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Criminal Law
Reversal Report
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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 May, 2024. The Entries in the Table of Contents Link to the Summaries Which Link to the Full Decisions on 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

APPEALS, ATTORNEYS.

THE DA HANDLING THE APPEAL WAS A LAW CLERK TO THE JUDGE WHO PRESIDED OVER THE TRIAL; THE CONFLICT OF INTEREST REQUIRES THE APPOINTMENT OF A SPECIAL PROSECUTOR FOR THE APPEAL (THIRD DEPT).

The Third Department determined the District Attorney handling the appeal had a conflict of interest because she was a law clerk to the County Court judge who presided over the trial. A special prosecutor must be appointed to handle the appeal:

During oral argument on this appeal, the Chief Assistant District Attorney (hereinafter ADA) who appeared on behalf of the People confirmed that she served as the confidential law clerk to the County Court Judge who presided over this matter and did so at the time of the underlying trial. Oral argument was permitted to proceed on the merits, but the Court directed the parties to submit letter briefs addressing the impact, if any, of the ADA's prior position on her ability to represent the People on appeal. Two days later, this Court handed down People v Pica Torres (___ AD3d ___, 2024 NY Slip Op 02345, *1-2 [3d Dept 2024]), which determined that a similar conflict situation required the appointment of a special prosecutor to handle the appeal. In her responding letter brief, the ADA acknowledges that she

was personally and substantially involved in this matter as the trial judge's law clerk, raising a conflict of interest under Rule 1.12 of the Rules of Professional Conduct (see Rules of Prof Conduct [22 NYCRR 1200.00] rule 1.12 [d] [1]). In her responding letter, counsel for defendant acknowledges that the appointment of a special prosecutor is required. Given the foregoing, we remit the matter for the expeditious appointment of a special prosecutor to handle this appeal. People v McNealy, 2024 NY Slip Op 02728, Third Dept 5-16-24

Practice Point: If the DA handling the appeal was a law clerk to the judge presiding over the trial there is a conflict of interest requiring the appointment of a special prosecutor for the appeal.

MAY 16, 2024

ATTORNEYS, INEFFECTIVE ASSISTANCE, EVIDENCE, APPEALS.

THE RECORD WAS NOT SUFFICIENT TO EVALUATE THE CLAIM DEFENSE COUNSEL'S FAILURE TO IMPEACH THE DETECTIVE'S TESTIMONY WITH AN INCONSISTENT STATEMENT CONCERNING THE IDENTIFICATION OF DEFENDANT AMOUNTED TO INEFFECTIVE ASSISTANCE; DEFENSE COUNSEL'S "PRE-PEOPLE V BOONE" FAILURE TO REQUEST A CROSS-RACIAL IDENTIFICATION JURY INSTRUCTION DID NOT AMOUNT TO INEFFECTIVE ASSISTANCE (CT APP).

The Court of Appeals, affirming defendant's conviction, over a concurring opinion, determined the record was not sufficient to demonstrate defense counsel's failure to impeach the defective's testimony with inconsistencies concerning the identification of defendant amounted to ineffective assistance. And the failure to request the cross-racial identification jury instruction, at a time when the instruction was discretionary (before People v Boone, 30 NY2d 521 (2017)), did not amount to ineffective assistance:

We cannot conclude that counsel's failure to impeach Detective Morales with his suppression hearing testimony that the victim was unsure if defendant was the gunman establishes ineffective assistance of counsel. "The lack of an adequate

record bars review on direct appeal wherever the record falls short of establishing conclusively the merit of the defendant's claim" … .

… [T]or the reasons set forth in People v Watkins (decided today), the failure to request a cross-racial identification instruction prior to this Court's decision in People v Boone (30 NY3d 521 [2017]), which made such an instruction mandatory upon request, does not alone amount to ineffective assistance of counsel. People v Lucas, 2024 NY Slip Op 02843, CtApp 5-23-24

Practice Point: The record was insufficient to evaluate the claim that defense counsel was ineffective for failure to impeach the detective's testimony with an inconsistent statement concerning the identification of the defendant.

Practice Point: At the time of this pre People v Boone trial a cross-racial identification jury instruction was discretionary. Defense counsel's failure to request the charge did not amount to ineffective assistance.

MAY 23, 2024

ATTORNEYS, INEFFECTIVE ASSISTANCE, JURY INSTRUCTIONS.

A CROSS-RACIAL IDENTIFICATION JURY INSTRUCTION IS NOW MANDATORY UPON REQUEST; AT THE TIME OF DEFENDANT'S TRIAL THE CHARGE WAS DISCRETIONARY; DEFENSE COUNSEL'S FAILURE TO REQUEST THE INSTRUCTION DID NOT AMOUNT TO CONSTITUTIONAL INEFFECTIVE ASSISTANCE (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Halligan, affirming defendant's conviction, over a concurring opinion and two dissenting opinions, determined defense counsel's failure to request a cross-racial identification jury instruction, which is now mandatory upon request (but was not at the time of trial), did not amount to constitutional ineffective assistance of counsel:

Defendant Mark Watkins contends that his trial counsel was ineffective for failing to request a cross-racial identification instruction at the close of his July 2017 trial. Under our decision in People v Boone—decided after Watkins' trial—such an instruction is now mandatory upon request "when identification is an issue in a

criminal case and the identifying witness and defendant appear to be of different races," in light of the higher "likelihood of misidentification" and the "significant disparity between what the psychological research shows and what uninstructed jurors believe" regarding the impact of this cross-race effect (30 NY3d 521, 526, 528-529, 535-536 [2017]). At the time of Watkins' pre-Boone trial, however, a defendant was not entitled to a cross-racial identification instruction upon request; rather, the charge was discretionary. Thus, counsel's failure to request such a charge did not give rise to a single-error ineffective assistance of counsel claim. * * *

Today, as in Boone, we reiterate the importance of instructing jurors "to examine and evaluate the various factors upon which the accuracy of identification depends," including the cross-racial nature, if applicable … . We continue to view the cross-racial identification charge as a powerful tool for assisting juries in determining whether there has been a mistaken identification, thereby reducing the risk of wrongful convictions caused by the cross-race effect. Still, Watkins has not shown that, as of July 2017, the failure to request a cross-racial instruction rendered his counsel's performance constitutionally deficient … . People v Watkins, 2024 NY Slip Op 02842, CtApp 5-21-24

Practice Point: A cross-racial identification jury instruction is now mandatory upon request based upon the Court of Appeals' 2017 ruling in People v Boone.

