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Table of Contents

Contents

APPEALS, INTEREST OF JUSTICE ADJUDICATION, YOUTHFUL OFFENDERS.

HERE THE APPELLATE DIVISION, IN THE INTEREST OF JUSTICE, ADJUDICATED DEFENDANT A YOUTHFUL OFFENDER (FOURTH DEPT).

The Fourth Department, reversing County Court, over a two-justice dissent, determined defendant should have been sentenced as a youthful offender for his role in a robbery::

… [T]he factors weighing against affording defendant youthful offender treatment are the seriousness of the offense, defendant's alleged gang affiliation, and defendant's failure to complete interim probation … . However, defendant was 15 years old at the time of the crime and had no prior criminal record. He accepted responsibility for his actions and cooperated with both police on the date of the incident and probation during his presentence report interview. According to his probation officer, although he had not yet begun substance abuse treatment in the extremely short period of time between his release from custody and his remand, he "report[ed] as directed, and ha[d] not secured any new charges." Probation described defendant as "[m]otivated to avoid further difficulties" and his prognosis for lawful behavior as "guarded." Indeed, probation asked that defendant's "sentencing be adjourned for sixty days to allow . . . defendant the opportunity to be placed on electronic monitoring through Probation." In addition, despite the senseless nature of this incident, defendant did not use a weapon, there is no allegation that this crime was gang-related, defendant was the youngest participant in the crime by approximately three years, and it was clearly an unplanned, spur-

of-the-moment decision for which youthful offender adjudication is meant … . People v Davonte S.B., 2024 NY Slip Op 03635, Fourth Dept 7-3-24

Practice Point: The Appellate Division has the power to review the record and adjudicate a defendant a youthful offender in the interest of justice.

JULY 3, 2024

APPEALS, WEIGHT OF THE EVIDENCE, IDENTIFICATION.

ALTHOUGH THE VICTIM, AFTER IDENTIFYING DEFENDANT IN A PHOTO ARRAY, ASKED TO SEE A SECOND PHOTO ARRAY, HER IDENTIFICATION OF THE DEFENDANT WAS NOT AGAINST THE WEIGHT OF THE EVIDENCE; THERE WAS A STRONG DISSENT (FOURTH DEPT).

The Fourth Department, affirming defendant's conviction, in a full-fledged opinion by Justice Greenwood, over a strong dissent, determined the one-witness identification of the defendant was not against the weight of the evidence. After identifying the defendant in a photo array the victim asked to see another photo array. In the second array she again picked out the defendant, but apparently she didn't think she was identifying the same person. But she had in fact identified the same person from an older photograph:

In determining whether a verdict is against the weight of the evidence, we must first determine whether, "based on all the credible evidence[,] a different finding would not have been unreasonable" … . If so, "then [we] must, like the trier of fact below, 'weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony' " … . Weight of the evidence review is not an "open invitation" for an appellate court to substitute its judgment for that of the jury … . Rather, in reviewing the evidence, we "must give '[g]reat deference' to the jury's verdict . . . precisely because '[t]he memory, motive, mental capacity, accuracy of observation and statement, truthfulness and other tests of the reliability of witnesses can be passed upon with greater safety by those who see and hear than by those who simply read the printed narrative' " … . Stated another way, it is the "fact-finder[ ]" that has the "opportunity to view the witnesses, hear the testimony and observe demeanor" … , and "those who see and hear the witnesses can assess their credibility and

reliability in a manner that is far superior to that of reviewing judges who must rely on the printed record" … .

Contrary to the conclusion of the dissent, the facts of this case do not warrant the substitution of our credibility determinations for those made by the jury … We conclude that the second victim's identification of defendant was not "incredible and unbelievable, that is, impossible of belief because it [was] manifestly untrue, physically impossible, contrary to experience, or self-contradictory" … . The issues of her identification of defendant and her credibility "were properly considered by the jury and there is no basis for disturbing its determinations" … . We note that the second victim "never wavered in her testimony regarding the events or her identification of defendant" … .People v Clark, 2024 NY Slip Op 03586, Fourth Dept 7-3-24

Practice Point: The criteria for a "weight of the evidence" appellate review is clearly illustrated here.

JULY 3, 2024

APPEALS, WEIGHT OF THE EVIDENCE, IDENTIFICATION.

PRIMARILY BECAUSE OF CREDIBILITY ISSUES CONCERNING THE IDENTIFICATION OF THE DEFENDANT, THE SECOND DEPARTMENT REVERSED THE ROBBERY CONVICTION AS AGAINST THE WEIGHT OF THE EVIDENCE; THERE WAS A DISSENT (SECOND DEPT).

The Second Department, over a dissent, determined the defendant's robbery conviction, which was based primarily on the complainant's identification evidence, was against the weight of the evidence:

Here, an acquittal would not have been unreasonable since the defendant did not possess the complainant's wallet, no physical evidence tied him to the scene of the theft or to the Lincoln in which the complainant had been abducted, and the clothing that the defendant was wearing did not match the description of the perpetrator's clothing. Moreover, upon the exercise of our factual review power (see CPL 470.15[5]), we find that the rational inferences that can be drawn from the trial evidence do not support the convictions beyond a reasonable doubt. Initially, while the People speculate that the defendant could have put on the

sweater at some time after he stole the complainant's wallet, by the complainant's version of events, the defendant was either engaged in a struggle with the complainant or under the constant watch of the complainant and his friend from the moment of the theft. Furthermore, the taxicab driver candidly admitted that he lost sight of the Lincoln and never saw it again, which cannot be reconciled with the complainant's testimony that the two vehicles were "bumper to bumper" the entire time the taxicab followed the Lincoln.

