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Criminal Law
Reversal Report
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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 June 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.

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ATTORNEYS, JUDGES, FAILURE TO SEEK VENTIMIGLIA RULING.

A SANDOVAL RULING ADDRESSED THE ADMISSIBILITY OF LIMITED REFERENCE TO DEFENDANT'S PRIOR CONVICTION ON CROSS-EXAMINATION; AT THE TIME OF THE ALLEGED RAPE, THE DEFENDANT TOLD THE VICTIM HE HAD SPENT SEVERAL YEARS IN PRISON; WITHOUT SEEKING A PRIOR VENTIMIGLIA RULING, THE PEOPLE INFORMED THE JURY ABOUT DEFENDANT'S "YEARS IN PRISON" STATEMENT TO THE VICTIM IN THE OPENING; NEW TRIAL ORDERED (THIRD DEPT).

The Third Department, ordering a new trial, determined the prosecutor's introduction of a statement defendant made to the victim about his prior incarceration warranted reversal of defendant's rape conviction. The prosecutor had not sought a prior "Ventimiglia" ruling on the admissibility of the statement. The statement was the subject of a prior Sandoval ruling which allowed limited reference to the prior conviction in cross-examination of the defendant. The trial judge, after hearing argument on the "Ventimiglia" issue after the statement had been introduced, determined the statement would have been ruled admissible had a prior request for a ruling been made:

In ruling on the People's proffer, County Court fashioned a Sandoval compromise that limited the scope of questioning to the existence of the conviction and when it occurred, with no information about "the title, the classification, the violent nature

under the Penal Law [or] the sentence . .. as well as underlying facts, unless the defense were to open the door with regard to those issues." In spite of that ruling, in their opening statement, the People stated that, during the encounter but prior to any sexual assault, defendant "disclosed something unexpected, something that jarred [the victim]"; specifically, that "he had spent several years in prison." * * *

We find that the People's introduction of the statement referencing defendant's prior incarceration without first seeking an advanced Ventimiglia ruling was improper … . While County Court's Sandoval compromise was limited to the introduction of such evidence on cross-examination, it directly addressed the proof at issue; specifically, the allowable reference to defendant's prior conviction. To this point, the People's contention that the evidence was not subject to a prior ruling as it was part of the criminal conduct itself runs contrary to the fact that the Sandoval proffer on this exact evidence before trial reflected that it was subject to a discretionary determination as to whether the probative value outweighed the risk for real prejudice. Thus, the People effectively deprived defendant of the benefit of such analysis prior to introduction of the evidence by circumventing the Sandoval ruling … . People v Osman, 2024 NY Slip Op 03106, Third Dept 6-6-24

Practice Point: Here, at the time of the alleged rape, defendant told the victim he had spent several years in prison. Although the People sought a Sandoval ruling on the admissibility of evidence of defendant's prior conviction during defendant's cross-examination, the People did not seek a "Ventimiglia" ruling on the admissibility of such evidence in its direct case. The People's reference to defendant's statement in their opening was deemed reversible error.

JUNE 6, 2024

ATTORNEYS, CONSTITUTIONAL LAW, INEFFECTIVE ASSISTANCE.

DEFENDANT WAIVED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BY REFUSING TO ATTEND THE TRIAL AND DIRECTING DEFENSE COUNSEL NOT TO PARTICIPATE IN THE TRIAL; A TWO-JUSTICE DISSENT CONCLUDED DEFENSE COUNSEL'S FAILURE TO PARTICIPATE CONSTITUTED INEFFECTIVE ASSISTANCE (FOURTH DEPT).

The Fourth Department, over a two-justice dissent, affirmed defendant's conviction after he was tried in absentia. Defendant was properly denied a request for new counsel. Defendant then directed his attorney not to participate in the trial and defendant did not attend the trial. Defense counsel did not participate, except to make a motion for a trial order of dismissal outside the presence of the jury. The two-justice dissent would have reversed on ineffective assistance grounds, concluding that defense counsel should have participated in the trial, despite defendant's directive:

Defendant contends that he was denied effective assistance of counsel. We reject that contention inasmuch as defendant waived the right to effective assistance of counsel by directing defense counsel not to participate in the proceedings … . * * * When the court had defendant brought into the courtroom and informed him that he had the right to be present for trial and participate in his defense, defendant again objected to the entire proceeding, reiterated that he had fired defense counsel, refused to answer the court's questions, and renewed his request for substitute counsel. When the court responded that defendant would not receive another attorney but had the right to proceed pro se, defendant left the courtroom. Defense counsel subsequently informed the court that he intended to follow defendant's directive not to participate in the proceedings. The trial was then held in defendant's absence. Defense counsel was present but did not participate, except to move, outside the presence of the jury, for a trial order of dismissal.

We conclude that, under these circumstances, defendant waived his right to effective assistance of counsel … . Defendant's "desire to prevent counsel's participation, coupled with his adamant refusal to represent himself, translates into an intentional failure to avail himself of his constitutional right to a fair opportunity to defend against the State's accusations" (id. [internal quotation marks omitted]), and he must therefore "accept the decision he knowingly, voluntarily and

intelligently made, and the consequences of his intentional actions and choices" … . People v Lewis, 2024 NY Slip Op 03245. Fourth Dept 6-14-24

Practice Point: Defendant did not attend the trial and directed his attorney not to participate in the trial. Defense counsel did not participate. The majority held defendant had waived his right to effective assistance. A two-justice dissent argued defense counsel's failure to participate constituted ineffective assistance and would have ordered a new trial.

JUNE 14, 2024

BATSON CHALLENGE, IDENTIFICATION PROCEDURE, JUDGES.

THE TRIAL COURT PROPERLY RULED THE PEOPLE PROVIDED RACE-NEUTRAL REASONS FOR STRIKING TWO BLACK JURORS; THE TRIAL COURT PROPERLY RULED THE HANDCUFFED DEFENDANT'S SHOW-UP IDENTIFICATION PROCEDURE WAS PROPER (CT APP).

The Court of Appeals, affirming the trial court's Batson and suppression rulings, in a full-fledged opinion by Judge Cannataro, over a three-judge dissenting opinion, determined the trial court's rulings (1) the People demonstrated race-neutral reasons for striking two Black jurors and (2) the show-up identification of the defendant, who was handcuffed, was proper:

Overall, C.C.'s responses gave rise to a reasonable inference that: (1) he viewed the arrest of his cousin for marijuana possession as a crime against his cousin; (2) he viewed the arrest of his cousin as a "raid" by police; and (3) his negative feelings towards police could affect his view of police witnesses in the case, regardless of any contradictory assurances he might have given. These inferences are patently reasonable and the trial court's determination that the non-discriminatory reasons offered by the People in support of their peremptory strike of C.C. were credible and non-pretextual finds ample support in the record … . * * *

The People expressed concern that K.C.'s job duties would cause her to be inappropriately sympathetic to defendant. K.C.'s job involved determining whether juvenile offenders would be entitled to intake diversion, or face prosecution, and she was previously employed as a caseworker. We have previously recognized that

a party may permissibly strike a juror "who works in a certain field . . . because that party believes—for reasons unrelated to the facts of the case—that such individual may have a more sympathetic attitude or view toward the opposing party" … . * * *