Practice Point: At the time of this 2017 trial, the cross-racial jury instruction was discretionary. Here defense counsel's failure to request the charge did not rise to constitutional ineffective assistance.

Practice Point: It remains an open question whether the failure to request the charge in a post-Boone trial would amount to constitutional ineffective assistance.

MAY 23, 2024

BATSON CHALLEGES, JUDGES, ATTORNEYS.

THE JUDGE'S PROVIDING A RACE-NEUTRAL REASON FOR THE PEOPLE'S PEREMPTORY CHALLENGE TO A JUROR, WHILE THE PROSECUTOR REMAINED SILENT, WAS REVERSIBLE ERROR (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Rivera, reversing the Appellate Division, determined the judge's providing a race-neutral reason for the People's peremptory challenge of a juror, while the prosecutor remained silent, was reversible error:

Here, it is undisputed that defendant established a prima facie case of discrimination with respect to the prosecution's exercise of a peremptory challenge against K.S., an African-American female, and that the burden then shifted to the prosecution to provide a race-neutral basis for its peremptory strike. The People failed to do so entirely … . Rather, the court stepped in to provide an explanation, speculating that the prosecution had gotten a "bad vibe" from K.S. regarding whether her prior jury service resulted in an acquittal. The prosecution remained silent. The court nevertheless ruled that the prosecution had "given a legitimate race neutral reason" for the strike.

This serious departure from the Batson framework was an error of the highest order. When the court supplied a race-neutral reason for the peremptory strike, it failed to hold the prosecution to its burden and instead, effectively became an advocate for the prosecution, thus abandoning its Batson-specific duty to "consider the prosecutor's race-neutral explanations in light of all of the relevant facts and circumstances, and in light of the arguments of the parties" … . It is the nonmovant's expressed explanation for its peremptory challenge—and whether such explanation is mere pretext for a race-based motive—not simply whether a race-neutral reason could theoretically exist—which is the focus of the Batson framework at steps two and three … . The court's speculation as to the prosecution's basis for the strike was irrelevant and deprived defendant of any meaningful way to demonstrate pretext in the face of the prosecution's silence. People v Estwick, 2024 NY Slip Op 02768, CtApp 5-21-24

Practice Point: It is the prosecutor's actual reason for a peremptory challenge which is required under Batson, not the theoretical existence of a race-neutral

reason. Therefore the Batson procedure is violated where, as here, the judge steps in to provide a reason while the prosecutor remains silent.

MAY 21, 2024

CONSTITUTIONAL LAW, JUDGES, CIVIL PROCEDURE.

FORMER PRESIDENT TRUMP'S PETITION FOR A WRIT OF PROHIBITION CHALLENGING A RESTRAINING ORDER RESTRICTING HIS ABILITY TO MAKE STATEMENTS DIRECTED AT POTENTIAL WITNESSES IN A CRIMINAL TRIAL DENIED (FIRST DEPT).

The First Department determined the restraining order restricting former President Donald Trump's speech during his criminal trial was valid. Trump's petition for a writ of prohibition was denied:

The Federal Restraining Order is nearly identical to the Restraining Order issued against petitioner in the underlying criminal case … .

Petitioner brings this petition because he disagrees with where the circuit court drew the line in balancing the competing considerations of his First Amendment rights to free expression and the effective functioning of the judicial, prosecutorial and defense processes … . Weighing these concerns, the circuit court ultimately concluded that, given the record, the court had "a duty to act proactively to prevent the creation of an atmosphere of fear or intimidation aimed at preventing trial participants and staff from performing their functions within the trial process" … . This Court adopts the reasoning in the circuit court's Federal Restraining Order Decision.

The Federal Restraining Order Decision properly found that the order was necessary under the circumstances, holding that "Trump's documented pattern of speech and its demonstrated real-time, real-world consequences pose a significant and imminent threat to the functioning of the criminal trial process" … . First, the circuit court concluded that petitioner's directed statements at potential witnesses concerning their participation in the criminal proceeding posed a significant and imminent threat to their willingness to participate fully and candidly, and that

courts have a duty to shield witnesses from influences that could affect their testimony and undermine the integrity of the trial process … . Justice Merchan properly determined that petitioner's public statements posed a significant threat to the integrity of the testimony of witnesses and potential witnesses in this case as well. Matter of Trump v Merchan, 2024 NY Slip Op 02680, First Dept 5-14-24

Practice Point: A court has the power to restrict speech by a defendant in a criminal trial which is directed at potential trial witnesses and which could threaten the witnesses' willingness to testify.

MAY 14, 2024

DUPLICITOUS COUNTS, EVIDENCE.

TRIAL TESTIMONY RENDERED SEVERAL COUNTS IN THIS SEXUAL ABUSE CASE DUPLICITOUS (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction on several counts in this sexual abuse case, determined the trial testimony rendered the counts duplicitous:

… [T]he trial testimony rendered counts 4, 5, 7, and 8 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' " … . A duplicitous count "may undermine the requirement of jury unanimity," inasmuch as some jurors may find that defendant committed one criminal act under the count, while other jurors may find that defendant committed some other criminal act under the same count … .

At trial, the victim was unable to identify the number of times defendant touched her during the relevant time period. She testified that he touched her breasts "[a]t least two" times. The victim also testified that defendant put his fingers inside her vagina "[p]robably at least three" times and licked her vagina "[a]t least three times." She further testified that when he touched her vagina, he would also touch her breasts, but she could not "remember the specifics" of each occurrence. Under the circumstances presented here, we conclude, with respect to counts 4, 5, 7, and 8, that "it is impossible to determine whether the jury reached a unanimous verdict

on those counts . . . [and] impossible to determine whether defendant was convicted of an act for which he was not indicted" … . People v Hunt, 2024 NY Slip Op 02471, Fourth Dept 5-3-24

Practice Point: If the trial testimony makes it possible for the jury to convict based upon an allegation that was not part of the indictment, the conviction will be reversed.

MAY 3, 2024

FAMILY LAW, POSSESSION OF COCAINE, NEGLECT, EVIDENCE.

EVIDENCE FATHER POSSESSED COCAINE WITH INTENT TO SELL WAS NOT SUFFICIENT TO SUPPORT A NEGLECT FINDING; THERE WAS NO EVIDENCE FATHER USED DRUGS, EXPOSED THE CHILDREN TO DRUG-DEALING, OR STORED THE DRUGS WHERE THE CHILDREN COULD ACCESS THEM (SECOND DEPT).