The testimony of the complainant and his friend that they saw the defendant exiting the Lincoln cannot be credited.

The testimony of the complainant and his friend suffered other credibility issues. People v Delvalle, 2024 NY Slip Op 03896, Second Dept 7-24-24

Practice Point: Credibility issues can support the reversal of a conviction as against the weight of the evidence.

JULY 24, 2024

APPEALS, SPECIAL PROSECUTORS, ATTORNEYS, JUDGES.

THE PROSECUTOR WHO ARGUED DEFENDANT'S APPEAL WAS A CLERK FOR THE TRIAL JUDGE; PRIOR DECISION AFFIRMING THE CONVICTION VACATED AND CASE REMITTED FOR THE APPOINTMENT OF A SPECIAL PROSECUTOR (THIRD DEPT)

The Third Department, vacating its prior affirmance of defendant's conviction, determined a special prosecutor should be appointed for the appeal because the appeal was handled by a prosecutor who had been the trial judge's law clerk:

… [T]he Chief Assistant District Attorney (hereinafter ADA) who argued the appeal on behalf of the People was the confidential law clerk to the trial judge who presided over this matter and served in this capacity at the time of the underlying trial. … [D]efendant moved to vacate our prior determination and sought the appointment of a special prosecutor, arguing that the ADA had a conflict of interest under Rule 1.12 of the Rules of Professional Conduct (22 NYCRR 1200.0) disqualifying her from representing the People on appeal … . The ADA maintained that she did not have a conflict of interest because she was not "personally and substantially" involved in this matter as the trial judge's law clerk, revealing that

her involvement consisted of drafting County Court's decision and order on defendant's omnibus motion as well as the decision and order on the prosecutor's motion for consolidation of the separate indictments filed against defendant and the codefendant … . We have determined that the ADA's involvement in this matter as the trial judge's law clerk was personal and substantial … . Moreover, defendant did not provide written informed consent waiving the conflict and the required screening procedures were clearly not undertaken "to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the [District Attorney's office]" … . … [T]he decision on appeal is being withheld and the matter remitted to County Court for the expeditious appointment of a special prosecutor … . People v Butts, 2024 NY Slip Op 03567, Third Dept 7-3-24

Practice Point: If the prosecutor handling the appeal was a clerk for the trial judge at the time of defendant's trial, there is a conflict requiring the appointment of a special prosecutor for the appeal. Here the decision affirming the conviction was vacated and the matter was remitted for the appointment of a special prosecutor.

JULY 3, 2024

DISCOVERY, DUE DILIGENCE.

THE PEOPLE DID NOT DEMONSTRATE DUE DILIGENCE IN ASCERTAINING THE EXISTENCE OF A FORENSIC REPORT AND DISCIPLINARY RECORDS; TURNING THEM OVER UPON DISCOVERING THEM AND SUMBITTING A SUPPLEMENTAL CERTIFICATE OF COMPLIANCE (COC) DID NOT CURE THE OMISSION (FOURTH DEPT).

The Fourth Department determined the People did not meet their burden of demonstrating compliance with their discovery obligations before filing the Certificate of Compliance (COC):

… [W]e conclude that the People failed to meet their burden of establishing that they exercised due diligence and made reasonable inquiries prior to filing the July 2022 COC … . The People failed to put forward any evidence of their efforts "to ascertain the existence" of either the forensic report or the disciplinary records prior to filing the July 2022 COC (…CPL 245.50 [1]). Rather, the People's submissions established that, after they became aware of the materials' existence,

they promptly provided them to defense counsel—an assertion that is undisputed. As the Court of Appeals stated in Bay, "post-filing disclosure and a supplemental COC cannot compensate for a failure to exercise diligence before the initial COC is filed" … . We note in particular that the forensic report was completed more than six months before, upon the case being assigned to a new prosecutor, it was discovered and provided … . People v Baker, 2024 NY Slip Op 04006, Fourth Dept 7-26-24

Practice Point: The People must demonstrate due diligence in ascertaining the existence of discovery material. It is not enough to quickly turn them over upon becoming aware of their existence.

JULY 26, 2024

EVIDENCE, SECOND TRIAL, COLLATERAL ESTOPPEL.

DEFENDANT WAS ACQUITTED OF MENACING AT THE FIRST TRIAL BUT THE EVIDENCE SUPPORTING THE MENACING CHARGES WAS ALLOWED IN THE SECOND TRIAL; THE COLLATERAL ESTOPPEL DOCTRINE PRECLUDED PRESENTATION OF THAT EVIDENCE IN THE SECOND TRIAL; NEW TRIAL ORDERED (FOURTH DEPT).

