, including the fine, the plea must be vacated.

MARCH 15, 2024

INCLUSORY CONCURRENT COUNTS.

PROMOTING PROSTITUTION CONVICTIONS REVERSED BECAUSE THE PROMOTING PROSTITUTION COUNTS ARE INCLUSORY CONCURRENT COUNTS OF SEX TRAFFICKING (FOURTH DEPT).

The Fourth Department dismissed the "promoting prostitution" counts of the indictment as inclusory concurrent counts of sex trafficking:

We note … that count 15 of the indictment, charging defendant with promoting prostitution in the second degree (Penal Law § 230.30 [1]), is an inclusory concurrent count of sex trafficking as charged in counts 12, 13, and 14 (§ 230.34 [5] [a], [c], [h]; see generally CPL 1.20 [37]; 300.30 [4]). Similarly, count 24 of the indictment, charging defendant with promoting prostitution in the second degree, is an inclusory concurrent count of sex trafficking as charged in counts 21, 22, and 23. We therefore conclude that counts 15 and 24 must be dismissed as a matter of

law because defendant was found guilty of counts 12 through 14 and 21 through 23, and "a verdict of guilty upon the greater [counts] is deemed a dismissal of every lesser [inclusory concurrent count]" … . People v Spencer, 2024 NY Slip Op 01448, Fourth Dept 3-15-25

Practice Point: If a defendant is convicted of sex trafficking and promoting prostitution, the promoting prostitution convictions must be reversed as inclusory concurrent counts of sex trafficking.

MARCH 15, 2024

JURORS, RACIAL BIAS, JUDGES.

THE MAJORITY CONCLUDED THE TRIAL JUDGE PROPERLY HANDLED ALLEGATIONS OF RACIAL BIAS WHICH INVOLVED HALF THE JURORS IN THIS MURDER CASE; TWO JUSTICES DISSENTED (FOURTH DEPT).

The Fourth Department, over a two-justice dissent, determined the trial judge correctly and adequately handled allegations of racial bias among the jurors. The decision is detailed and comprehensive and cannot be fairly summarized here:

From the dissent:

We recognize that "a trial court's investigation of juror misconduct or bias is a delicate and complex task" … . On this record, however, the disclosure of alleged racial bias harbored by approximately half of the members of the jury warranted, at the very least, a question posed to each of the members of the panel of whether they could perform their duties as jurors without bias or prejudice. We also conclude that, in its voir dire of juror No. 10, the court did not explore whether juror No. 10 harbored any racial prejudice toward Black people, a prerequisite to determining whether she, in fact, could be unequivocally fair and impartial in deliberations. Under these circumstances, the court should also have determined on the record "whether the juror's statements created a substantial risk of prejudice to the rights of the defendant by coloring the views of the other jurors as well as her own" … . People v Wiggins, 2024 NY Slip Op 01659, Fourth Dept 3-22-24

Practice Pont: Here a juror alleged half the jurors exhibited racial bias. The majority held the judge properly handled the question and properly determined defendant would get a fair trial. There was a two-justice dissent which argued further questioning of the jurors was required.

MARCH 22, 2024

MURDER DEFENDANT'S STATE OF MIND CANNOT BE PROVEN BY VICTIM'S HEARSAY STATEMENTS ABOUT DOMESTIC VIOLENCE.

THE VICTIM DIED BY STRANGULATION; THE DEFENSE WAS DEFENDANT DID NOT INTEND TO KILL; THE VICTIM'S HEARSAY STATEMENTS ABOUT DOMESTIC VIOLENCE WERE NOT ADMISSIBLE TO SHOW THE DEFENDANT'S, AS OPPOSED TO THE VICTIM'S, STATE OF MIND; CONVICTION REVERSED (SECOND DEPT).