The Second Department, reversing Family Court, determined the evidence that father possessed four ounces of cocaine did not support the neglect finding. There was not evidence the children were exposed to drug-dealing and the drugs were stored above where the children could access them:

Family Court's finding that the father neglected the children was not supported by a preponderance of the evidence … . … [Father's] intent to sell these illicit drugs was insufficient, without more, to warrant a finding of neglect. The record … contained no evidence establishing that the father engaged in drug transactions within the house or that he otherwise exposed the children to drug-trafficking activities … . Nor was there evidence adduced at the hearing as to whether the father regularly engaged in the sale of drugs, or the manner in which he intended to sell the cocaine. Moreover, although the officers discovered the cocaine within the father's bedroom closet, it was located on a five- or six-foot-high shelf and was otherwise stored in a manner that was not readily accessible to the children … . Finally, there was no indication in the record that the father ever used cocaine or any other illicit drugs. Absent evidence that the father's conduct caused the

requisite harm to the children or otherwise placed them in imminent danger of such harm, the court should not have found that he neglected them … . Matter of Jefferson C.-A. (Carlos T.-F.), 2024 NY Slip Op 02701, Second Dept 5-15-24

Practice Point: Storing four ounces of cocaine in a closet where the children could not access it, without more, is not sufficient for a neglect finding against father. Although there was evidence father intended to sell the drugs, there was no evidence father used drugs or exposed the children to drug-dealing.

MAY 15, 2024

GUILTY PLEAS, IMMIGRATION LAW, ATTORNEYS.

DEFENDANT WAS ENTITLED TO A HEARING ON HIS MOTION TO VACATE HIS GUILTY PLEA; DEFENDANT DEMONSTRATED DEFENSE COUNSEL PROVIDED ERRONEOUS INFORMATION ABOUT THE DEPORTATION CONSEQUENCES OF THE PLEA; AND DEFENDANT RAISED A QUESTION OF FACT ABOUT WHETHER HE WOULD HAVE DECIDED AGAINST PLEADING GUILTY HAD HE BEEN GIVEN ACCURATE INFORMATION ABOUT THE RISK OF DEPORTATION (THIRD DEPT).

The Third Department, reversing County Court, determined defendant was entitled to a hearing on his motion to vacate his guilty plea on the ground his attorney provided erroneous information about the deportation consequences of the plea. In addition to showing defense counsel's advice was wrong, defendant raised a question of fact whether it was reasonably probable he would not have pled guilty if he had been correctly advised about the risk of deportation:

… [T]rial counsel erroneously advised defendant that he "could . . . be deported" if he were to be "incarcerated for any extensive amount of time," but, if he were sentenced to "probation," defendant would not be deported. "These advisements were erroneous, and … defense counsel readily could have ascertained — simply from a reading of the relevant statutes — that defendant's plea to criminal possession of a controlled substance in the third degree rendered deportation

presumptively mandatory and rendered defendant ineligible for cancellation of an order of removal" … . …

… [D]efendant averred in his CPL 440.10 motion that, at the time of his plea, he had resided in the United States for over 20 years and that he "financially supported the mother of his child, as well as her two older children from a prior relationship." Given his family circumstances and their dependency upon him, defendant averred that, had he received correct advice about pleading guilty to an aggravated felony for purposes of immigration, he "would have rejected the plea offer, proceeded to trial, or sought other alternative plea options." These allegations "raise a question of fact as to whether it was reasonably probable that he would not have entered a plea of guilty if he had been correctly advised of the deportation consequences of the plea" … . People v Pinales-Harris, 2024 NY Slip Op 02844, Third Dept 5-23-24

Practice Point: If, in the papers supporting a motion to vacate the guilty plea, a defendant shows defense counsel provided erroneous information about the deportation consequences of the guilty plea, and raises a question of fact whether it is reasonably probable he would not have pled guilty had the correct information been provided, he is entitled to a hearing on the motion.

MAY 23, 2024

GUILTY PLEAS, JUDGES, APPEALS.

DEFENDANT WAS NOT INFORMED OF THE PERIOD OF POSTRELEASE SUPERVISION, GUILTY PLEA VACATED; THE WAIVER OF APPEAL WAS NOT DISCUSSED UNTIL AFTER THE GUILTY PLEA, WAIVER INVALID (SECOND DEPT).

The Second Department, vacating defendant's guilty plea and finding the waiver of appeal invalid, held that the judge's failure to inform defendant of the period of postrelease supervision rendered the guilty plea involuntary. In addition, the judge did not discuss the waiver of appeal until after the guilty plea:

… County Court did not specify the period of postrelease supervision to be imposed and did not explain that a term of postrelease supervision would be imposed even if the defendant successfully completed a substance abuse diversion program. … [T]he court's failure to so advise the defendant prevented his plea from being knowing, voluntary, and intelligent … . …

… County Court did not discuss the appeal waiver until after the defendant had already admitted his guilt … , and the court failed to ascertain whether the defendant "understood the nature of the appellate rights being waived" and the consequences of waiving those rights … . People v Reyes, 2024 NY Slip Op 02547, Second Dept 5-8-24

Practice Point: Failure to inform defendant of the period of postrelease supervision renders the guilty plea involuntary.

Practice Point: Failure to discuss the waiver of appeal until after the defendant pleads guilty renders the waiver invalid.

MAY 8, 2024

GUILTY PLEAS, JUDGES, APPEALS.

THE PLEA ALLOCUTION NEGATED ELEMENTS OF THE CRIME; APPEAL HEARD DESPITE FAILURE TO PRESERVE THE ISSUE BY MOVING TO WITHDRAW THE PLEA; GUILTY PLEA VACATED (SECOND DEPT).

The Second Department, vacating defendant's guilty plea, determined the defendant's factual recitation preceding the plea negated elements of the offense. The court heard the appeal despite a failure to preserve the error by moving to withdraw the plea:

Although the defendant failed to preserve for appellate review his contention concerning the factual recitation with respect to the charge of attempted burglary in the second degree, where, as here, the defendant's factual recitation clearly casts significant doubt upon his guilt or otherwise calls into question the voluntariness of the plea, the defendant may challenge the sufficiency of the plea allocution on

direct appeal despite the failure to move to withdraw his plea of guilty on that ground … .

The crime of attempted burglary in the second degree provides, in relevant part, that a person is guilty of that offense when, inter alia, he or she knowingly enters a dwelling unlawfully with the intent to commit a crime therein (Penal Law §§ 110.00, 140.25[2]). During his plea allocution, the defendant stated that he did not enter the home knowingly. Upon further questioning by the County Court, the defendant stated that he had "no intent" to commit the crime. The defendant's factual recitation therefore negated an essential element of attempted burglary in the second degree, which was not corrected by further inquiry by the court, thereby calling into question the voluntariness of the defendant's plea … . People v Martinez, 2024 NY Slip Op 02938, Second Dept 5-29-24

Practice Point: When the plea allocution negates elements of the crime and the judge does not inquire further, the question whether the plea was voluntary is raised.