The Fourth Department, reversing defendant's convictions and ordering a new trial, determined defendant's acquittal of menacing in his first trial precluded evidence defendant displayed a firearm during a confrontation in the second trial:

At his second trial, the People were permitted to introduce in their case-in-chief, over defendant's objection, the testimony of an eyewitness that, during a confrontation in a park that occurred prior to the shooting, defendant had pulled out a gun and waved it at the victim, and had cocked the gun and pointed it at the eyewitness. We agree with defendant that, under the circumstances here, the People were collaterally estopped by the earlier verdict from presenting evidence at defendant's second trial concerning the alleged display of a gun during the earlier confrontation at the park … .

The doctrine of collateral estoppel "operates in a criminal prosecution to bar relitigation of issues necessarily resolved in defendant's favor at an earlier trial" … . "[W]here the People have had a full and fair opportunity to contest issues, but

have failed, it would be inequitable and harassive to again permit the prosecution to establish these same matters, as if the first trial had never taken place" … . Only those facts that were "necessarily decided" by a prior acquittal will have collateral estoppel effect in a subsequent prosecution … . Although it may "normally be impossible to ascertain the exact import of a verdict," we are charged with giving "a practical, rational reading to the record of the first trial" to determine "whether a rational jury could have grounded its decision on an issue other than that which the defendant seeks to foreclose from consideration" … .

Here, the two menacing counts alleged that defendant intentionally placed or attempted to place another person in reasonable fear of physical injury, serious physical injury, or death by displaying what appeared to be a firearm, on the basis of his alleged actions at the park shortly before the murder. The eyewitness's testimony at the first trial was the only evidence supporting the menacing counts. People v Moore, 2024 NY Slip Op 03941, Fourth Dept 7-26-24

Practice Point: Evidence supporting charges of which defendant was acquitted in the first trial cannot be presented in the second trial.

JULY 26, 2024

FIFTH AMENDMENT PRIVILEGE, FEAR OF COMMITTING PERJURY IN UPCOMING TRIAL.

A WITNESS IS NOT UNAVAILABLE TO TESTIFY AT A TRIAL BASED UPON THE FEAR OF COMMITTING PERJURY DURING THAT TRIAL; NEW TRIAL ORDERED (FOURTH DEPT).

The Fourth Department, reversing the judgment and ordering a new trial, determined a witness was not be unavailable to testify at the trial based upon her fear she would commit perjury at the trial:

"A witness may not claim the privilege of the [F]ifth [A]mendment out of fear that he [or she] will be prosecuted for perjury for what he [or she] is about to say. The shield against self-incrimination in such a situation is to testify truthfully, not to refuse to testify on the basis that the witness may be prosecuted for a lie not yet told" … . "Fear of a perjury prosecution can typically form a valid basis for

invoking the Fifth Amendment only where the risk of prosecution is for perjury in the witness' past testimony" … .

"[T]he court focuses inquiry on what a truthful answer might disclose, rather than on what information is expected by the questioner" … . Simply put, the Fifth Amendment "does not permit a witness to invoke the privilege on the ground that he [or she] anticipates committing perjury sometime in the future" … . There is "no doctrine of 'anticipatory perjury' " … . * * *

We … conclude that the court erred in declaring the victim unavailable and allowing her testimony from the first trial to be read to the jury at the retrial. Inasmuch as the victim was the only person who identified defendant as the person who shot her, we cannot conclude that the evidence of defendant's guilt is overwhelming, and therefore the error cannot be deemed harmless … . People v Smith, 2024 NY Slip Op 03973, Fourth Dept 7-26-24

Practice Point: The Fifth Amendment does not permit a witness to invoke the self-incrimination privilege on the ground the witness anticipates committing perjury in the future.

JULY 26, 2024

HACKED WEB CAM VIDEO EVIDENCE, ABUSE, FAMILY LAW.

HACKED WEB CAM VIDEO EVIDENCE ALLEGED TO DEPICT ABUSE OF A CHILD IN MOTHER'S HOME WAS DEEMED BY THE MAJORITY TO HAVE BEEN SUFFICIENTLY AUTHENTICATED; STRONG DISSENT (FOURTH DEPT).

The Fourth Department, over a strong and comprehensive dissent, determined the video evidence allegedly showing abuse of her daughter was properly authenticated. The video was obtained in an unrelated investigation of a suspect who hacked into a security web camera which was linked to mother's house:

The testimony at the fact-finding hearing established that the videos depicted the living room of the home in which the mother, the subject children, and the boyfriend lived. The State Police detective testified that the mother identified her daughter and boyfriend in screenshots taken from the videos; that he observed cameras in the house, including in the living room; and that he observed that the

living room and its furnishings matched what was shown in the videos. As the court noted, the same couch, afghan, end table, and lamp were all visible in the videos and photographs. Other particularly specific items the police recovered from the home were also seen in the videos. In addition, the mother, the children, and the boyfriend were all easily identifiable in the videos. The court determined that the "actions, dialogue, and behavior shown in the videos show no indication of any tampering." In other words, there were "distinctive identifying characteristics" in the videos themselves … . There was also the "significant fact" that the mother did not dispute that … . Rather, the mother confirmed through the screenshots from the videos that the individuals shown were her children and boyfriend. In addition, the FBI agent testified that he primarily investigated child pornography and performed digital forensic work and that he saw no signs of alteration or tampering with the videos. Matter of Mekayla S., 2024 NY Slip Op 03584, Third Dept 7-3-24

Practice Point; Here hacked web cam video footage was alleged to have been properly authenticated by the identification of persons depicted in screen shots from the video and the lay out and contents of the room depicted in the video. There was a strong dissent.