The Second Department, reversing defendant's murder conviction, determined the victim's hearsay statements about domestic violence should not have been admitted. There was no applicable exception the the hearsay rule and Molineux evidence of prior bad acts must be in admissible form. The victim died of strangulation. The defense argued defendant did not intend to kill the victim, his girlfriend:

… [T]he admission into evidence of prior statements of the victim regarding instances of domestic violence involving the defendant as proof of murder in the second degree, was error which may not be deemed harmless. This hearsay evidence was admitted, purportedly not for its truth, but to establish the victim's state of mind, the nature of the parties' relationship, the defendant's motive and intent, and the absence of an accident. The victim's state of mind may be an issue in certain circumstances, warranting the admission of hearsay evidence on that issue pursuant to a recognized hearsay exception … , but it was not at issue in this case. Rather, the evidence was used to establish the defendant's state of mind, based upon the victim's characterization of the defendant's conduct and the acceptance of that characterization for its truth. In People v Brooks (31 NY3d 939, 942), the Court of Appeals ruled that a "witness's testimony as to the victim's

statement that defendant had previously threatened her constituted double hearsay and was not properly admitted pursuant to any exceptions to the hearsay rule. . . . Nor is there any blanket hearsay exception providing for use of such statements as 'background' in domestic violence prosecutions" (citation omitted). Assuming arguendo that evidence of the defendant's prior bad acts was admissible under People v Molineux (168 NY 264]) and its progeny, "there is no Molineux exception to the rule against hearsay . . . . [S]uch evidence must still be in admissible form" … . This purported evidence of the defendant's state of mind, in this case where intent became the primary issue, was not in admissible form. Thus, the admission of that evidence was error. The error cannot be deemed harmless because the evidence of the defendant's intent was not overwhelming … . People v Rivers, 2024 NY Slip Op 01731, Second Dept 3-17-24

Practice Point: Here the murder victim's hearsay statements about domestic violence were allowed in evidence to show the defendant's, not the victim's, state of mind. The statements were not admissible under any exception to the hearsay rule. The error was not harmless because the defendant argued he did not intend to kill the victim (who died by strangulation).

MARCH 27, 2024

PAROLE VIOLATIONS, CONSTITUTIONAL LAW.

THE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION (DOCCS) VIOLATED THE LESS IS MORE ACT (LIMA) BY FAILING TO HOLD A RECOGNIZANCE HEARING WITHIN 24 HOURS, AND FAILING TO HOLD A PRELIMINARY HEARING WITHIN FIVE DAYS OF THE EXECUTION OF THE PAROLE-VIOLATION WARRANT; HABEAS CORPUS PETITION PROPERLY GRANTED (FIRST DEPT).

The First Department, affirming the grant of the habeas corpus petition, in a full-fledged opinion by Justice Gonzalez, determined the Department of Corrections and Community Supervision's (DOCCS's) failure to hold a recognizance hearing on petitioner's alleged violation of parole within 24 hours as required by the Less is More Act (LIMA) (Executive Law 259-i) violated due process:

LIMA's plain language was abrogated when petitioner's recognizance hearing was held five days after the execution of the warrant, instead of within the requisite 24 hours. This error was compounded when the preliminary hearing was held seven days after the execution of the warrant, instead of the requisite five days (Executive Law § 259-i[3][c][i][B]). The interpretation that DOCCS advances would bypass LIMA and effectively remove its statutory duty to ensure that recognizance hearings are timely held within 24 hours of the warrant execution … . Matter of People of the State of N.Y. v Annucci, 2024 NY Slip Op 01685, First Dept 3-26-24

Practice Point: The statutory requirement that a recognizance hearing must be held within 24 hours and a preliminary hearing must be held within five days of the execution of a parole-violation warrant is strictly enforced. Failure to comply with the statutory time-limits violates due process and warrant granting a habeas corpus petition.

MARCH 26, 2024

RIGHT TO COUNSEL, SIROIS HEARING.