Practice Point: When it is clear from the record that the plea allocution negated elements of the crime, the issue will be heard on direct appeal even if not preserved by a motion to withdraw the plea.

MAY 29, 2024

GUILTY PLEAS, JUDGES, APPEALS.

WHEN DEFENDANT MADE STATEMENTS AT THE TIME OF THE PLEA WHICH RAISED A POSSIBLE INTOXICATION DEFENSE THE JUDGE SHOULD HAVE INQUIRED FURTHER; THE ISSUE NEEDN'T BE PRESERVED FOR APPEAL (FIRST DEPT).

The First Department, vacating defendant's guilty plea, determined the defendant's statement at the time of the plea raised questions the judge should have explored. A narrow exception to the preservation requirement applies here:

The narrow exception to the preservation requirement applies in this "rare case" where defendant made statements that cast doubt upon his guilt and the court failed

to satisfy its duty of inquiring further to ensure that defendant's plea was knowing and voluntary … . Although defendant's statements at sentencing raised a possible intoxication defense, the court did not make any inquiry regarding the statements or the applicability of the defense. The court's failure to ensure that defendant understood the defense and was waiving his right to pursue it at trial requires vacatur of the plea … . People v Dozier, 2024 NY Slip Op 02602, First Dept 5-9-24

Practice Point: If a defendant makes statements at the time of a plea which indicates a possible defense, the judge must make inquiries sufficient to ensure the plea is voluntary and intelligent.

Practice Point: When a defendant makes statements at the time of the plea which indicate a possible defense and the judge fails to make sufficient inquiries, the issue is appealable in the absence of preservation.

MAY 9, 2024

GUILTY PLEAS, JUDGES, CONSTITUTIONAL LAW, VEHICLE AND TRAFFIC LAW.

FAILURE TO INFORM DEFENDANT A FINE IS PART OF THE SENTENCE RENDERED THE GUILTY PLEA INVOLUNTARY (FOURTH DEPT).

The Fourth Department, vacating defendant's guilty plea, determined the failure to inform defendant that a fine was part of the sentence rendered the plea involuntary:

"[I]n 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 a direct consequence of that plea "requires that [the] plea be vacated" … . Here, the court failed to advise defendant that the sentence imposed on a person convicted of aggravated unlicensed operation of a motor vehicle in the first degree must include

a fine in an amount between $500 and $5,000 (see Vehicle and Traffic Law § 511 [3] [b] [i]). People v Carmichael, 2024 NY Slip Op 02427, Fourth Dept 5-3-24

Practice Point: A judge's failure to inform the defendant that a fine is part of the sentence renders the guilty plea involuntary.

MAY 3, 2024

GUILTY PLEAS, SENTENCING, EVIDENCE, JUDGES.

THE NEGOTIATED PLEA REQUIRED NO POST-PLEA ARRESTS; DEFENDANT WAS ARRESTED AFTER THE PLEA BUT THE PROCEEDINGS WERE DISMISSED ON SPEEDY TRIAL GROUNDS AND THE RECORDS SEALED; THE POST-PLEA ARRESTS WERE THEREFORE A NULLITY AND SHOULD NOT HAVE BEEN CONSIDERED BY THE SENTENCING JUDGE (SECOND DEPT).

The Second Department determined defendant's sentence was based upon post-plea arrests which resulted in dismissal on speedy trial grounds and for which the records had been sealed. Criminal records sealed pursuant to Criminal Procedure Law (CPL) 160.50(1) have thereby been rendered a nullity. Therefore the sealed proceedings can not be the basis for a sentence:

… [T]he defendant … pleaded guilty to criminal possession of a firearm … and criminal possession of a weapon in the fourth degree … as part of a negotiated disposition. It was agreed that if the defendant successfully completed one year of interim probation and complied with certain conditions during that time, including a no-arrest condition, the criminal possession of a firearm charge would be dismissed and he would be sentenced to a conditional discharge on the conviction of criminal possession of a weapon in the fourth degree. However, if the defendant failed to satisfy the conditions, he would be sentenced to a one-year term of imprisonment on the conviction of criminal possession of a firearm.

It is undisputed that during the term of the defendant's interim probation, he was arrested three times. The proceedings with regard to those arrests were dismissed on speedy trial grounds and the records sealed. However, after an Outley hearing … , the Supreme Court determined that there was "a legitimate basis for [the

defendant's] arrest" and that the defendant failed to comply with the terms of his interim probation. Based upon that determination, the court sentenced the defendant to a one-year term of imprisonment on the conviction of criminal possession of a firearm. * * *

The proceedings resulting from the defendant's postplea arrests were dismissed on speedy trial grounds, which were terminations in his favor … , and the records of those proceedings were sealed pursuant to CPL 160.50(1). Thus, the "arrest[s] and prosecution[s] [are] deemed a nullity" … , and the sealed records were "not available for consideration at sentencing" … . People v Desdunes, 2024 NY Slip Op 02932, Second Dept 5-29-24

Practice Point: Arrests and prosecutions dismissed on speedy trial grounds and sealed pursuant to CPL 160.50(1) are a nullity and cannot be considered in sentencing.

MAY 29, 2024

INTENT, APPEALS, EVIDENCE.

THE SHOOTER, WHO WAS NEVER FOUND OR IDENTIFIED, WAS A PASSENGER IN A CAR DRIVEN BY DEFENDANT WHEN THE SHOOTER SHOT AT AND MISSED A PERSON SITTING IN A PARKED CAR; THE ATTEMPTED MURDER AND ASSAULT CONVICTIONS WERE AGAINST THE WEIGHT OF THE EVIDENCE; TWO-JUSTICE DISSENT (FOURTH DEPT).

The Fourth Department, reversing defendant's attempted murder and assault convictions as against the weight of the evidence, over a two-justice dissent, determined there was no evidence defendant shared the shooter's intent. It was alleged defendant was the driver when his passenger shot at and missed a person sitting in a parked car. The shooter was never identified. There was no evidence defendant knew the victim:

… [T]he question is whether defendant shared the shooter's intent to kill or seriously injure the victim. Even assuming, arguendo, that the conviction is

supported by legally sufficient evidence … , we conclude that the verdict is against the weight of the evidence … . Viewing the evidence in light of the elements of those crimes as charged to the jury … and considering that "a defendant's presence at the scene of the crime, alone, is insufficient for a finding of criminal liability" … , here the People failed to prove beyond a reasonable doubt that defendant "shared the [shooter's] intent to kill" or cause serious physical injury to the victim, or the intent to use the gun unlawfully against the victim … , particularly given the lack of evidence "that defendant knew that the [shooter] was armed at the time defendant transported him" … .