Same issue and result in the abuse proceeding against mother's boyfriend, this time with two different dissenting justices, agreeing with and adopting the rationale of the dissenting justice in the proceeding against mother. Matter of Gabriel H., 2024 NY Slip Op 03588, Fourth Dept 7-3-24

JULY 3, 2024

KIDNAPPING, MERGER, INCLUSORY-CONCURRENT-COUNT DOCTRINE.

THE DOCTRINE OF MERGER REQUIRED REVERSAL OF THE KIDNAPPING CONVICTION AND THE INCLUSORY-CONCURRENT-COUNT DOCTRINE REQUIRED REVERSAL OF THE FORCIBLE TOUCHING CONVICTION (FOURTH DEPT).

The Fourth Department, reversing the kidnapping and forcible touching convictions determined the doctrine of merger precluded the kidnapping conviction and the forcible touching count was in inclusory concurrent count re: stalking:

Defendant appeals from a judgment convicting him, upon a jury verdict, of attempted kidnapping in the second degree as a sexually motivated felony … , stalking in the first degree … , and forcible touching … .

Defendant approached the victim while she was walking alone on a street. After a brief verbal encounter, defendant began to follow the victim, grabbing her buttocks and then restraining her before ultimately releasing her and walking away. * * *

The merger doctrine is "a means of effectuating the Legislature's intent [to effectuate a statutory scheme presenting a range of offenses and penalties measured by the gravity of a defendant's conduct] by precluding additional kidnapping sanctions for conduct that, while literally falling within the definition of that crime, was not intended to be separately treated as kidnapping," such as "conduct that, in fairness, should result in a single conviction" … . The "guiding principle" of the merger doctrine inquiry is whether the acts of restraint or abduction were " 'so much the part of another substantive crime that the substantive crime could not have been committed without such acts and that independent criminal responsibility may not fairly be attributed to them' " … . Where the alleged "abduction and underlying crime are discrete, for example, there is no merger," but "where there is minimal asportation immediately preceding [the underlying crime], the abduction should not be considered kidnapping" … . Here, defendant's restraint of the victim was "simultaneous [with] and inseparable from" defendant's stalking and forcible touching of the victim … , such that "independent criminal responsibility may not fairly be attributed" to the attempted kidnapping … .

Finally, we conclude that, as charged … , it was impossible for defendant to commit stalking in the first degree without, by the same conduct, committing forcible touching, thereby rendering forcible touching an inclusory concurrent count of stalking in the first degree … . People v Woods, 2024 NY Slip Op 03606, fourth Dept 7-3-24

Practice Point: Here is an illustration of the merger doctrine applied to reverse a kidnapping conviction and the inclusory-concurrent-count doctrine applied to reverse a forcible touching conviction.

JULY 3, 2024

MISTRIAL, JURY COMMUNICATIONS.

THE JUDGE SHOULD HAVE DECLARED A MISTRIAL AFTER THE JURY'S REPEATED COMMUNICATIONS EXPLAINING THEY COULD NOT REACH A UNANIMOUS VERDICT; NEW TRIAL ORDERED (SECOND DEPT).

The Second Department, reversing defendant's conviction and ordering a new trial, determined the judge should have ordered a mistrial after the jury's repeated communications stating they could not reach a unanimous verdict:

The jury sent its third note regarding deadlock on the fourth day of deliberations, which not only stated that the jurors were "hopelessly deadlocked," but also that "[a] unanimous decision would only be able to be achieved by the abandonment" of the jurors' "firm . . . convictions," and that "any change in their decisions would be untrue and unjust" … . Thus, the jury unequivocally informed the court that any unanimous verdict would be the result of jurors abandoning their genuine beliefs about the defendant's guilt or innocence in order to achieve a unanimous verdict, which demonstrated that it would have served no purpose to provide additional instructions to the jury to continue deliberating … . Moreover, portions of the court's instructions delivered after that note were potentially coercive, including the court's statements that "some of you are locked into your positions and you're fixed in those positions and inflexible and that's contrary to what jurors have to do during jury deliberations," and that "when you were selected as jurors you promised me that you would deliberate and discuss your views with your other jurors, so if you refuse to deliberate or close off your mind then you're violating your promise and your oath to me" … . Notably, the jury returned a unanimous verdict later on the same day the court gave those instructions. Thus, under the circumstances, the court should have discharged the jury and declared a mistrial. People v Calixte, 2024 NY Slip Op 04079, Second Dept 7-31-24

Practice Point: Here the jury sent out three articulate and detailed notes explaining they could not reach a unanimous verdict. The judge should have declared a mistrial.

JULY 31, 2024

POSSESSION OF DRUGS, "ROOM" OR "DRUG FACTORY" PRESUMPTION.

DEFENDANT WAS NOT IN "CLOSE PROXIMITY" TO THE DRUGS WITHIN THE MEANING OF THE "ROOM" OR "DRUG FACTORY" PRESUMPTION; NEW TRIAL ORDERED (FOURTH DEPT).