Although this Court has stated that a showup procedure in which a suspect is handcuffed and in the presence of police is "suggestive and not preferred" and "presses judicial tolerance to its limits" … , we have concluded that, such a showup is "reasonable under the circumstances" when it is conducted in close geographic and temporal proximity to the crime … . When a showup is done as part of "one unbroken chain of events—crime, escape, pursuit, apprehension and identifications" such a procedure is acceptable … . As we have recognized, " 'prompt showup identifications by witnesses following a defendant's arrest at or near the crime scene have been generally allowed" ,,, . Moreover, "[w]hether a crime scene showup is unduly suggestive is a mixed question of law and fact. Thus, if record evidence supports the determination below, this Court's review is at an end" …. . People v Wright, 2024 NY Slip Op 03320, CtApp 6-18-24

Practice Point: A show-up identification procedure in close geographical and temporal proximity to the crime can be proper, even when the defendant is handcuffed.

JUNE 18, 2024

BATSON CHALLENGE, JUDGES, ATTORNEYS, APPEALS.

THE TRIAL JUDGE DID NOT PROCEED TO STEP THREE OF THE BATSON ANALYSIS OF THE PEOPLE'S PEREMPTORY CHALLENGE TO A JUROR; MATTER REMITTED FOR THAT PURPOSE (THIRD DEPT).

The Third Department, remitting the matter for findings on the Batson analysis of the People's peremptory challenge to a juror, determined the judge did not follow the three-step procedure mandated by Batson. Defense counsel met the criteria for the initial step by noting that the juror appeared to be the only person of Hispanic descent on the jury (both defendant and the victim were of Hispanic descent) and the prosecutor had not asked the juror a single question. The prosecutor met the criteria for the second step by arguing the juror was laughing and would not take the case seriously. It was up to the judge at that point to evaluate defense counsel's

argument that the prosecutor's reason was pretextual. The matter was sent back for the judge's ruling on step three:

This record confirms that the court made only a step one decision, and did not make any determination on the issue of pretext, implicit or otherwise … .

This is a critical error because "[a] trial court that resolves a Batson challenge without proceeding to [the] third step 'falls short of [providing] a meaningful inquiry into the question of discrimination' " … .* * *

The trial court's role in the analysis is particularly important where, as here, the race-neutral reasons proffered by the People were based upon the challenged juror's demeanor — an issue that Supreme Court was in a unique position to verify and which is not clearly established in the appellate record … . Given the failure to abide by the Batson protocol, we withhold decision and remit this case to Supreme Court to enable the trial judge who presided over this matter to determine "whether the race-neutral reason proffered by [the People] was pretextual" … . People v Cruz, 2024 NY Slip Op 03108, Third Dept 6-6-24

Practice Point: Here, the judge's failure to make a finding whether the prosecutor's reason for a peremptory juror-challenge was pretextual (the third step in the Batson protocol) resulted in remittal for that purpose.

JUNE 6, 2024

CHILD VICTIMS ACT, EDUCATION-SCHOOL LAW.

HERE IN THIS CHILD VICTIMS ACT (CVA) CASE, THE ALLEGATIONS OF ABUSE OF PLAINTIFF BY A TEACHER WERE BASED ON HER INABILITY TO CONSENT UNDER THE PENAL LAW; THEREFORE THE SCHOOL COULD ONLY BE LIABLE FOR NEGLIGENT SUPERVISION UNTIL PLAINTIFF TURNED 17; ALTHOUGH THE ABUSE WAS ALLEGED TO HAVE TAKEN PLACE OFF SCHOOL GROUNDS, THE TEACHER, DURING SCHOOL HOURS, ALLEGEDLY MADE PUBLIC COMMENTS ABOUT PLAINTIFF'S APPEARANCE AND MADE ARRANGEMENTS TO MEET HER AFTER SCHOOL; THE NEGLIGENT SUPERVISION CAUSE OF ACTION AGAINST THE SCHOOL SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the negligent supervision cause of action against the school based upon alleged conduct by a teacher should not have been dismissed, despite the fact the abuse allegedly took place off school grounds: The abuse was alleged to be conduct which would violate article 130 of the Penal Law. Plaintiff was legally incapable of consent until she turned 17. The school was deemed responsible for supervision only until plaintiff turned 17:

The allegations of criminal conduct against the teacher were based on the plaintiff's inability to consent to sexual conduct due to the plaintiff's age, which ended when the plaintiff turned 17 years old (see Penal Law § 130.05[3][a]). Accordingly, the court properly determined that the CVA did not revive so much of the cause of action alleging negligent supervision of the plaintiff as was related to alleged conduct that occurred after the plaintiff turned 17 years old … .

… The defendants' submissions included … the transcript of the plaintiff's deposition testimony, wherein the plaintiff testified that all of the sexual abuse occurred off school property and outside of school hours … . In opposition, however, the plaintiff … averred that the teacher singled her out for attention, made extended eye contact with her, winked at her, and complimented her appearance in front of other staff in school. According to the plaintiff, the teacher made comments directly to other staff and in the presence of other students about the plaintiff's appearance, and the teacher made arrangements with the plaintiff

during school hours and on school grounds to meet after school where the alleged abuse took place … . Fain v Berry, 2024 NY Slip Op 03032, Second Dept 6-5-24

Practice Point: Allegations of violations of Penal Law article 130 based upon the legal incapacity to consent apply only until the victim turns 17.

Practice Point: Although the alleged abuse by a teacher took place off school grounds, the teacher, during school hours, made public comments about plaintiff's appearance and arranged to meet her after school. There the negligent supervision cause of action against the school should not have been dismissed.

JUNE 5, 2024

DISCOVERY, ATTORNEYS, CERTIFICATE OF COMPLIANCE.

THE STATUTE REQUIRING THE PEOPLE TO FILE A CERTIFICATE OF COMPLIANCE WITH THEIR DISCOVERY OBLIGATIONS IN ORDER TO BE READY FOR TRIAL WENT INTO EFFECT ON JANUARY 1, 2020; REVERSING THE APPELLATE DIVISION, THE COURT OF APPEALS HELD A VALID READY-FOR-TRIAL ANNOUNCEMENT MADE PRIOR TO JANUARY 1, 2020, WAS NOT AFFECTED BY THE NEW STATUTE (CT APP).