From the dissent:

Defendant drove the vehicle while the shooter fired several times at the parked vehicle in which the victim was sitting in the front passenger seat, and the victim heard someone say "yo" as soon as the gunshots started. The police found the parked vehicle's driver's side windows shattered and shell casings on the ground next to the vehicle. A permissible and eminently reasonable inference from the facts was that defendant stopped or slowed down the vehicle in order to allow the shooter to fire several shots at the parked vehicle … . In other words, defendant shared the shooter's intent to use a gun to kill or cause serious physical injury to the victim and "intentionally aid[ed]" the shooter to engage in such conduct (Penal Law § 20.00). In addition, defendant fled from the scene after the gunshots were fired and collided with another vehicle. The driver of that vehicle testified that, when she asked defendant to exchange paperwork and information, he told her to "move the f*** out of the way," before he pushed her vehicle with his vehicle and drove off again. People v Lathrop, 2024 NY Slip Op 02618, Fourth Dept 5-10-24

Practice Point: Here the appellate court found the evidence of attempted murder legally sufficient but the verdict against the weight of the evidence (a difficult concept).

MAY 10, 2024

INTENT, EVIDENCE.

THE EVIDENCE DEFENDANT SHARED A COMMUNITY OF PURPOSE WITH THE SHOOTER WAS LEGALLY INSUFFICIENT; ASSAULT AND FIREARMS CONVICTIONS REVERSED AND INDICTMENT DISMISSED (THIRD DEPT).

The Third Department, reversing defendant's assault and related use and possession of a firearm convictions, determined there was insufficient evidence that defendant shared the intent to shoot the victim. The victim was shot. Defendant drove a car which followed the wounded victim who was then robbed by an occupant of the car:

The trial evidence is insufficient to demonstrate that defendant shared a community of purpose with the unidentified shooter to cause serious physical injury to the victim or that he aided the shooter in doing so … . To begin with, there was no evidence that defendant formed a plan with anyone to assault the victim or had any advance knowledge that the victim was going to be attacked … . Further, although there is proof that defendant was present, he cannot be observed on the surveillance video striking the victim or participating in any way in the altercation that preceded the shooting. In fact, the victim testified that, during the brief struggle, he did not know if defendant was there to help him or harm him and that it was defendant's friends with whom he was actually fighting. Additionally, as noted above, there was no indication during this brief and seemingly chaotic interaction that defendant was aware that [anyone] had a gun …. This situation is also not akin to cases where an accomplice's community of purpose with a fellow assailant can be inferred from his or her continued participation in an attack after the other produces a weapon … . … [T]here is evidence that, following the shooting, defendant drove a vehicle in the direction of the victim and stopped it [an assailant's] command, at which time [the assailant] got out and robbed the victim. However, that alone is insufficient to establish that defendant shared a community of purpose to commit the earlier assault or provided assistance thereto. People v Walker, 2024 NY Slip Op 02346, Third Dept 5-2-24

Practice Point: Defendant's presence with the assailants when the victim was shot, and defendant's driving a car following the wounded victim victim and stopping

the car to allow an assailant to get out and rob the victim, did not demonstrate defendant shared a community of purpose with the shooter at the time of the shooting.

MAY 2, 2024

JURY NOTES, JUDGES, ATTORNEYS.

THERE WAS NO RECORD DEFENSE COUNSEL WAS INFORMED OF THE JURY NOTE AND NO RECORD THE JUDGE RESPONDED TO THE NOTE, A MODE OF PROCEEDINGS ERROR; ALTHOUGH THE NOTE REFERRED ONLY TO ONE COUNT, THE THREE COUNTS WERE FACTUALLY CONNECTED REQUIRING A NEW TRIAL (FIRST DEPT).

The First Department, reversing defendant's conviction and ordering a new trial, determined the absence of a record indicating defense counsel was notified of a note from the jury, or even that the judge responded to the note, was a mode of proceedings error. The People's argument that the note addressed only one count of the indictment and the convictions on the other counts should survive was rejected. The nature of the jury's question was relevant to all counts:

The fourth note stated: "We the jury request to hear the judge's reading of count 1, including definitions and detail. Further, can you please confirm if it is up to our determination to decide if something is considered as "course of conduct" and "act"? As written on the verdict sheet, count 1 states "engaging in a course off conduct," we want to confirm if this is a typo or not." * * *

When an O'Rama error occurs, the question of whether the error in the proceedings related to some charges requires reversal on the other charges is determined on a case-by-case basis, with 'due regard' for the facts of the case, the nature of the error, and the 'potential for prejudicial impact on the over-all outcome' … .

Here, the three counts of the indictment were alleged to arise from a course or repetition of conduct in violation of the order of protection reasonably perceived as threatening to the victim's safety (count 1), through means both electronic/written

(count 2) and telephonic (count 3). Thus, given the underlying factual relationship between the crimes, defendant is entitled to a new trial … . People v Jamison, 2024 NY Slip Op 02286, First Dept 4-30-24

Practice Point: If the record is silent about whether counsel was notified of a jury note and whether the judge even responded to the note, that is a mode of proceedings error.

Practice Point: Although the jury note related to only one of the three counts, the convictions on the other two counts could not survive because all the counts were factually connected.

APRIL 30, 2024

MARIJUANA FELONY STATUTE REPEALED, RESENTENCING.

THE MARIJUANA FELONY CONVICTION WHICH WAS THE BASIS FOR DEFENDANT'S SECOND FELONY OFFENDER STATUS WAS BASED ON A STATUTE WHICH HAS SINCE BEEN REPEALED AND REPLACED WITH A MISDEMEANOR; DEFENDANT WAS ENTITLED TO RESENTENCING AS A FIRST-TIME FELONY OFFENDER (FOURTH DEPT).

The Fourth Department, in a full-fledged opinion by Justice Bannister, determined defendant, who had been sentenced as a second felony offender, was entitled to resentencing as a first-time felony offender because his 2013 marijuana-felony conviction was based upon a statute which had been repealed and replaced by a misdemeanor:

MRTA [Marihuana Regulation and Taxation Act] provides a procedural mechanism for a person, such as defendant, who has completed serving a sentence for a conviction under Penal Law former article 221 to petition the court of conviction for vacatur of that conviction where … the person would have been guilty of a lesser or potentially less onerous offense under [the new] article 222 than under former article 221 … . … Defendant successfully moved to vacate his January 2013 felony conviction, and Supreme Court … replaced that conviction with a conviction under Penal Law § 222.30.