A SIROIS HEARING TO DETERMINE WHETHER WITNESSES ARE UNAVAILABLE TO TESTIFY BECAUSE OF INTIMIDATION IS A MATERIAL STAGE OF A TRIAL; DEFENDANT AND DEFENSE COUNSEL WERE EXCLUDED FROM THE HEARING; NEW TRIAL ORDERED (FOURTH DEPT).

The Fourth Department, reversing the conviction and ordering a new trial, determined the judge should not have conducted the Sirois hearing, which is a material stage of a trial, in the absence of defendant and defense counsel. The hearing determined two witnesses were unavailable to testify because of intimidation. Defense counsel was allowed to submit questions to be posed during the hearing:

… [A] new trial is warranted with respect to the criminal possession of a weapon count because he was denied his right to be present at a material stage of the trial

(… see generally CPL 260.20). During the suppression hearing, allegations were made that defendant, or people acting at his behest, had threatened two witnesses to the underlying incident about testifying against defendant. The People, therefore, requested a Sirois hearing and sought a determination that the witnesses had been made constructively unavailable to testify at trial by threats attributable to defendant, allowing them to introduce at trial statements made by the witnesses that would otherwise constitute inadmissible hearsay … . * * *

The court erred in conducting the Sirois hearing without defendant or defense counsel present. "[A] defendant's absence at a Sirois hearing has a substantial effect on [their] ability to defend the charges against [them] and, thus, a Sirois hearing constitutes a material stage of the trial" … . A "[d]efendant [is] entitled to confront the witness[es] against [them] at [such a] hearing and also to be present so that [the defendant can] advise counsel of any errors or falsities in the witness[es]' testimony which could have an impact on guilt or innocence" … . People v Steele, 2024 NY Slip Op 01642, Fourth Dept 3-22-24

Practice Point; Here defendant and defense counsel were excluded from the Sirois hearing which determined two prosecution witnesses were unavailable to testify because of intimidation. Because the hearing is a material stage of the trial, defendant must be present. Allowing defense counsel to submit written questions was insufficient. A new trial was required.

MARCH 22, 2024

SEX OFFENDER REGISTRATION ACT (SORA), JUDGES.

DEFENDANT WAS NOT GIVEN PRIOR NOTICE OF THE JUDGE'S SUA SPONTE DECISION TO ASSESS 25 POINTS FOR A RISK FACTOR WHEN THE SORA BOARD SUGGESTED FIVE AND THE PEOPLE AGREED TO FIVE; NEW HEARING ORDERED (FOURTH DEPT).

The Fourth Department, vacating the SORA risk-level assessment and remitting the matter for a new hearing, determined the defendant did not have notice of the judge's sua sponte assessment of 25 points for risk factor 2, when both the SORA Board and the People recommended a five point assessment:

… [T]he court assessed 25 points under risk factor 2 even though the Board had recommended that five points be assessed and the People requested five points. Although the court stated during an appearance prior to the SORA hearing that "it does appear that the upward modification [sic] that was requested [in writing] by the People may be warranted in regards to the sexual intercourse factor," the court misapprehended the nature of the People's request for an upward departure, which plainly was not based on a disagreement with the Board's recommendation under risk factor 2. In any event, the court did not grant an upward departure; instead, after determining at the hearing that only five points should be assessed under risk factor 2, the court later assessed 25 points based on an indication in the case summary that defendant stated at sentencing on the qualifying offense that he had consensual sexual intercourse with the victim.

Because defendant did not have notice that the court was considering a sua sponte assessment of additional points under risk factor 2, we "reverse the order, vacate defendant's risk level determination, and remit the matter to [Supreme] Court for a new risk level determination, and a new hearing if necessary, in compliance with Correction Law § 168-n (3) and defendant's due process rights" … . People v Acosta, 2024 NY Slip Op 01626, Fourth Dept 3-22-24

Practice Point: The judge in a SORA risk-level hearing cannot, sua sponte, increase the number of points assessed for a risk factor without prior notice to the defendant. Notice that the People will seek an upward departure does not constitute notice of increased points for a specific risk factor.