The Court of Appeals, reversing the Appellate Division, in a full-fledged opinion by Judge Singas, over a concurring opinion and a dissenting opinion, determined the new statutory discovery obligations imposed upon the People, effective January 1, 2020, did not affect a valid ready-for-trial announcement made prior to January 1, 2020. The Appellate Division held the new statute required the People to file a Certificate of Compliance to be ready for trial and the failure to do so mandated dismissal on speedy-trial grounds:

On January 1, 2020, amendments to New York's discovery (CPL art 245) and statutory speedy trial (CPL 30.30) rules went into effect, and the old discovery rules (CPL former art 240) were repealed … . On January 27, the first day of trial, defendant moved to dismiss the indictment on statutory speedy trial grounds, arguing that the People had become unready for trial when the amendments came into effect and had failed to file a certificate of compliance with the new discovery

rules (COC) as required by the amendments and announce their readiness before their statutory speedy trial time expired. * * *

There is no evidence, in the plain language of the amendments or the legislative history, that the legislature intended to—or did—revert the People to a state of unreadiness on January 1, 2020. Rather, the amendments specifically tie the COC requirement to the People's ability to state ready and be deemed ready. Because the legislature established the COC requirement as a condition precedent to declaring ready for trial and did not indicate an intent to undo the People's prior readiness statements, there is no basis to apply that requirement prospectively to a case such as the present one where the People were in a trial-ready posture when it went into effect. In other words, the People are not required to fulfill a prerequisite to declaring trial readiness when they have already validly declared ready for trial. Accordingly, the only way to apply the COC requirement to this case would be to wholesale invalidate the People's pre-2020 readiness statement—not to render the People unready as of January 1, 2020. Because the language of the amendments does not "expressly or by necessary implication require" this plainly retroactive application, we cannot conclude that the legislature intended for the COC requirement to apply in this manner … . Consequently, the People are not chargeable for any delay after January 1, 2020, and thus remained within the applicable 181-day statutory speedy trial limit … . People v King, 2024 NY Slip Op 03322, CtApp 6-18-24

Practice Point: Here the People made a valid ready-for-trial announcement before the new discovery statute went into effect on January 1, 2020. The trial started on January 27, 2021, and the defense moved to dismiss on speedy trial grounds because the People never filed a certificate of compliance, a new statutory requirement for readiness for trial. The Appellate Division dismissed the case on that ground. The Court of Appeals reversed, finding the pre-January 1, 2020, ready-for-trial announcement was unaffected by the new statutory requirements.

JUNE 18, 2024

DISCOVERY, ATTORNEYS, DUE DILIGENCE.

THE PEOPLE DID NOT EXERCISE DUE DILIGENCE BEFORE STATING IN THE CERTIFICATE OF COMPLIANCE (COC) THAT COMPLAINANT DID NOT HAVE A CRIMINAL RECORD AND ANNOUNCING READINESS FOR TRIAL; IF DEFENSE COUNSEL KNEW OF COMPLAINANT'S CRIMINAL RECORD, THE DEFENSE WAS STATUTORILY REQUIRED TO ALERT THE PEOPLE TO THE DEFECT IN THE COC; MATTER REMITTED FOR DETERMINATION OF THE SPEEDY-TRIAL MOTION; EXTENSIVE TWO-JUSTICE DISSENT (FOURTH DEPT).

The Fourth Department, reversing County Court, determined the People, who initially erroneously asserted the complainant did not have a criminal record, did not comply with their discovery obligations and therefore the initial certificate of compliance (COC) and ready-for-trial announcement were illusory. The matter was sent back for the court to determine the motion to dismiss on speedy-trial grounds. On remittal County Court is to consider whether defense counsel met the statutory requirement that the defense alert the People to any defects in the COC of which defense counsel is aware. The two-justice dissent argued the People had exercised due diligence to determine whether the complainant had a criminal record and that, therefore, the initial COC indicating she had no convictions was not improper:

[The People's] [r]eliance on the report provided by the OCSO [Ontario County Sheriff's Office] may have been in good faith, but "while good faith is required, it is not sufficient standing alone and cannot cure a lack of diligence" … . The DA's office, as a qualified agency entitled to access such information maintained pursuant to statute by DCJS [New York State Division of Criminal Justice Services], did not mention any pre-COC attempts to obtain the complainant's criminal history record from DCJS (see Executive Law §§ 835 [9]; 837 [6]; 845-b), nor did the DA suggest that the People, prior to filing the initial COC, ever checked their own files to determine whether the complainant—their prime witness on whose testimony the success of the prosecution would depend—had a criminal history. Instead, the People relied entirely on a non-DCJS report provided by the OCSO that appeared to have been prepared by an unidentified third-party responsible for running background checks, and the People did not independently check the complainant's repository to determine whether the complainant had a criminal history until prompted by defense counsel's request for a judicial

subpoena, at which point the People easily obtained and disclosed the complainant's certificates of conviction … . Under these circumstances, we conclude that the People's explanation for the discovery lapse was insufficient … .

… We … remit the matter to County Court to determine whether the People were ready within the requisite time period … , including the applicability and effect, if any, of defendant's obligation under CPL 245.50 (4) (b)—which became effective during the pendency of the prosecution—to notify or alert the People to the extent he was aware of a potential defect or deficiency related to the COC, which awareness was a disputed issue before the court … . People v Mitchell, 2024 NY Slip Op 03256, Fourth Dept 6-14-24

Practice Point: The People must exercise due diligence in providing discovery. Here the failure to contact the NYS Division of Criminal Justice Services to determine whether the complainant had a criminal record rendered the ready-for-trial announcement illusory (the accompanying certificate of compliance erroneously stated the complainant had no prior convictions).

Practice Point: Defense counsel has a statutory duty to report to the People any defects in the certificate of compliance of which the defense is aware. Here it was alleged defense counsel knew of the complainant's criminal record and did not alert the People. The court may consider the failure to notify the People of a defect in the certificate of compliance in determining a speedy-trial motion.

JUNE 14, 2024

DISCOVERY, ATTORNEYS, LAW ENFORCEMENT DISCIPLINARY RECORDS.

OVER A TWO-JUSTICE DISSENT, THE MATTER WAS SENT BACK FOR A RULING ON WHETHER THE PEOPLE COMPLIED WITH THEIR DISCOVERY OBLIGATIONS RE: LAW ENFORCEMENT DISCIPLINARY RECORDS (FOURTH DEPT).

The Fourth Department, sending the matter back for a ruling on whether the People complied with their discovery obligations, over a two-justice dissent, noted that the People cannot use a "screening panel" to review law enforcement disciplinary records:

Defendant … contends that the court erred in denying his motion to dismiss the indictment on statutory speedy trial grounds (see CPL 30.30). In particular, he contends that the People's failure to disclose existing disciplinary records of potential law enforcement witnesses for use as impeachment materials … rendered any certificate of compliance (COC) filed pursuant to CPL 245.50 improper and thereby rendered any declaration of trial readiness made pursuant to CPL 30.30 illusory and insufficient to stop the running of the speedy trial clock. As the Court of Appeals recently stated in People v Bay, "the key question in determining if a proper COC has been filed is whether the prosecution has 'exercis[ed] due diligence and ma[de] reasonable inquiries to ascertain the existence of material and information subject to discovery' " … . Due diligence "is a familiar and flexible standard that requires the People to make reasonable efforts to comply with statutory directives" (id. [internal quotation marks omitted]). "[W]hether the People made reasonable efforts sufficient to satisfy CPL article 245 is fundamentally case-specific, as with any question of reasonableness, and will turn on the circumstances presented" … . "[C]ourts should generally consider, among other things, the efforts made by the prosecution and the prosecutor's office to comply with the statutory requirements, the volume of discovery provided and outstanding, the complexity of the case, how obvious any missing material would likely have been to a prosecutor exercising due diligence, the explanation for any discovery lapse, and the People's response when apprised of any missing discovery" … . Although the statute does not require a " 'perfect prosecutor,' " the Court emphasized that the prosecutor's good faith, while required, "is not sufficient standing alone and cannot cure a lack of diligence" … . People v Sumler, 2024 NY Slip Op 03307, Fourth Dept 6-14-24

Practice Point: A "screening panel" cannot be used to determined what law enforcement disciplinary records must be supplied to the defense in discovery.