… [D]efendant moved pursuant to CPL 440.20 to vacate the sentence imposed for his 2019 conviction. He contended that the vacatur of his prior felony marihuana conviction invalidated the enhanced sentence imposed for his 2019 conviction, which was based on the prior felony conviction. … Supreme Court … granted defendant's motion to set aside the sentence for his 2019 conviction and resentenced him as a first felony offender to 3½ years in prison and 3½ years of postrelease supervision. * * *

… [W]e conclude that one of the "purposes" … served in substituting the misdemeanor for the felony conviction is to allow for the retroactive amelioration of a predicate felony sentence. People v Parker, 2024 NY Slip Op 02414, Fourth Deptp 5-3-24

Practice Point: Here defendant's second felony offender status was based on a marijuana statute which has since been repealed and replaced with a misdemeanor. Defendant was entitled to resentencing as a first-time felony offender.

MAY 3, 2024

MERGER, KIDNAPPING.

THE DOCTRINE OF MERGER CAN BE APPLIED TO DISMISS A KIDNAPPING CHARGE EVEN IF THE LESSER OFFENSE IS NOT CHARGED (FOURTH DEPT).

The Fourth Department remitted the matter for consideration of the People's remaining objection to applying the merger doctrine to the kidnapping charge. County Court had erroneously ruled the merger doctrine could not be applied to dismiss the kidnapping charge unless the lesser offense is also charged:

… [D]efendant contends that the court erred in denying that part of his omnibus motion seeking to dismiss the charge of kidnapping in the second degree pursuant to the merger doctrine. The kidnapping merger doctrine is a judicially-created doctrine intended to prevent overcharging and "to prohibit a conviction for kidnapping based on acts which are so much the part of another substantive crime that the substantive crime could not have been committed without such acts and

independent criminal responsibility for kidnapping may not fairly be attributed to the accused" … . A kidnapping charge "is generally deemed to merge with another offense only where there is minimal asportation immediately preceding the other crime or where the restraint and underlying crime are essentially simultaneous" … . Even if that is so, however, there is no merger where "the manner of detention is egregious" … . We agree with defendant that the court erred in concluding that the merger doctrine did not apply because defendant was charged only with kidnapping and, therefore, there was no other crime with which the count could merge.

… [D]efendant correctly contends that he had committed acts that would have supported a conviction for menacing and, therefore, the merger doctrine was applicable whether he was charged with the lesser offense or not … . * * *

Inasmuch as the court did not rule on the People's alternative argument—i.e., that the merger doctrine did not apply because any alleged menacing of the victim was incidental to the kidnapping—we may not affirm the decision on that ground … . We therefore … reserve decision, and remit the matter to County Court for a ruling on the motion in accordance with this memorandum … . People v Almonte, 2024 NY Slip Op 02426, Fourth Dept 5-3-24

Practice Point: The doctrine of merger can be applied to dismiss a kidnapping charge even if the lesser offense is not charged.

MAY 3, 2024

RIGHT TO REPRESENT ONESELF, JUDGES, ATTORNEYS, CONSTITUTIONAL LAW.

HERE THERE WAS NO VALID REASON TO DENY DEFENDANT'S REQUEST TO REPRESENT HIMSELF; NEW TRIAL ORDERED (FIRST DEPT).

The First Department, reversing defendant's conviction and ordering a new trial, determined defendant's request to represent himself should have been granted:

The court deprived defendant of his constitutional right to self-representation when it denied defendant's motion to proceed pro se despite defendant's knowing and voluntary waiver of his right to counsel. A defendant may invoke the right to self-representation where "(1) the request is unequivocal and timely asserted, (2) there has been a knowing and intelligent waiver of the right to counsel, and (3) the defendant has not engaged in conduct which would prevent the fair and orderly exposition of the issues" … . Here, defendant made a timely and unequivocal request to represent himself, and during an extensive inquiry, at which time the court repeatedly warned defendant of the dangers and disadvantages of proceeding pro se, defendant affirmed that he understood the risks and insisted on representing himself at trial … . Defendant's lack of familiarity with the law was not a proper basis for the denial of his motion … . Further, nothing in the record indicates that defendant's motion was calculated to undermine or delay the progress of the trial— indeed, the court determined that defendant was not malingering—and defendant's purported "outbursts" during two prior pretrial video conferences did not suggest an intent to disrupt the proceedings … . People v Ivezic, 2024 NY Slip Op 02785, First Dept 5-21-24

Practice Point: A defendant's lack of knowledge of the law is not a valid reason for denying defendant's request to represent himself at trial.

MAY 21, 2024

SEARCH AND SEIZURE, PAROLEES, EVIDENCE.

THE SEARCH OF A SMALL EARBUD CASE IN DEFENDANT-PAROLEE'S POCKET WAS NOT REASONABLY RELATED TO THE CLAIMED PURPOSE OF THE PAROLE OFFICERS' PRESENCE IN DEFENDANT'S RESIDENCE, I.E., A SEARCH FOR A PAROLE ABSONDER; THE HEROIN FOUND IN THE EARBUD CASE SHOULD HAVE BEEN SUPPRESSED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Troutman, reversing the Appellate Division, determined the search of defendant-parolee's person by a parole officer was not rationally and reasonably related to the parole officers' duty. The parole officers claimed they entered defendant's residence to look for a parole absconder. The search of a small earbud case found inside defendant's pocket, which turned up heroin, was not reasonably related to the claimed purpose of the parole officers' presence:

… [T]he People failed to meet their burden to establish that the search of defendant's pocket was substantially related to the performance of the parole officers' duties in the particular circumstances presented, i.e., the search of defendant's residence for a parole absconder. Nor did the People present any evidence at the hearing that circumstances that developed after the parole officers arrived at defendant's residence rendered the search of his pocket substantially related to the performance of their duties. On this record, the parole officer had no reason to continue the brief pat-down search of the exterior of defendant's person by searching his pocket and investigating the contents of an earbud case. People v Lively, 2024 NY Slip Op 02767, CtApp 5-21-24

Practice Point: Here the parole officers claimed to be in defendant-parolee's residence to search for a parole absconder. Therefore the search of a small earbud case found in defendant-parolee's pocket was not reasonably related to the parole officers' duties and the drugs found in the case should have been suppressed.

MAY 21, 2024

SEARCH AND SEIZURE, PAROLEES, EVIDENCE.