The Fourth Department, reversing defendant's possession-of-drugs convictions and ordering a new trial, determined the "room" or "drug factory" presumption was not applicable:

… [S]ection 220.25 (2) provides that "[t]he presence of a narcotic drug . . . in open view in a room . . . under circumstances evincing an intent to unlawfully mix, compound, package or otherwise prepare for sale such controlled substance is presumptive evidence of knowing possession thereof by each and every person in close proximity to such controlled substance at the time such controlled substance was found." "Penal statutes 'must be construed according to the fair import of their terms to promote justice and effect the objects of the law' " … . The drug factory presumption is "intended to allow police in the field to identify potentially culpable individuals involved in a drug business, under circumstances that demonstrate those individuals' participation in a drug operation" … . According to its drafters, the presumption is "designed to remedy that situation wherein police execute a search warrant on a premises suspected of being a 'drug factory,' only to find dangerous drugs and/or drug paraphernalia scattered about the room. The occupants of such 'factories,' who moments before were diluting or packaging the drugs, usually proclaim their innocence and disclaim ownership of, or any connection with, the materials spread before them. Police, under such circumstances, are often uncertain as to whom to arrest. In addition, with the present burden of proof of knowing possession of dangerous drugs on the [P]eople, successful prosecution of persons other than the owner or lessee of such premises is extremely rare" … . …

… [T]he phrase "close proximity" in Penal Law § 220.25 (2) means "when the defendant is sufficiently near the drugs so as to evince defendant's participation in an apparent drug sales operation, thus supporting a presumption of defendant's knowing possession" … . "[T]he proximity determination requires careful consideration of the underlying facts related to defendant's location on the premises" … . Thus, a defendant need not be apprehended within the same room as

the drugs in order to satisfy the element of "close proximity" … , and the presumption applies to a defendant caught while trying to flee the premises upon the sudden entry by police … . …

… [D]efendant was not apprehended in close proximity to the drugs as contemplated by the drug factory presumption, i.e., he was not "sufficiently near the drugs so as to evince defendant's participation in an apparent drug sales operation, thus supporting a presumption of defendant's knowing possession" … . Defendant was not apprehended in the room with the drugs, he was not apprehended fleeing from that room, and he was not apprehended within or outside of the home while attempting to hide from police. Thus, he was not apprehended under circumstances suggesting that he had, just "moments before," been engaged in drug distillation or packaging … . People v Campbell, 2024 NY Slip Op 03995, Fourth Dept 7-26-24

Practice Point: Consult this decision for an explanation of the "room" or "drug factory" presumption re: the possession of drugs.

JULY 26, 2024

RECANTATION OF TESTIMONY, ABUSE, FAMILY LAW.

EVIDENCE THE CHILD HAD RECANTED THE CHILD'S TESTIMONY THAT FATHER SEXUALLY ABUSED THE CHILD WAS VAGUE AND WAS NOT SUFFICIENT TO REBUT THE ABUSE FINDING (SECOND DEPT).

The Second Department, reversing Family Court, determined the recantation evidence did rebut the prima facie evidence that father had sexually abused the child:

… [P]etitioner established by a preponderance of the evidence that the father sexually abused the child. The child's testimony during the fact-finding hearing was consistent and detailed, and any minor inconsistencies "did not render such testimony unworthy of belief" … . The child's testimony was sufficient to establish a finding of sexual abuse pursuant to Family Court Act § 1046(b)(i) … .

At the reopened fact-finding hearing, the mother of the father's other children (hereinafter the witness) testified that the child recanted her allegations of abuse. The child did not testify at the reopened fact-finding hearing. "[A] child's

recantation of allegations of abuse does not necessarily require [the] Family Court to accept the later statements as true because it is accepted that such a reaction is common among abused children" … . "Rather, recantation of a party's initial statement simply creates a credibility issue which the trial court must resolve" … . Here, even assuming that the witness's testimony was credible, it was insufficient to warrant dismissal of the petition. The witness testified that she overheard the child telling other children that the child missed the father. After the witness confronted the child, the child told the witness that "she wished that she never lied . . . by saying that [the father] did those things." The witness did not specify what "things" the child was referring to. During cross-examination, the witness testified that immediately after she asked the child "what did she mean by she lied," the child indicated that "she never said that." The witness also testified on cross-examination that she had previously confronted the child about the allegations against the father, and the child told the witness that "she was sure . . . that these things took place." The alleged recantation as described by the witness was vague, and the witness's testimony was insufficient to rebut the finding of abuse … . Matter of Kenyana D. (Kenneth D.), 2024 NY Slip Op 03746, Second Dept 7-10-24

Practice Point: Here the evidence the child had recanted the child's testimony that father had abused the child was too vague to rebut the abuse finding.

JULY 10, 2024

SANDOVAL HEARING, RIGHT TO BE PRESENT, CONSTITUTIONAL LAW.

DEFENDANT WAS ERRONEOUSLY DENIED HIS RIGHT TO BE PRESENT AT THE SANDOVAL HEARING, NEW TRIAL ORDERED (FOURTH DEPT).

The Fourth Department, reversing defendant's convictions and ordering a new trial, determined defendant was erroneously deprived of his right to be present for the Sandoval hearing:

Where a defendant is denied the right to be present during a Sandoval hearing, reversal of defendant's conviction is required (… see … CPL 260.20), unless "defendant's presence at the hearing would have been superfluous" … . Here, it cannot be said that defendant's presence at the hearing would have been superfluous because the court's ruling was a compromise and thus, it was not

"wholly favorable to defendant" … . People v Anderson, 2024 NY Slip Op 04042, Fourth Dept 7-26-24

Practice Point: Defendant was erroneously denied his right to be present at the Sandoval hearing, new trial ordered.

