NEW YORK APPELLATE DIGEST, INC.

Criminal Law
Reversal Report
September 2024

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THE APPELLATE COURTS HAVE THE "INTEREST OF JUSTICE" POWER TO REDUCE AN OTHERWISE LEGAL AND APPROPRIATE SENTENCE WHEN THE DEFENDANT IS SERIOUSLY MENTALLY ILL; HERE THE MAJORITY CHOSE NOT TO REDUCE THE SENTENCE; A STRONG TWO-JUSTICE DISSENT ARGUED FOR A REDUCTION (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Shulman, over an extensive two-justice dissent, affirmed defendant's conviction by guilty plea to attempted murder and declined to reduce the eight-year sentence in the interest of justice. Defendant is seriously mentally ill and has endured almost indescribable hardships throughout his life, which are detailed in the dissent. The underlying question here is, given the prison system's inability to properly care for the seriously mentally ill, should the appellate court exercise its power to reduce this defendant's sentence in the interest of justice. The majority answered "no" and the dissent argued "yes." The opinion is far too detailed to fairly summarize here:

From the dissent:

… [R]esearch … demonstrates that people with serious psychiatric needs are more likely to be violently victimized and housed in segregation while in prison. That research also shows that the vast majority of people with mental illness in jails and prisons do not receive care, and for those that do, the care is generally inadequate.… This is of particular concern given [defendant's] history of suicide attempts … .

This case raises an important question: What is the utility of extended incarceration under the present circumstances? Specifically, where, among other things, the offense occurred during a time when [defendant] had been unmedicated for five days and, moreover, the record suggests—as evidenced by [defendant's] comments to the police when arrested and a subsequent mental examination—that his severe mental illness contributed to what is his first and only criminal conviction. People v Paulino, 2024 NY Slip Op 04625, First Dept 9-26-24

Practice Point: The appellate courts have the "interest of justice" power to reduce an otherwise appropriate sentence based upon a defendant's mental illness.

September 26, 2024

CONSTITUTIONAL LAW, SUPERIOR COURT INFORMATION (SCI).

A DEFENDANT WHO HAS WAIVED INDICTMENT CANNOT PLEAD GUILTY TO A SUPERIOR COURT INFORMATION (SCI) WHICH INCLUDES AN OFFENSE GREATER THAN ANY CHARGED IN THE CORRESPONDING FELONY COMPLAINT (FIRST DEPT).

The First Department, reversing defendant's conviction by guilty plea to a superior court information (SCI), over a dissent, determined an SCI cannot include an offense greater than any offense charged in the felony complaint. Here the SCI "charged [defendant] with a higher level offense than any contained in the felony complaint, that is, robbery in the third degree is a class D felony, whereas grand larceny in the fourth degree, the highest offense charged in the felony complaint is an class E felony:"

Neither the Court of Appeals nor this Court has directly addressed the issue now before us: whether an SCI that charges an offense for which a defendant was held for action of a grand jury can also, under CPL 195.20 and consistent with New York Constitution article I, § 6, charge a joinable offense of a higher grade or degree than any contained in the felony complaint. * * *

… [T]he New York Constitution article I, § 6 permits prosecution pursuant to an SCI only for "an offense" for which a defendant has been "held for the action of a grand jury". Such an "offense" includes "the lesser included offenses as well as a greater offense charged in the felony complaint" … , but does not include a greater offense, not charged in the felony complaint, which has additional aggravating elements … . Permitting inclusion in an SCI of an offense of a higher grade than any charged in the felony complaint "would permit circumvention of" the "constitutional imperative" of prosecution by indictment … . People v Perkins, 2024 NY Slip Op 04361, First Dept 9-5-24

Practice Point: Here, a defendant, who waived indictment, pled to a superior court information (SCI) which included an offense greater than any in the corresponding

felony complaint. The inclusion in the SCI of an offense greater than any for which the defendant was held for indictment violates the NYS Constitution.

September 5, 2024

DEPRAVED INDIFFERENCE, SUFFICIENCY OF GRAND JURY EVIDENCE.

THE GRAND JURY EVIDENCE SUPPORTED THE INDICTMENT COUNTS CHARGING DEFENDANT STATE TROOPER WITH "DEPRAVED INDIFFERENCE" CRIMES STEMMING FROM HIGH-SPEED CHASES OF PURPORTED SPEEDERS WHICH RESULTED IN CRASHES AND THE DEATH OF A CHILD; THERE WAS A COMPREHENSIVE DISSENT WHICH ARGUED THE CRITERIA FOR "DEPRAVED INDIFFERENCE" WERE NOT MET (THIRD DEPT).