THE SEARCH OF DEFENDANT-PAROLEE'S RESIDENCE WAS "RATIONALLY AND REASONABLY RELATED TO THE PERFORMANCE OF THE PAROLE OFFICER'S DUTY" AND THEREFORE DENIAL OF THE MOTION TO SUPPRESS THE WEAPON FOUND IN THE RESIDENCE WAS PROPER (CT APP).

The Court of Appeals, affirming the Appellate Division, determined the search of defendant-parolee's residence after a tip from defendant's mother about defendant's possession of a firearm was "rationally and reasonably related to the performance of the parole officer's duty:"

As a condition of his parole, defendant agreed not to "own, possess, or purchase" any firearm without permission from his parole officer. Defendant was given "the most severe" mental health designation from the Department of Corrections and Community Supervision, OMH Level 1-S, indicating there were "serious" concerns regarding his mental health. Shortly after defendant's release to parole, his parole officer received information from his supervisor that defendant's mother contacted the parole office to inform them that she saw a photograph of defendant with a firearm, and gave the parole officers permission to search the residence that she shared with defendant … . Acting on this information, defendant's parole officer, with the assistance of other officers, conducted a search of defendant's home and recovered an AR-15 style rifle and two thirty-round extended magazines with extra gun parts from defendant's bedroom.

Based on the foregoing, there is record support for the lower courts' conclusion … that the search of defendant's residence by defendant's parole officer was "rationally and reasonably related to the performance of the parole officer's duty" and so defendant's motion to suppress this evidence was properly denied … . The Aguilar-Spinelli test … for evaluating whether a tip provides police with probable cause for a search or seizure does not apply in these circumstances … . People v Spirito, 2024 NY Slip Op 02766, Fourth Dept 5-21-24

Practice Point: The criteria for a search of a parolee's residence by a parole officer is not subject to the same constitutional restraints as are searches by the police.

Here a tip from defendant's mother about her son's possession of a weapon was sufficient to justify the parole-officer search.

MAY 21, 2024

SENTENCING, JUDGES.

THE STATUTORY PROCEDURE FOR SENTENCING A DEFENDANT AS A PERSISTENT FELONY OFFENDER WAS NOT FOLLOWED BY THE JUDGE; SENTENCE VACATED (SECOND DEPT).

The Second Department, vacating defendant's sentence, determined the judge did not follow the procedure for sentencing a defendant as a persistent felony offender:

The Supreme Court erred in failing to comply with the procedural requirements of Penal Law § 70.10(2) when resentencing the defendant as a persistent felony offender. The procedure for determining whether a defendant may be subjected to increased punishment as a persistent felony offender requires a two-pronged analysis (see CPL 400.20[1] …). "Initially, the court must determine whether the defendant is a persistent felony offender as defined in subdivision 1 of section 70.10 of the Penal Law, namely, that he [or she] previously has been convicted of at least two felonies, and secondly, the court must determine if it 'is of the opinion that the history and character of the defendant and the nature and circumstances of his [or her] criminal conduct are such that extended incarceration and lifetime supervision of the defendant are warranted to best serve the public interest'" … . Before imposing such sentence, "the court is obliged to set forth on the record the reasons it found this second element satisfied" … .

Here, the Supreme Court failed to comply with the second prong of the analysis by failing to set forth, on the record, the reasons why it was "of the opinion that the history and character of the defendant and the nature and circumstances of his criminal conduct indicate[d] that extended incarceration and life-time supervision [would] best serve the public interest" (Penal Law § 70.10[2] …). People v Acevedo, 2024 NY Slip Op 02927, Second Dept 5-29-24

Practice Point: A judge's failure to set forth on the record the reasons for sentencing defendant as a persistent felony offender will result in vacation of the sentence and remittal.

MAY 29, 2024

SEX OFFENDER REGISTRATION ACT (SORA).

17-YEAR-OLD'S ARE STATUTORILY EXCLUDED FROM THE CLASS OF VICTIMS UNDER PENAL LAW 263.11, TO WHICH DEFENDANT PLED GUILTY; RISK-LEVEL REDUCED FROM TWO TO ONE (FOURTH DEPT).

The Fourth Department, reducing defendant's SORA risk-level from two to one, determined the 17-year-old involved in the offense was statutorily excluded from the class of victims:

… [T]he court erred in assessing 20 points for the number of victims under risk factor 3 … . The court based its assessment on a determination that a 17-year-old was a victim of defendant's conduct. However, 17-year-olds are statutorily excluded from the class of victims under Penal Law § 263.11, to which defendant pleaded guilty. When those points are removed, defendant has a total of 60 points, making him a presumptive level one risk. People v Cockrell, 2024 NY Slip Op 02439, Fourth Dept 5-3-24

Practice Point: 17-year-old's are statutorily excluded from the class of victims under Penal Law 263.11.

MAY 3, 2024

SPEEDY TRIAL.

HERE THE PEOPLE REQUESTED AN ADJOURNMENT OF THE HUNTLEY HEARING BUT THE RECORD IS SILENT ABOUT THE LENGTH OF THE REQUESTED ADJOURNMENT; THEREFORE THE ENTIRE TIME BETWEEN THE REQUEST AND THE HEARING WAS COUNTED AGAINST THE PEOPLE FOR "SPEEDY TRIAL" PURPOSES (FOURTH DEPT).

The Fourth Department, granting the speedy trial motion and dismissing the indictment, determined that the record did not indicate the length of an

adjournment of the Huntley hearing requested by the People and, therefore, the entire time between the request and the hearing was chargeable to the People:

"Normally, the People will be charged only with the actual period of adjournment requested, following their initial statement of readiness; any additional period of delay, for the convenience of the court's calendar, will be excludable" … . The People, however, "bear the burden of ensuring that the record explains the cause of adjournments sufficiently for the court to determine which party should properly be charged with any delay" … . Here, there is no explanation as to the reason for the requested adjournment in the record, and there is no indication on the record of the length of the adjournment the People were requesting. Thus, the entire period is chargeable to the People … . Furthermore, the adjournment is not excludable inasmuch as defendant did not expressly consent to the adjournment … . People v Bish, 2024 NY Slip Op 02409, Fourth Dept 5-3-24

Practice Point: If the People request an adjournment of a hearing but the record is silent about the length of the requested adjournment, the entire time between the request and the hearing may be chargeable to the People.

MAY 3, 2024

SPEEDY TRIAL.

THE COVID TOLL OF THE SPEEDY TRIAL STATUTE RENDERED THE INDICTMENT TIMELY (SECOND DEPT).