Practice Point: The People's failure to comply with discovery obligations may render the certificate of compliance improper and the ready-for-trial announcement illusory, warranting dismissal on speedy trial grounds.

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FAMILY LAW, VISITATION WITH INCARCERATED FATHER.

INCARCERATED FATHER SHOULD NOT HAVE BEEN AWARDED IN-PERSON VISITATION WITH HIS SON ONCE EVERY SIX MONTHS; FATHER HAD STABBED MOTHER WHILE SHE WAS HOLDING THE CHILD AND FATHER HAD HARASSED MOTHER DURING PERMITTED PHONE CALLS (FIRST DEPT).

The First Department, reversing Family Court, determined the award of in-person visitation by the child with the incarcerated father once every six months was not supported by the record:

Visitation with a noncustodial parent, including an incarcerated parent, is generally presumed to be in the best interests of the child … . However, that presumption is rebuttable, and "a demonstration that such visitation would be harmful to the child will justify denying such a request" … .

Here, the evidence was sufficient to overcome the presumption in favor of visitation. The father is incarcerated in connection with his conviction for robbing and stabbing the mother while she was holding their child in her arms. The record indicates that the father has been incarcerated for most of the child's life and that the father has had no meaningful relationship with the child … . … [T]he now five-year-old child would have to travel several hours each way to visit the prison at which the father is incarcerated, and the child is not comfortable being in a car or being away from her mother for an extended period … .

… [M]other testified that the father has used his permitted phone-calls with the child to harass the mother, despite her order of protection against him … . The position advocated by the attorney for the child was also entitled to serious consideration and supports modification of the court's order … . Matter of Leroy W. (Shanequa W.), 2024 NY Slip Op 03238, First Dept 6-13-24

Practice Point: Here the presumption incarcerated father was entitled to in-person visitation with his son was rebutted.

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FAMILY LAW, INCARCERATED FATHER, TERMINATION OF PARENTAL RIGHTS.

ALTHOUGH FATHER FAILED TO COOPERATE WITH THE PLACEMENT OF HIS CHILDREN WHILE INCARCERATED; HE MADE SERIOUS EFFORTS TO RECONNECT WITH THE CHILDREN AFTER HIS RELEASE; FAMILY COURT SHOULD HAVE GRANTED A SUSPENDED JUDGMENT RATHER THAN PERMANENTLY TERMINATING HIS PARENTAL RIGHTS (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined father, after his release from prison, made efforts to reconnect with his children which warranted a suspended judgment rather than permanent termination of his parental rights. While incarcerated father had not cooperated with efforts to place the children:

A suspended judgment "provides a brief grace period to give a parent found to have permanently neglected a child a second chance to prepare for reunification with the child" … . Notably, we may substitute our discretion for that of the trial court even in the absence of an abuse of discretion … , and here we conclude that a suspended judgment, rather than termination of parental rights, was in the children's best interests … . At the time of the dispositional hearing—just two months after his release from prison—the father had found full-time employment, participated in weekly visitation with the children, had started communicating regularly with the children's foster family regarding the children, and was in the process of finding housing and completing a mental health evaluation and parenting classes, while the children were reportedly happy to be visiting with the father regularly. "Given the child[ren]'s . . . young age, [the father's] recommencement of regular visitation, . . . the sustained efforts on the part of [the father following his release from prison], and the Legislature's express desire to return children to their natural parents whenever possible" … , we conclude that the father "should have been granted a 'second chance' in the form of a suspended judgment" … . Matter of Rodcliffe M., Jr. (Rodcliffe M., Sr.), 2024 NY Slip Op 03267, Fourth Dept 6-14-24

Practice Point: Family Court has the option of issuing a suspended judgment to give a parent a second chance to avoid termination of parental rights.

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FAMILY OFFENSE, JUDGES, ORDER OF PROTECTION.

ABSENT MOTHER'S ADMISSION TO THE ALLEGED FAMILY OFFENSE OR CONSENT TO AN ORDER OF PROTECTION, THE COURT SHOULD NOT HAVE ISSUED A PERMANENT (TWO-YEAR) ORDER OF PROTECTION WITHOUT HOLDING A FACT-FINDING HEARING; MATTER REMITTED (SECOND DEPT).

The Second Department, reversing Family Court and remitting the matter for fact-finding, determent the judge in this family offense proceeding should not have issued a permanent order of protection against mother without a fact-finding hearing. Unless a party admits the family offense or consents to an order of protection, the court may issue only a temporary order pending a fact-finding hearing:

… Family Court improperly issued an order of protection directing the mother, inter alia, to stay away from the father and the child for a period of two years, except for court-ordered parental access with the child. Upon expressing dissatisfaction with the mother's behavior at the September 2023 conference, the court initially signaled an intent to issue a temporary order of protection. It then changed course and chose to issue an order of protection that it described as "permanent" and that would last "two years." However, the court did so without holding a fact-finding hearing to determine whether the mother committed the family offenses alleged in the father's petition. Nor did it obtain an admission from the mother that she committed such family offenses or secure her consent to the issuance of the order of protection. The court therefore failed "to observe the procedural steps set forth in Family Ct Act § 154-c(3)" before issuing that order … . … [S]ince a fact-finding hearing was not held and the court otherwise rendered its determination without receiving any evidence demonstrating that the mother committed the alleged family offenses, the record is not sufficient for this Court to render an independent determination on that question … . Matter of Acker v Teneyck, 2024 NY Slip Op 03043, Second Dept 6-5-24

Practice Point: Although a Family Court judge can issue a temporary order of protection during a family offense proceeding, the judge cannot issue a permanent order of protection unless the opposing party admits the family offense, consents to the order of protection, or the court holds a fact-finding hearing.

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JUNE 5, 2024

GUILTY PLEAS, IMMIGRATION LAW.

DEFENDANT SUFFICIENTLY DEMONSTRATED HE WAS NOT INFORMED OF THE DEPORTATION CONSEQUENCES OF A GUILTY PLEA AND HE WOULD NOT HAVE PLED GUILTY HAD HE BEEN SO INFORMED; REVERSED AND REMITTED FOR A HEARING ON THE MOTION TO VACATE THE GUILTY PLEA ON INEFFECTIVE ASSISTANCE GROUNDS (THIRD DEPT).