JULY 26, 2024

SEARCH WARRANTS, PARTICULARITY REQUIREMENT, CELL PHONES.

THE WARRANT AUTHORIZING THE SEARCH OF THE CONTENTS OF DEFENDANT'S CELL PHONE DID NOT RESTRICT THE SEARCH TO EVIDENCE OF ANY PARTICULAR CRIME AND DID NOT INCORPORATE THE POLICE INVESTIGATOR'S AFFIDAVIT WHICH PURPORTEDLY LAID OUT THE BASIS FOR FINDING PROBABLE CAUSE; THE WARRANT DID NOT MEET THE "PARTICULARITY REQUIREMENT" (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction by guilty plea, determined the motion to suppress evidence seized from defendant's cell phone should have been granted because the search warrant lacked particularity:

A search warrant must be "specific enough to leave no discretion to the executing officer" … . To meet the particularity requirement, a search warrant must (1) "identify the specific offense for which the police have established probable cause," (2) "describe the place to be searched," and (3) "specify the items to be seized by their relation to designated crimes" … . Here, the search warrant authorized and directed the police to search for … "cellular phones (including contents)" located in defendant's vehicle. Significantly, the search was not restricted by reference to any particular crime. Thus, the search warrant failed to meet the particularity requirement and left discretion over the search to the executing officers …. The search warrant states that an affidavit from a police investigator provided the basis for the finding of probable cause for the search. Although that affidavit contained information about the crime and defendant's exchange of text messages with the victim before the crime, the mere mention in a search warrant of an affidavit or application "does not save the warrant from its facial invalidity" where the search warrant contains no language incorporating that document … . People v Wiggins, 2024 NY Slip Op 03614, Fourth Dept 7-3-24

Practice Point: A search warrant which does not restrict the search to evidence of a particular crime is invalid because it fails to meet the particularity requirement.

Practice Point: Reference in a search warrant to an affidavit which is not incorporated into the warrant doesn't overcome the defect.

JULY 3, 2024

SENTENCING, PLEA ALLOCUTION.

HERE THE PLEA ALLOCUTION DID NOT INDICATE TWO SEPARATE AND DISTINCT ACTS WERE E NCOMPASSED BY COUNTS 2 AND 3; THEREFORE CONSECUTIVE SENTENCES FOR THOSE COUNTS SHOULD NOT HAVE BEEN IMPOSED (FOURTH DEPT).

The Fourth Department, vacating defendant's consecutive sentences, determined there was no evidence the counts to which defendant pled guilty involved two separate and distinct acts:

Sentences imposed for two or more offenses may not run consecutively where, inter alia, "a single act constitutes two offenses" … . Thus, in order for a consecutive sentence to be legally imposed, the People have the burden of demonstrating by "identifiable facts . . . that the defendant's acts underlying the crimes are separate and distinct" … . Where, as here, the defendant is "convicted upon a plea to a lesser offense than that charged in the indictment, the People may rely only on those facts and circumstances admitted during the plea allocution" in order to meet that burden … .

Here, no facts were adduced at defendant's plea allocution that would establish two separate and distinct acts causing injury to the victims named in counts 2 and 3, and thus there was no basis for imposing consecutive sentences for those counts … . People v Wright, 2024 NY Slip Op 03613, Fourth Dept 7-3-24

Practice Point: To impose consecutive sentences based upon a guilty plea, the plea allocution must demonstrate the counts encompass separate and distinct acts.

JULY 3, 2024

SENTENCING, DOMESTIC VIOLENCE SURVIVORS JUSTICE ACT.

TWO DISSENTERS ARGUED DEFENDANT WAS ENTITLED TO RESENTENCING UNDER THE DOMESTIC VIOLENCE SURVIVORS JUSTICE ACT (THIRD DEPT).

The Third Department, over a two-justice dissent, determined County Court properly denied defendant's request to be resentenced under the Domestic Violence Survivors Justice Act (DVSJA). Defendant pled guilty to manslaughter after her murder and assault convictions were vacated on appeal. She had been in an intimate relationship with the man she killed for a little more than a year:

From the dissent:

Pursuant to Penal Law § 60.12, a court may impose an alternative sentence under the DVSJA when a defendant has established by a preponderance of the evidence following a hearing that "(a) at the time of the instant offense, the defendant was a victim of domestic violence subjected to substantial physical, sexual or psychological abuse inflicted by a member of the same family or household as the defendant as such term is defined in [CPL 530.11 (1)]; (b) such abuse was a significant contributing factor to the defendant's criminal behavior; [and] (c) having regard for the nature and circumstances of the crime and the history, character and condition of the defendant, that a sentence of imprisonment pursuant to [Penal Law §§ 70.00, 70.02, 70.06 or 70.71 (2) or (3)] would be unduly harsh" … . At such a hearing, "the court shall consider oral and written arguments, take testimony from witnesses offered by either party, and consider relevant evidence to assist in making its determination" … . "Reliable hearsay shall be admissible at such hearings" … . "The court may consider any fact or circumstances relevant to the imposition of a new sentence which are submitted by the applicant or the district attorney," including "the institutional record of confinement of such person" … . "The court's consideration of the institutional record of confinement of such applicant shall include, but not be limited to, such applicant's participation in or willingness to participate in programming such as domestic violence, parenting and substance abuse treatment while incarcerated and such applicant's disciplinary history" … . * * *