The Second Department, reversing County Court, determined that the COVID toll of the speedy trial statute rendered the indictment timely:

Contrary to the determination of the County Court, while it was in effect, Executive Order No. 202.87 constituted a toll of the time within which the People must be ready for trial for the period from the date a felony complaint was filed through the date of a defendant's arraignment on the indictment, with no requirement that the People establish necessity for a toll in each particular case … .

Because Executive Order No. 202.87 served to toll the speedy trial statute, the period from December 30, 2020, to January 25, 2021, was not chargeable to the People … . People v Fuentes, 2024 NY Slip Op 02933, Second Dept 5-29-24

Practice Point: The Executive Order imposing the COVID toll of the speedy trial statute rendered the indictment in this case timely.

Same issue and result in People v Lawson, 2024 NY Slip Op 02937, Second Dept 5-29-24.

Same Issue and result in People v McPhaul, 2024 NY Slip Op 02939, Second Dept 5-29-24.

MAY 29, 2024

TRAFFIC STOPS, "COMMUNITY CARETAKING," EVIDENCE.

THE POLICE MAY STOP A VEHICLE IN THE EXERCISE OF THE "COMMUNITY CARETAKING" FUNCTION IF THERE IS CAUSE TO BELIEVE SOMEONE IN THE VEHICLE NEEDS ASSISTANCE; THE QUICK OPENING AND CLOSING OF A PASSENGER DOOR WAS NOT ENOUGH (CT APP).

The Court of Appeals, reversing the Appellate Division, in a full-fledged opinion by Judge Troutman, over a two-judge concurrence, recognized that a vehicle may be stopped by the police exercising the "community caretaking" function if the police have cause to believe someone in the vehicle needs assistance. Here defendant's car was stopped after the passenger door opened and closed quickly. The defendant driver was arrested after admitting he possessed ecstasy. The Court of Appels, after describing the criteria for a "community caretaking" vehicle stop, found that the quick opening and closing of the passenger door was not enough to conclude an occupant needed help:

We conclude that the police may stop an automobile in an exercise of their community caretaking function if two criteria exist. First, the officers must point to specific, objective, and articulable facts that would lead a reasonable officer to

conclude that an occupant of the vehicle is in need of assistance. Second, the police intrusion must be narrowly tailored to address the perceived need for assistance. Once assistance has been provided and the peril mitigated, or the perceived need for assistance has been dispelled, any further police action must be justified under the Fourth Amendment and Article I, section 12 of the State Constitution. People v Brown, 2024 NY Slip Op 02765, CtApp 5-21-24

Practice Point: The police may stop a vehicle if there is cause to believe someone in the vehicle needs assistance. Here the quick opening and closing of a passenger door was not enough to justify the stop.

MAY 21, 2024

TRAFFIC STOPS, EVIDENCE.

THE DETECTIVE'S TESTIMONY AT THE SUPPRESSION HEARING THAT THE VEHICLE WAS PULLED OVER BECAUSE OF "EXCESSIVELY TINTED WINDOWS" WAS NOT SUFFICIENT TO DEMONSTRATE PROBABLE CAUSE FOR THE STOP; SUPPRESSION SHOULD HAVE BEEN GRANTED (CT APP).

The Court of Appeals, reversing the Appellate Term, determined the police officer's testimony at the suppression hearing the vehicle in which defendant was a passenger was stopped based on "excessively tinted window" was not sufficient to demonstrate probable cause for the vehicle stop. Therefore the drugs seized from the defendant should have been suppressed:

Vehicle and Traffic Law § 375 (12-a) (b) generally provides that "[n]o person shall operate any motor vehicle upon any public highway, road[,] or street" with windows which have a light transmittance of less than 70%. * * *

When a defendant challenges "the sufficiency of the factual predicate for the stop," it is the People's burden "to come forward with evidence sufficient to establish that the stop was lawful" … . "Summary statements that the police had arrived at a conclusion that sufficient cause existed will not do" … . * * *

… Detective Fortunato's testimony that the tint was "excessive" is … a legal conclusion that the tint violated the Vehicle and Traffic Law. Yet, the People failed to elicit any factual basis for this conclusion. The detective did not testify, for example, that the windows were so dark that he could not see into the vehicle … or that he had training and experience in identifying illegally tinted windows or conducting this type of stop … . Nor did the detective testify that he measured the tint after stopping the vehicle and the results confirmed that the tint level violated the Vehicle and Traffic Law, which could have provided objective, corroborative evidence of the reasonableness of his conclusion … . People v Nektalov, 2024 NY Slip Op 02725, CtApp 5-16-24

Practice Point: To demonstrate probable cause for a vehicle stop based upon "excessively tinted windows" there must be some demonstration the tint violated the Vehicle and Traffic Law (less that 70% light transmittance). Simply testifying the windows were "excessively tinted" is not enough.

MAY 16, 2024

VALUE OF STOLEN PROPERTY, EVIDENCE, JUDGES.

PROOF OF THE VALUE OF STOLEN PROPERTY WAS INSUFFICIENT; CONVICTION REDUCED IN THE INTEREST OF JUSTICE (FOURTH DEPT).

The Fourth Department, reducing defendant's possession-of-stolen-property conviction, determined the value of the property was not established:

We agree with defendant that, with respect to his conviction of criminal possession of stolen property in the third degree under count 1 of the indictment, there is legally insufficient evidence establishing the value of the items seized from the storage unit. Although defendant did not preserve that issue for our review, we exercise our power to address it as a matter of discretion in the interest of justice … . "A person is guilty of criminal possession of stolen property in the third degree when [that person] knowingly possesses stolen property, with intent to benefit [that person] or a person other than an owner thereof or to impede the recovery by an owner thereof, and when the value of the property exceeds three thousand dollars"

… . It is well settled that "a victim must provide a basis of knowledge for [their] statement of value before it can be accepted as legally sufficient evidence of such value" … . "Conclusory statements and rough estimates of value are not sufficient" to establish the value of the property … . Although the People elicited some valuation testimony from the victims at trial, such testimony did not include the basis for the victims' knowledge of the value of most of the items in the storage unit … . We conclude on this record that the evidence is legally insufficient to establish that the value of the property taken exceeded $3,000 … . The evidence is legally sufficient, however, to establish that defendant committed the lesser included offense of criminal possession of stolen property in the fifth degree (see § 165.40). People v Hensley, 2024 NY Slip Op 02650, Fourth Dept 5-10-24

Practice Point: The basis for the victim's knowledge of the value of the stolen property was not demonstrated; possession-of-stolen-property conviction reduced.

MAY 10, 2024