The Third Department, reversing County Court and ordering a hearing on defendant's motion to vacate his guilty plea on ineffective assistance grounds, determined defendant, a citizen of Haiti, sufficiently demonstrated he had never been informed of the deportation consequences of the guilty plea and he would not have pled guilty if he had been so informed:

… [D]efendant proffered a sworn affidavit wherein he averred that counsel did not inquire as to whether defendant was a citizen, never discussed with defendant his immigration status nor did he advise defendant that he could be deported as a result of his guilty plea. Defendant also asserted that, during the plea proceeding, County Court never inquired about whether he was a United States citizen, his immigration status or advised that a conviction could result in deportation. This assertion is supported by the record, which reveals no mention of citizenship or deportation at any point during defendant's plea or sentencing … . Defendant also averred that he moved to the United States approximately 20 years ago, when he was six years old, and that his entire family resides in this country … . Furthermore, defendant asserted that he would not have pleaded guilty and would have insisted on going to trial if he had been informed that this conviction could result in deportation … . Thus, defendant sufficiently alleged that counsel failed to provide him with any information regarding deportation consequences of his plea and that defendant was prejudiced because he would not have pleaded guilty had he been advised of these consequences, such that a hearing is warranted … . Indeed, given defendant's affidavit as well as the record of the plea proceeding, there is a genuine concern that, as defendant asserts, he was never advised of the deportation consequences of his plea. Accordingly, this matter must be remitted to County Court for a hearing

on defendant's CPL 440.10 motion. People v Philippe, 2024 NY Slip Op 03105, Third Dept 6-6-24

Practice Point: The failure to inform a non-citizen defendant of the deportation consequences of a guilty plea can constitute ineffective assistance.

Practice Point: A non-citizen defendant who shows he was not informed of the deportation consequences of the guilty plea and sufficiently demonstrates he would not have pled guilty if he had been so informed is entitled to a hearing on his motion to vacate the guilty plea.

JUNE 6, 2024

HEARSAY, CONSTITUTIONAL LAW, HARMLESS ERROR.

UNDER THE CONSTITUTIONAL ERROR STANDARD, HEARSAY STATEMENTS ADMITTED IN THIS ATTEMPTED MURDER AND FIRST DEGREE EXPLAINED (CT APP).

The Court of Appeals, reversing the Appellate Division, determined the hearsay statements allowed in evidence in the attempted murder and assault first degree trial constituted harmless error:

Before this Court, the parties primarily focus on whether the erroneous admission of testimony reflecting the daughter's statements was harmless. Applying the standard for constitutional errors, we conclude that it was. The evidence against defendant was overwhelming, particularly as it related to the critical issue of intent … .. Properly admitted evidence demonstrated that the victim and her daughter fled the home seeking help immediately after the attack; one of them called defendant the "culprit" as he attempted to flee; defendant had to be physically subdued by a bystander until his arrest; both women told several witnesses that defendant "stabbed" the victim; the weapon used was a large, sharp knife; medical records reflect that the victim reported to hospital staff that her husband had stabbed her; and those records, as well as a treating physician's testimony, demonstrate that the victim sustained two serious knife wounds to the neck and chest, both over two inches in length and one of which was a direct stabbing so forceful that it fractured her breastbone. These facts leave no doubt that defendant acted with the intent to cause the victim serious physical injury. For that reason, the properly admitted evidence rendered the improper testimony recounting the

daughter's description of the attack redundant and therefore harmless, as "there is no reasonable possibility that the error might have contributed to defendant's conviction" … .

The errors in admission of statements by the 911 caller and defendant's son were also harmless and do not warrant a new trial. Because the statements supplied information properly provided to the jury through several testifying witnesses and the victim's medical records, there is no "significant probability . . . that the jury would have acquitted the defendant had it not been for" their admission … . People v Vargas, 2024 NY Slip Op 03200, CtApp 6-13-24

Practice Point: Here the Court of Appeals applied the constitutional error standard and found the hearsay statements admitted at trial constituted harmless error because the evidence of guilt was overwhelming.

JUNE 13, 2024

JUDGES, FAILURE TO RULE ON MOTION FOR TRIAL ORDER OF DISMISSAL, APPEALS.

THE FAILURE TO RULE ON A MOTION FOR A TRIAL ORDER OF DISMISSAL IS NOT A DENIAL OF THE MOTION; AN APPELLATE COURT MUST REMIT FOR A RULING BY THE TRIAL COURT (FOURTH DEPT).

The Fourth Department, remitting the matter for a ruling, noted that a judge's failure to rule on a trial order of dismissal motion does not constitute a denial of the motion. Therefore an appellate court cannot rule on the evidentiary issue raised in the motion and must send the matter back for a ruling:

The failure of a trial court to rule on a motion for a trial order of dismissal cannot be deemed a denial of that motion, and thus we must hold the case, reserve decision, and remit the matter to County Court for a ruling on defendant's motion … . People v Kohmescher, 2024 NY Slip Op 03287, Fourth Dept 6-14-24

Practice Point: Because the failure to rule on a motion for a trial order of dismissal is not a denial of the motion an appellate court cannot address the issue and must remit for a ruling by the trial court.

JUNE 14, 2024

JUDGES, LATE NOTICE OF INTENT TO PRESENT PSYCHIATRIC EVIDENCE.

ALTHOUGH THE NOTICE OF THE INTENT TO PRESENT PSYCHIATRIC EVIDENCE DEMONSTRATING DEFENDANT'S LACK OF CAPACITY TO COMMIT ARSON WAS "1400 DAYS LATE," THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO ACCEPT THE LATE NOTICE (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Wilson, over a three-judge dissent, determined the trial court abused its discretion in refusing to accept late notice of the intent to present psychiatric evidence as a defense to the arson charge. The defendant had been evaluated and treated for mental illness since childhood. When a new attorney was assigned to the defense, the notice of the intent to present psychiatric evidence was served "1400 days late." The defense sought to introduce expert testimony to demonstrate defendant did not have the capacity to commit arson at the time of the offense:

We … hold that the trial court's application of CPL 250.10 precluding Mr. Sidbury's [defendant's] psychiatric defense was an abuse of discretion. We have been clear that the governing principle animating CPL 250.10 is "procedural fairness and orderliness" with the intention of "eliminating the element of surprise" for the prosecution … . The statute formulates a procedure for defendants to serve notice of their intent to present psychiatric evidence that is "prepared and presented manageably and efficiently," such that it allows for "proper notification, adversarial examination, and preclusion when appropriate" … . * * *

Although the statute provides for service of the notice within 30 days of the defendant's not-guilty plea, the court has discretion to permit service of a late notice "[i]n the interest of justice and for good cause shown" … . Late notice is permissible "at any time prior to the close of evidence"—including after trial has commenced … .

The decision to permit late notice is within the discretion of the trial court … . That discretion, however, is "not absolute," because "[e]xclusion of relevant and probative testimony as a sanction for a defendant's failure to comply with a statutory notice requirement implicates a defendant's constitutional right to present witnesses in [their] own defense" … . Instead, the trial court must "weigh [the

defendant's constitutional] right against the resultant prejudice to the People from the belated notice" … . People v Sidbury, 2024 NY Slip Op 03318, CtApp 6-18-24

Practice Point: Although service of notice of intent to present psychiatric evidence as a defense should be made within 30 days of the not-guilty plea, the court has the discretion to accept late notice at any time prior to the close of evidence (because the constitutional right to present a defense is at stake).