… [D]efendant explained that she and the victim had been in a relationship for a little [*8]over a year at the time of the subject incident. Around seven months into

their relationship, the victim — who was 65 years old while defendant was 28 — became verbally, sexually and physically abusive. Defendant, who was financially dependent on the victim, detailed "almost daily" acts of violence perpetrated against her during their relationship, including threats to her life and instances in which the victim "slam[med] his fist into the side of [her]head," "s[u]nk his nails into [her]," punched her, slapped her and scratched her. Defendant also testified that the victim bragged about having previously killed someone, sexually assaulted her while she was bound with a rope and drugged her with hallucinogens. In other statements contained in the record, defendant recounted the victim telling her: "I own you" and "If you leave, I'll kill you." He also attempted to control her weight and isolated her from friends and family, taking away her vehicle and phone and leaving her alone for "days on end" at the camp where they resided. She further explained that October 2013 — the month before the incident — was the worst month she had ever experienced in her entire relationship. As for defendant's assertion that the victim isolated her, defendant's mother confirmed that, for almost a year before the subject incident, there had been "no communication between [defendant] and her."

Defendant also presented independent corroborative evidence in this regard … . * * *

A resentencing under CPL 440.47 is warranted. People v Angela VV., 2024 NY Slip Op 03851, Third Dept 7-18-24

Practice Point: CPL 60.12 allows a reduced sentence for defendants who suffered domestic violence at the hands of the victim, criteria explained.

JULY 18, 2024

Table of Contents

SEX OFFENDER REGISTRATION ACT (SORA), CONSTITUTIONAL LAW.

BECAUSE DEFENDANT'S 20-YEAR-OLD OUT-OF-STATE CONVICTION DID NOT INVOLVE A SEXUALLY VIOLENT OFFENSE, THE CORRECTION LAW WHICH REQUIRES THAT HE BE DESIGNATED A SEXUALLY VIOLENT OFFENDER IS UNCONSTITUTIONAL AS APPLIED TO HIM (FOURTH DEPT).

The Fourth Department, reversing County Court, determined defendant should not have been designated a sexually violent offender based upon a 20-year-old out-of-state conviction of an offense which would not qualify as a sexually violent offense in New York:

There is no dispute that the crime of which defendant was convicted, sexual assault in violation of 18 Pa Cons Stat § 3124.1, does not include all of the essential elements of a sexually violent offense in New York enumerated in Correction Law § 168-a (3) (a), and therefore is not a sexually violent offense under the first disjunctive clause of Correction Law § 168-a (3) (b). Instead, after defendant moved to New York approximately 20 years after the sexual assault conviction was entered and the Board of Examiners of Sex Offenders determined that he was required to register as a sex offender in New York …, the People contended that County Court should designate him a sexually violent offender under the second disjunctive clause of Correction Law § 168-a (3) (b). That clause defines a sexually violent offense as including a "conviction of a felony in any other jurisdiction for which the offender is required to register as a sex offender in the jurisdiction in which the conviction occurred." The court designated defendant a sexually violent offender under the foreign registration clause.

… [W]e agree with defendant that the foreign registration clause of Correction Law § 168-a (3) (b) is unconstitutional, as applied to him, under the Due Process Clause of the Fourteenth Amendment to the Federal Constitution. People v Zellefrow, 2024 NY Slip Op 03605, Fourth Dept 7-3-24

Practice Point: The Correction Law which requires a person convicted of a registrable offense in another state to be designated a sexually violent offender upon moving to New York is unconstitutional as applied to the defendant here, whose out-of-state conviction did not involve a sexually violent offense under New York law.

Table of Contents

JULY 3, 2024

SEX OFFENDER REGISTRATION ACT (SORA), CONSTITUTIONAL LAW.

THE STATUTE REQUIRING DEFENDANT TO REGISTER AS A SEXUALLY VIOLENT OFFENDER BASED ON AN OUT-OF-STATE CONVICTION FOR A NONVIOLENT OFFENSE IS UNCONSTITUTIONAL AS APPLIED TO DEFENDANT (FOURTH DEPT).

The Fourth Department, reversing County Court, determined the statute which required designating defendant a sexually violent offender based upon an out-of-state conviction for a nonviolent offense was unconstitutional as applied to her:

In this proceeding under the Sex Offender Registration Act (Correction Law § 168 et seq.), defendant appeals from an order insofar as it designated her a sexually violent offender. Defendant was previously convicted in North Carolina upon her guilty plea of sexual activity by a substitute parent under the theory of aiding and abetting, a felony offense (former NC Gen Stat § 14-27.7 [a]). The conviction required her to register as a sex offender in that state. After defendant moved to New York, the Board of Examiners of Sex Offenders (Board) determined that she was required to register as a sex offender in New York pursuant to Correction Law … .