Similar issue and result where the People did not give notice of their intent to request a 10 point assessment for risk factor 12. People v Lostumbo, 2024 NY Slip Op 01639, Fourth Dept 3-22-24

MARCH 22, 2024

SEX OFFENDER REGISTRATION ACT (SORA).

BURGLARY SECOND DEGREE AS A SEXUALLY MOTIVATED FELONY IS NOT A REGISTRABLE OFFENSE UNDER SORA; DEFENDANT'S SEX OFFENDER ADJUDICATION VACATED (FIRST DEPT).

The First Department, vacating defendant's sex offender adjudication, noted that burglary second degree as a sexually motivated felony is not a registrable sex offense on SORA:

As the People concede, burglary in the second degree as a sexually motivated felony is not a registrable sex offense under Sora (see People v Conyers, 212 AD3d 417, 418 [1st Dept 2023], lv denied 39 NY3d 1110 [2023]; People v Simmons, 203 AD3d 106, 111-112 [1st Dept 2022], lv denied 38 NY3d 1035 [2022]). We therefore modify the judgment as indicated. People v Burgos, 2024 NY Slip Op 01255, First Dept 3-7-24

Practice Point: Burglary second as a sexually motivated felony is not a registrable offense under SORA.

MARCH 7, 2024

SPEEDY TRIAL, POSTREADINESS DELAY.

CONSULT THIS OPINION FOR IN-DEPTH DISCUSSIONS OF WHEN POSTREADINESS DELAY SHOULD BE ATTRIBUTED TO THE PEOPLE; THE DISSENT ARGUED THIS RULING UPENDS DECADES OF PRECEDENT BY ATTRIBUTING A DELAY ATTRIBUTABLE TO THE COURT TO THE PEOPLE, RESULTING IN A SPEEDY-TRIAL VIOLATION (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Wilson, over an extensive three-judge dissenting opinion, reversed defendant's misdemeanor (reckless driving) conviction on speedy-trial grounds. The majority and dissenting opinions are comprehensive and cannot be fairly summarized here. The opinions should be consulted for in depth discussions of how postreadiness delays should be calculated. The dissent argued that decades of precedent have been upended by the

majority's ruling because postreadiness delay which was attributable to the court (the People asked for a 12-day adjournment and the court imposed a 43-day adjournment) was attributed to the People:

Here … the People filed an off-calendar statement of readiness, were not ready on three successive trial dates, and failed to provide any explanation despite the court's invitation to do so, and despite the opportunity to provide an explanation in their opposition to [defendant's] 30.30 motion. Indeed, even in their papers to this Court, the People offered no explanation for any of the times they were not ready on a previously scheduled trial date to which they had assented. Surely that conduct does not serve the legislature's intended purpose of "discourag[ing] prosecutorial inaction" … . Instead, the People's conduct fits squarely within our dissenting colleagues understanding of postreadiness delays—they are "charged to the People only when the delay is attributable to their inaction and directly implicates their ability to proceed to trial" … .

From the dissent:

The majority's opinion upends [the] common-sense understanding that courts and parties have relied on for decades by attributing the court's postreadiness delay to the People. Applied here, this new rule means the People are held responsible for 43 days of postreadiness delay when they requested only a 12-day adjournment and the additional 31 days were undisputedly caused by court—all because the prosecutor appearing did not know the underlying reason for the People's 12-day adjournment request. People v Labate, 2024 NY Slip Op 01582, CtApp 3-21-24

Practice Point: This opinion should be consulted for in-depth discussions of when postreadiness delay is attributed to the People. The dissent argued decades of precedent have been upended by this ruling because postreadiness delay which should have been attributed to the court was attributed to the People, resulting in a speedy-trial violation.

MARCH 21, 2024

TRAFFIC STOPS, APPEALS.