JUNE 18, 2024

JUDGES, READBACK REQUEST.

THE JURY REQUESTED A READBACK OF BOTH THE DIRECT AND THE CROSS; THE JUDGE ONLY PROVIDED A READBACK OF THE DIRECT AND ERRONEOUSLY INDICATED THE TOPIC WAS NOT ADDRESSED ON CROSS; NEW TRIAL ORDERED (FOURTH DEPT).

The Fourth Department, reversing the conviction and ordering a new trial, determined the judge did not meaningfully respond to a jury note requesting both the direct testimony and the cross-examination on a specific topic. The judge only provided the direct testimony and erroneously told the jury the cross-examination did not address the topic:

… [T]he jury submitted a note requesting, inter alia, a readback of testimony from the victim "about the time she was in the car on Glenwood until she was out of the car from both defense and the DA's questions." The court responded to the jury's request by reading back only testimony from the victim on direct examination about the time that she was inside the car. The court did not order the readback of any cross-examination, which included questioning about inconsistencies in the victim's account of the incident, including questions about the victim's earlier statement to the police describing a conversation that she had with defendant outside the car and questions regarding her statement to the police on the day of the incident that the driver of a car attempted to pull her into the car through the window. The court also instructed the jury that only direct examination included questions with respect to the victim being inside the car and, despite the jury's request to hear questioning from both the prosecution and the defense, the court did not request clarification from the jury whether they wanted to hear the defense's cross-examination regarding the incident. A meaningful response to a

request for a readback of testimony "is presumed to include cross-examination which impeaches the testimony to be read back … . People v Dortch, 2024 NY Slip Op 03283, Fourth Dept 6-14-24

Practice Point: Here the jury requested a readback of the direct and cross on a specific topic. The judge provided only the direct which did not constitute a meaningful response to the jury note. New trial ordered.

JUNE 14, 2024

JURY INSTRUCTIONS, ATTORNEYS, INEFFECTIVE ASSISTANCE.

THE BURGLARY COUNT CHARGED THAT DEFENDANT ENTERED THE VICTIM'S APARTMENT WITH THE INTENT TO "HOLD A KNIFE TO THE VICTIM'S THROAT;" THE JURY WAS INSTRUCTED ONLY THAT DEFENDANT ENTERED THE APARTMENT WITH THE INTENT TO "COMMIT A CRIME;" DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO REQUEST A JURY INSTRUCTION TAILORED TO MATCH THE CRIME CHARGED IN THE INDICTMENT (FOURTH DEPT).

The Fourth Department, reversing defendant's burglary conviction on ineffective assistance grounds, determined defense counsel should have insisted on a jury instruction which reflected the crime charged in the indictment. The indictment alleged defendant entered the victim's apartment with the intent to hold a knife to the victim's throat. The jury was instructed that it need only find defendant unlawfully entered and remained in the victim's apartment with the intent "to commit a crime" with no mention of holding a knife to the victim's throat. At trial whether defendant possessed a knife was contested and defendant was acquitted of criminal possession of a weapon and menacing:

In its charge to the jury, County Court made no mention of the People's theory of the crime as limited by the indictment. The court charged, with respect to the intent element, that the People must prove beyond a reasonable doubt that defendant entered or remained in the building "with the intent to commit a crime inside the building," without specifying the intended crime. Defense counsel did not seek a tailored instruction limited to the theory in the indictment.

"There is no requirement that the People allege or establish what particular crime was intended," to secure a conviction for burglary … . However, "[i]f the People . . . expressly limit[ ] their theory of the 'intent to commit a crime therein' element to a particular crime, then they . . . have . . . to prove that the defendant intended to commit that crime" … .

Here, defense counsel failed to seek an appropriately tailored instruction to the jury on burglary in the second degree or object to the burglary charge given. Defense counsel thereby permitted the jury to convict defendant upon a theory of the intent element that was not set forth in the indictment … . People v Mcclendon, 2024 NY Slip Op 03260, Fourth Dept 6-14-24

Practice Point: If the burglary count in the indictment charges that defendant unlawfully entered the victim's apartment to "hold a knife to the victim's throat," the jury instruction should match the language in the indictment. Here the jury was instructed it need only find that defendant entered the apartment "to commit a crime" with no mention of a knife. Whether there was a knife was contested at trial and defendant was acquitted of criminal possession of a weapon and menacing. Under those facts, defense counsel was ineffective for failing to request a jury instruction which matched the knife-related crime charged in the indictment.

JUNE 14, 2024

RESENTENCING, JUDGES.

DEFENDANT WAS CONVICTED OF CRIMINAL POSSESSION OF A WEAPON FIRST DEGREE, THE WEAPON BEING AN IMPROVISED EXPLOSIVE DEVICE (IED); THE ATTEMPTED CRIMINAL POSSESSION OF A WEAPON THIRD DEGREE COUNT IS AN INCLUSORY CONCURRENT COUNT WHICH MUST BE DISMISSED; COUNTY COURT IMPROPERLY RESENTENCED DEFENDANT IN HIS ABSENCE, REQUIRING VACATION OF THE SENTENCE (THIRD DEPT).

The Third Department determined (1) the attempted criminal possession of a weapon third degree must be dismissed as an inclusory concurrent count of criminal possession of a weapon first degree and (2) the judge's resentencing the defendant on the attempted criminal possession of a weapon third conviction in

defendant's absence was improper and warranted vacation of the sentence. The defendant was convicted of possessing an improvised explosive device (IED), essentially a bomb:

A person is guilty of attempted criminal possession of a weapon in the third degree "when, with intent to commit a crime, he [or she] engages in conduct" wherein "[s]uch person possesses any explosive or incendiary bomb [or] bombshell" (Penal Law §§ 110.00, 265.02 [2]). The terms explosive substance, explosive and incendiary bomb are not defined in the Penal Law. Explosives are, however, defined in the Labor Law as "gunpowder, powders used for blasting, high explosives, blasting materials, detonating fuses, detonators, pyrotechnics and other detonating agents, fireworks and dangerous fireworks as defined in section 270.00 of the [P]enal [L]aw, smokeless powder and any chemical compound or any mechanical mixture containing any oxidizing and combustible units, or other ingredients in such proportions, quantities, or packing that ignition by fire, friction, concussion, percussion or detonation of any part thereof may cause and is intended to cause an explosion" (Labor Law § 451). The terms explosive or incendiary bomb were added to Penal Law § 265.02 (2) in 1970 to cover Molotov cocktails within the meaning of the statute … . We agree with defendant that it would be impossible to commit the greater crime — criminal possession of a weapon in the first degree — without concomitantly, by the same conduct, committing the lesser crime involving possession of an explosive, incendiary bomb or bombshell. Thus, the conviction for attempted criminal possession of a weapon in the third degree must be vacated and dismissed as an inclusory concurrent count … . People v Graham, 2024 NY Slip Op 03104, Third Dept 6-6-24

Practice Point: Here the attempted criminal possession of a weapon third degree was dismissed as an inclusory concurrent count of criminal possession of a weapon first degree.