… [T]he foreign registration clause of Correction Law § 168-a (3) (b) does not withstand constitutional scrutiny as applied to her. Initially, we agree with the People that, although a sexually violent offender designation affects a "liberty interest . . . [that] is substantial" … because it "imposes a stigma that broadly impacts a defendant's life and ability to participate in society" … , "[t]he right not to have a misleading label attached to one's serious crime is not fundamental in [the constitutional] sense" … . As a result, defendant's "constitutional claims [are] subject to [*2]deferential rational basis review" … . That standard of review "is not a demanding" test, but rather "is the most relaxed and tolerant form of judicial scrutiny" … .

Here, defendant established that the People never disputed the nonviolent nature of the sex offense of which defendant was convicted in North Carolina and neither the Board nor the People requested that points be assessed under risk factor 1 for use of violence. Moreover, in support of their position that defendant be designated as

a sexually violent offender, the People never argued that the sex offense was the statutory equivalent of a sexually violent offense in New York (see Correction Law § 168-a [3] [b]). In short, the sole reason put forward by the People for seeking the "sexually violent" designation was the operation of the challenged statute. People v Cromwell, 2024 NY Slip Op 03934, Fourth Dept 7-26-24

Practice Point: The Correction Law provision requiring a defendant to register as a sexually violent offender for an out-of-state conviction for a nonviolent offense is unconstitutional as applied.

JULY 26, 2024

SPECIAL PROSECUTORS, QUALIFICATIONS.

THE SPECIAL PROSECUTOR APPOINTED TO HANDLE DEFENDANT'S CASE DID NOT MEET THE QUALIFICATIONS IN THE COUNTY LAW; CONVICTIONS REVERSED AND INDICTMENT DISMISSED (FOURTH DEPT).

The Fourth Department reversed the convictions and dismissed the indictment because the special prosecutor appointed to handle the case did not meet the statutory qualifications:

"County Law § 701 (1) allows a court to appoint a special district attorney in situations where the district attorney is 'disqualified from acting in a particular case to discharge his or her duties at a term of any court' " … . The Court of Appeals, "[a]cknowledging that a court's authority under County Law § 701 'to displace a duly elected [d]istrict [a]ttorney' raises separation of power concerns, [has] cautioned that '[t]his exceptional superseder authority should not be expansively interpreted' " … . As relevant here, section 701 (1) (a) explicitly limits the superseding authority of a court to "appoint[ing] some attorney at law having an office in or residing in the county, or any adjoining county, to act as special district attorney." Where, as here, a court exceeds its authority by appointing a special district attorney who does not meet those statutory requirements, "[t]he indictment must be dismissed to preserve the integrity of a statute designed narrowly by its terms and by its purpose to fill emergency gaps in an elected prosecutorial official's responsibility" … . People v Callara, 2024 NY Slip Op 03969, Fourth Dept 7-26-24

Practice Point: If the special prosecutor appointed to handle defendant's case does not meet the qualifications in the County Law, the convictions will be reversed and the indictment dismissed.

JULY 26, 2024

TRAFFIC STOPS, COMMUNITY CARETAKING FUNCTION.

THE TRAFFIC STOP WAS A PROPER EXERCISE OF THE POLICE "COMMUNITY CARETAKING FUNCTION;" BUT THERE WAS NO SHOWING THE SUBSEQUENT QUESTIONING WHICH LED TO DEFENDANT'S DWI ARREST WAS "COMMENSURATE WITH ANY PERCEIVED NEED FOR ASSISTANCE;" INDICTMENT DISMISSED (SECOND DEPT).

The Second Department, reversing County Court and dismissing the indictment, determined the statements made to police after a traffic stop, including his refusal to submit to a breath test, should have been suppressed. Defendant was behind the police car when he flashed his lights several times. The police pulled over but defendant just drove past them. The police then followed the defendant, pulled him over and asked why he flashed his lights and whether he was ok. Defendant's response was not in the record. After it was clear defendant gave the police a phony birth date, he was asked to step out of the car. At that point the police suspected he was intoxicated:

… [T]he Constitution "is not a barrier to a police officer seeking to help someone in immediate danger" … . Deemed the "community caretaking function[ ]" by the United States Supreme Court … , this concept recognizes that police do not just fight crime, but "perform varied public service roles, including protecting citizens from harm" … . The police's community caretaking function is "'totally divorced from the detection, investigation, or acquisition of evidence' of criminal conduct" … .

The Court of Appeals has determined that the police may stop an automobile in an exercise of their community caretaking function if two criteria are met. "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" … .

… [T]he People failed to establish … that the police intrusion in this matter was narrowly tailored to address the perceived need for assistance. Upon permissibly stopping the defendant's vehicle, [Officer} Pavinski appropriately asked the defendant why he had flashed his lights and whether everything was okay. However, there is no evidence as to the defendant's response to this inquiry. Without such evidence, and in light of [Officer} Spilotros's testimony that the defendant did not appear to be in distress, the People have not demonstrated that the continued questioning of the defendant was an intrusion "commensurate with [any] perceived need for assistance" … . … [T]here is nothing in the record indicating that the officers had suspicions that the defendant was intoxicated until after they determined that he had lied about his birth date and asked him to exit the vehicle. People v Serrano, 2024 NY Slip Op 03833, Second Dept 7-17-24

Practice Point: The police can stop a vehicle if they believe the driver may be in distress (community caretaking function). But the subsequent questioning of the driver must address the perceived need for assistance and should stop once it is determined no assistance is required.

JULY 17, 2024