THE SUPPRESSION COURT APPLIED THE WRONG "DEBOUR" LEVEL TO THE INITIAL INQUIRY BY THE OFFICER WHO APPROACHED DEFENDANT AND REQUESTED THAT HE STEP OUT OF THE CAR; BECAUSE THE SUPPRESSION ISSUE HAD NOT BEEN RULED UPON UNDER THE CORRECT "DEBOUR" STANDARD, THE APPELLATE COURT COULD NOT CONSIDER THE ISSUE AND THE MATTER WAS REMITTED FOR A RULING UNDER THE CORRECT "DEBOUR" STANDARD (FOURTH DEPT).

The Fourth Department, reserving decision, remitted the matter for another ruling on defendant's suppression motion. The trial judge determined that the police officer conducted a level one (DeBour) inquiry when he ordered the defendant out of the car. In fact, the officer conducted a level three inquiry which required reasonable suspicion of criminal activity. Because the ruling on defendant's suppression motion was based upon the wrong standard, the matter was remitted for a ruling under the correct standard:

… [T]he patrol lieutenant engaged in a level three intrusion under De Bour when he ordered the occupants out of the vehicle … . Although an "officer's initial approach of [a person] and request for identification [may constitute] a permissible level one encounter" under De Bour, it is well established that an "officer's request that [a person] exit [a] parked vehicle elevate[s] the situation to a level three encounter under De Bour" and requires reasonable suspicion that criminal activity is afoot … .

Because the court erroneously concluded that the patrol lieutenant engaged in only a level one intrusion when he directed defendant to step out of the vehicle, the court had no occasion to consider whether the patrol lieutenant had reasonable suspicion justifying that directive … . Although the People concede that the patrol lieutenant lacked reasonable suspicion, we are precluded "from reviewing an issue that . . . was not decided by the trial court" … . People v Taylor, 2024 NY Slip Op 01449, Fourth Dept 3-15-24

Practice Point: When the police officer approached defendant and asked defendant to get out of the car, the officer was conducting a level three DeBour inquiry which required reasonable suspicion of criminal activity. The suppression judge erroneously applied the criteria for a level one inquiry and denied suppression. Because the correct suppression issue was never ruled upon, the appellate court was forced to remit the matter for a ruling under the correct DeBour standard.

MARCH 15, 2024

YOUTHFUL OFFENDER STATUS, JUDGES, APPEALS.

IT WAS NOT CLEAR FROM THE RECORD WHETHER THE JUDGE IMPROPERLY DEEMED YOUTHFUL OFFENDER STATUS TO HAVE BEEN WAIVED BY THE PLEA, OR WHETHER THE JUDGE REJECTED YOUTHFUL OFFENDER STATUS AFTER CONSIDERING IT AS REQUIRED; MATTER REMITTED (FIRST DEPT).

The First Department, remanding the matter for consideration of youthful offender status, determined it was not clear from the record whether the judge improperly denied youthful offender status because it has been waived by the plea or whether youthful offender status had been considered and rejected:

Although the court stated at sentencing that it would not grant defendant youthful offender status with regard to Indictment Nos. 3801/16 and 583/17, "there is nothing in the record to indicate that it actually independently considered youthful offender treatment," as required by CPL 720.20(1) and People v Rudolph (21 NY3d 497 [2013]), "instead of denying such treatment because it was not part of the plea agreement" … . While a court need not set forth its reasons for denying youthful offender treatment … , it is still required to "clarify expressly whether it had 'actually consider[ed] youthful offender treatment' or whether it had improperly 'ruled it out on the ground that it had been waived as part of defendant's negotiated plea'" … . Because the court did not satisfy this obligation, we remand the matter for a determination of whether defendant should be afforded youthful offender treatment as to the promoting prison contraband and attempted

criminal sale of a controlled substance convictions. People v J.G., 2024 NY Slip Op 01520, First Dept 3-19-24

Practice Point: In rejecting youthful offender status, the judge need not give the reasons but the record must reflect the judge considered the issue and did not improperly consider it waived by the plea.

MARCH 19, 2024