Practice Point: Resentencing the defendant in defendant's absence is a violation of defendant's constitutional and statutory rights to be present and requires vacation of the sentence.

JUNE 6, 2024

SEX OFFENDER REGISTRATION ACT (SORA), ATTORNEYS.

HERE THE PEOPLE'S FAILURE TO PROVIDE TEN-DAY'S NOTICE THEY WERE SEEKING A HIGHER SORA RISK LEVEL THAN THAT RECOMMENDED BY THE BOARD WARRANTED A REDUCTION FROM LEVEL THREE TO TWO; DEFENSE COUNSEL'S REPLY TO THE LATE NOTICE DID NOT WAIVE THE REQUIREMENT (FIRST DEPT).

The First Department, reducing defendant's SORA risk level from three to two, determined (1) the defendant was not given the requisite 10-day notice of the prosecutor's intent to seek a higher risk level than that recommended by the Board, and (2) defense counsel's reply to the late notice by the prosecutor did not waive the 10-day notice requirement:

We agree with defendant that he was denied due process because the People did not provide written notice of its intent to seek a determination different than that recommended by the Board "at least ten days prior to the determination proceeding" (Correction Law § 168-n[3] …). The People sent defense counsel a letter stating their intent to seek a risk level three adjudication, different from the Board's recommendation of risk level two, less than 10 days in advance of the hearing. … [T]he People indicated in their letter only that they were seeking additional point assessments and did not apprise counsel that they were also requesting an upward departure … . … [T]he People announced their intention to seek an upward departure for the first time at the court's invitation during the SORA hearing.

Defendant's right to timely notice was not waived by his counsel's letter, in response to the People's, that counsel was willing to go forward with the hearing if the prosecutor delivered to counsel by the next day the evidence that the People intended to use at the hearing. Nothing in the record indicates that the prosecutor complied with this condition. Moreover, because the People did not announce an intention to seek an upward departure, any waiver would not have embraced that request. People v Tookes, 2024 NY Slip Op 03095, First Dept 6-6-24

Practice Point: The People must provide defendant ten-day's notice of their intent to seek a higher SORA risk level than that recommended by the Board.

Practice Point: The People should not wait until the SORA hearing to announce they are seeking an upward departure.

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JUNE 6, 2024

SEX OFFENDER REGISTRATION ACT (SORA), CORRECTION LAW, CONSTITUTIONAL LAW.

DEFENDANT, PURSUANT TO CORRECTION LAW 168-A (3)(B), WAS DESIGNATED A "SEXUALLY VIOLENT OFFENDER" BASED SOLELY ON HIS OUT-OF-STATE CONVICTION OF A REGISTRABLE SEXUAL OFFENSE WHICH DID NOT INVOLVE VIOLENCE; THE CORRECTION LAW AS APPLIED TO DEFENDANT VIOLATED HIS RIGHT TO DUE PROCESS; TWO-JUSTICE DISSENT (FOURTH DEPT).

The Fourth Department, reversing County Court, over a concurrence and a two-justice dissent, determined designating defendant a "sexually violent offender" based solely upon an out-of-state conviction of a non-violent sexual offense violated defendant's right to due process. The concurrence argued the Correction Law statute which allows such a "sexually violent offender" designation based on an out-of-state conviction is unconstitutional on its face:

We conclude that designating defendant as sexually violent merely because he had an out-of-state sex conviction requiring out-of-state registration, regardless of whether that underlying offense is violent—as is currently required by the text of Correction Law § 168-a (3) (b)—bears no rational relationship to the legitimate governmental interest of informing the public of threats posed by sex offenders. Indeed, the animating notification purpose of SORA presupposes that the information available to the public as a consequence of a SORA registration is accurate. Where, as here, an offender is designated a sexually violent offender merely because of an out-of-state conviction requiring out-of-state registration, the public is not accurately informed of the true risk posed by the offender. We further conclude that the designation of defendant as a sexually violent offender—augmenting defendant's SORA registration period from a term of 20 years to his entire lifetime—merely because of the location of the registrable offense does not result in "a criminal designation that rationally fits [defendant's] conduct and public safety risk" … . People v Malloy, 2024 NY Slip Op 03264, Fourth Dept 6-14-24

Practice Point: The Correction Law (section 168-a (3)(b)) pursuant to which defendant was designated a "sexually violent offender" based solely on an out-of-state registrable offense which did not involve violence was deemed to violate defendant's right to due process of law.

JUNE 14, 2024

SEX OFFENDER REGISTRATION ACT (SORA).

LEVEL ONE SEX OFFENDERS MUST REGISTER UNDER SORA FOR 20 YEARS; LOW RISK-LEVEL SEX OFFENDERS WHO WERE REGISTERED IN ANOTHER STATE AND WHO RELOCATE TO NEW YORK ARE NOT ENTITLED TO CREDIT FOR THE TIME THEY WERE REGISTERED OUT-OF-STATE (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Troutman, over two dissenting opinions (three judges), determined sex offenders registered in other states who are designated level-one risks upon relocating to New York are not entitled to credit for the time they were registered in another state:

Generally, those convicted of sex offenses in other states must register under the Sex Offender Registration Act ([SORA] …) upon relocating to New York … . While the statute requires some sex offenders to register for life … , those in the lowest risk category register for a term of 20 years … . The issue here is whether the statute entitles sex offenders who are classified in that lowest risk category upon relocating to New York to credit for their time registered as sex offenders under the laws of other states. We hold that it does not … .

Defendant in each of these appeals was convicted in another state of an offense that required him to register as a sex offender under the laws of that state. Some years later, each defendant relocated to New York and was required to register as a level-one risk under SORA. Neither is designated a sexual predator, sexually violent offender, or predicate sex offender. During the risk level determination hearings under Correction Law § 168-k (2), each defendant requested that Supreme Court order him registered nunc pro tunc to the date when he registered as a sex offender in the state where he was convicted of his sex offense, in effect giving him credit for the time registered in the foreign jurisdiction against the 20-year registration period. * * *

We recognize that the statute, as written, may lead to unfair results in some circumstances. For example, an offender with a minimal risk of reoffense who has spent substantial time compliant with an effectively administered out-of-state registry scheme without having reoffended would seem to deserve credit for that time as a matter of policy. Moreover, the diversion of public resources and attention towards offenders such as these arguably undermines the state's effort to protect the public against genuinely dangerous offenders. On the other hand, not all state registry schemes are necessarily created equal, for example, in terms of supervision and registration requirements, and there is no specific mechanism under SORA for a court to determine whether a foreign state's administration of its registry is as exacting as New York's or the extent to which a particular offender complied with his obligations under that state's statute and remained free of reoffense. People v Corr, 2024 NY Slip Op 03379, CtApp 6-20-24

Practice Point: Low risk-level sex offenders who relocate to New York are not entitled to credit for the time they were registered out-of-state. They must remain registered in New York for twenty years.

JUNE 20, 2024

SEX OFFENDER REGISTRATION ACT (SORA).

THE "ESSENTIAL ELEMENTS" TEST SHOULD BE USED TO DETERMINE WHETHER AN OUT-OF-STATE NON-SEXUAL CONVICTION CAN BE USED TO ASSESS RISK-LEVEL POINTS UNDER SORA (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Clark, determined the "essential elements" test must be used to determine whether a defendant should be assessed risk-level points for non-sexual offenses committed out-of-state. Defendant relocated to New York and was subject to a SORA risk-level assessment based upon a Washington child molestation conviction. Defendant had been convicted of driving while intoxicated in Texas for driving in circles in a grassy area in a park. New York's DWI statutes do not criminalize such off-road driving. Therefore the Texas conviction should not have been used to assess risk-level points under SORA: In addition the commission of the Washington child molestation offense predated a Washington DWI conviction. Therefore the

Washington DWI should not have been used to calculate the risk-level because it was not part of defendant's "prior criminal history:"

Pursuant to the essential elements test, a court must "compare the elements of the foreign offense with the analogous New York offense to identify points of overlap" and, "where the offenses overlap but the foreign offense also criminalizes conduct not covered under the New York offense, the [court] must review the conduct underlying the foreign conviction to determine if that conduct is, in fact, within the scope of the New York offense" … . … This Court and the other Departments previously have deemed it appropriate to utilize the essential elements test to determine whether a foreign conviction falls within the scope of a New York offense to assess points under any category of risk factor 9 … .. Such application ensures that courts properly assess "prior crimes" and accurately determine a sex offender's risk level in accordance with acts that the Legislature has deemed apt to criminalize (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 6 [2006]). Consequently, to the extent that we have not expressly held that the essential elements test should be utilized to determine whether a foreign conviction supports the assessment of any points under risk factor 9, we hold so now. People v Pardee, 2024 NY Slip Op 03360, Third Dept 6-20-24

Practice Point: Here the Third Department expressly adopted the "essential elements" test for determining whether an out-of-state DWI can be used to assess risk-level points under SORA. The elements of the Texas DWI statute are different from the elements of New York's DWI statutes. Defendant's driving in circles on a grassy area of a park would not constitute DWI in New York. Therefore the Texas conviction should not have been used to assess points.

JUNE 20, 2024

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SEX OFFENDERS, MENTAL HYGIENE LAW.

ALTHOUGH RESPONDENT SEX OFFENDER VIOLATED RULES IMPOSED BY THE "STRICT AND INTENSIVE SUPERVISION" (SIST) REGIMEN, HE DID NOT EXHIBIT ANY DANGEROUS SEXUAL BEHAVIOR; THEREFORE RESPONDENT SHOULD NOT HAVE BEEN CONFINED AND SHOULD BE RELEASED AND MANAGED UNDER "SIST" (FIRST DEPT).

The First Department, reversing Supreme Court, determined that, although respondent sex offender violated some of the rules associated with his released into the community, the violations were not related to sexual behavior. Therefore respondent should not be confined and should be released to the community and managed under SIST (strict and intensive supervision):

It is undisputed that, during the relevant period, respondent made no sexual threats, did not approach any treatment staff in a sexual manner, and did not express any sexual impulses or urges. We agree with our sister department that "in the absence of evidence of sexually inappropriate conduct while on SIST, it becomes incumbent on the State to demonstrate a persuasive link between a nonsexual SIST violation and the offender's ability to control his sexual behavior" … . "A mere tendency to engage in risky or socially undesirable conduct — even if that conduct provides an opportunity for, or increases the likelihood of, sexual offending — is quintessentially insufficient to establish 'inability' under the Michael M. formulation" (George N., 160 AD3d at 31 …). Finally, a respondent's mere struggling with sexual urges is insufficient to show inability to control … . Matter of State of New York v Anthony R., 2024 NY Slip Op 03392, First Dept 6-20-24

Practice Point: A sexual offender who has not exhibited any dangerous sexual behavior under SIST should be released and management under SIST should be continued. Confinement is not justified by non-sexual SIST violations.

JUNE 20, 2024

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TRAFFIC STOPS, REASONABLE SUSPICION STANDARD, JUDGES, MOTION TO SUPPRESS.

AFTER A VALID TRAFFIC STOP, DEFENDANT WAS DETAINED WHILE HIS PAROLE OFFICER WAS CALLED TO THE SCENE; DEFENDANT'S CAR WAS THEN SEARCHED AND HEROIN WAS FOUND; THE MATTER WAS REMITTED TO DETERMINE WHETHER DEFENDANT WAS PROPERLY DETAINED UNDER THE "REASONABLE SUSPICION" STANDARD, NOT THE "RIGHT TO INQUIRE" STANDARD APPLIED BY THE SUPPRESSION COURT (CT APP).

The Court of Appeals, remitting the case for a determination of the suppression motion under the "reasonable suspicion" standard, in a full-fledged opinion by Judge Cannataro, over an extensive dissenting opinion, determined there was a question whether the defendant was illegally detained after a valid traffic stop to allow investigation of a possible parole violation. The parole officer was called to the scene, the defendant's car was searched, and heroin was found:

The proper standard for detaining an individual beyond "the time reasonably required" to complete a traffic stop is reasonable suspicion … . Given that a traffic stop is a "limited seizure" of the occupants of a vehicle, "[f]or a traffic stop to pass constitutional muster, the officer's action in stopping the vehicle must be justified at its inception and the seizure must be reasonably related in scope, including its length, to the circumstances which justified the detention in the first instance" … . A "continued involuntary detention of [a] defendant . . . constitute[s] a seizure in violation of their constitutional rights, unless circumstances coming to [the officer's] attention following the initial stop furnishe[s] . . . reasonable suspicion that they were engaged in criminal activity" … . Likewise, the United States Supreme Court has held that "[a] seizure justified only by a police-observed traffic violation . . . become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission of issuing a ticket for the violation" … . In this vein, although that "mission" encompasses " 'ordinary inquiries incident to [the traffic] stop,' " it does not include additional measures designed to detect evidence of criminality … . Thus, an otherwise lawful traffic stop may not be prolonged "absent the reasonable suspicion ordinarily demanded to justify detaining an individual" … .

… [T]here is record support for the affirmed finding that the traffic stop was justified at its inception, based upon the police officer's observation that defendant committed a traffic infraction … . However, the courts below evaluated whether the traffic stop was prolonged beyond the time reasonably required for its completion under the founded suspicion standard applicable to the common law right to inquire … , a lesser standard than the reasonable suspicion necessary to prolong a traffic stop. As a result, remittal is necessary to allow for consideration of this issue under the proper standard. People v Thomas, 2024 NY Slip Op 03319, CtApp 6-18-24

Practice Point: After a valid traffic stop, the question whether defendant was properly detained to allow inquiry into suspected crimes unrelated to the traffic infraction is analyzed under the "reasonable suspicion" standard, not the lesser "right to inquire" standard.

JUNE 18, 2024