The Third Department, over a dissent, reversed County Court and reinstated the depraved indifference murder and first-degree reckless endangerment (which also requires "depraved indifference") counts. County Court, after reviewing the grand jury evidence, had dismissed the depraved indifference murder count and reduced the first-degree reckless endangerment counts to second degree reckless endangerment. The charges against defendant, a State trooper, stemmed from two separate high-speed chases, about a year apart, which resulted in crashes and the death of an 11-year-old passenger. The chases began because the drivers were allegedly speeding on a highway. In one instance the driver stopped, but fled when defendant allegedly pepper-sprayed everyone in the car, including the 11-year-old. Both the majority and the dissent focused on detailed versions of the events which cannot be fairly summarized here. As an example:

The grand jury heard from witnesses that, around 11:40 p.m., defendant was "see[ing] if he could get one last ticket" before meeting his partner when he stopped an SUV for speeding. The SUV pulled over, and, as told by Tristin Goods, who was driving the SUV, along with Goods' wife, who was seated in the front passenger seat, defendant began the traffic stop by angrily and profanely accusing Goods of traveling over 100 miles per hour. An argument between defendant and Goods ensued in front of Goods' wife and two children, who tried to calm him. Witnesses testified that, after defendant stepped away upon Goods' request to

summon a supervisor, defendant returned and, without warning or provocation, pepper-sprayed the passenger cabin of the SUV, and Goods' wife and two children began screaming in pain. Goods, who had shielded his eyes from the spray, fled the traffic stop; in the commotion, defendant's pepper spray canister ended up inside the passenger cabin of the SUV.

Defendant radioed that the SUV was "taking off" with his pepper spray. According to the grand jury record, defendant pursued and caught up to the SUV and, without activating his siren, intentionally rammed the back of the SUV at 130 miles per hour. Defendant radioed dispatch, however, that the SUV had "just f***ing rammed me." The collision caused the SUV to fishtail, and pieces of it fell onto the road. The SUV continued on, so defendant intentionally rammed the back of the SUV again, this time at 100 miles per hour. Defendant radioed dispatch that the SUV "rammed me again."

The second collision caused Goods to lose control of the SUV, and the SUV flipped over, coming to a stop upside down in the grass next to the Thruway with Goods, his wife and two children inside. Defendant, seeing this, radioed that a car was overturned.[FN1] Testimony established that defendant drew his gun, instructed the occupants of the SUV to put their hands out of the windows and asked repeatedly whether they possessed weapons or drugs. Defendant did not inquire if anyone inside was injured in the crash and, when Goods' 11-year-old child could not be located, defendant did not assist him in looking for her. According to Goods, who had sustained arm, hand and head injuries, defendant "did not care." The child was later found pinned inside the wreck of the SUV, having already died from severe injuries sustained in the accident. People v Baldner, 2024 NY Slip Op 04495, Third Dept 9-19-24

Practice Point: This is a detailed, fact-specific decision, with an extensive fact-specific dissent, which should be consulted re: the legal sufficiency of evidence of a "depraved indifference" state of mind (at the grand jury stage).

September 19, 2024

DOMESTIC VIOLENCE SURVIVORS JUSTICE ACT (DVSJA) HEARING CAN BE WAIVED IN A PLEA AGREEMENT.

A DEFENDANT, AS PART OF A NEGOTIATED PLEA AGREEMENT, MAY WAIVE A HEARING SEEKING A REDUCED SENTENCE PURSUANT TO THE DOMESTIC VIOLENCE SURVIVORS JUSTICE ACT (DVSJA) (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Dowling, affirming defendant's sentence after a guilty plea, determined that a hearing pursuant to the Domestic Violence Survivors Justice Act (DVSJA) seeking a reduced sentence can be waived. Therefore defendant's negotiated plea agreement, which required her waiver of a DVSLA hearing, was valid:

… Penal Law § 60.12 contains no language requiring a sentencing court to hold a DVSJA hearing in every case containing allegations that the defendant is a victim of domestic violence, regardless of whether a hearing was requested, prior to announcing sentence. A defendant wishing to avail himself or herself of the possibility of a reduced sentence must instead request a DVSJA hearing to determine his or her eligibility before the sentencing court … . Where a DVSJA hearing is held, Penal Law § 60.12 provides that the court "may" apply the alternative sentencing scheme if the stated factors are established by the defendant. This permissive language reflects the Legislature's intent that sentencing under Penal Law § 60.12 be an option exercised in the sentencing court's discretion … . People v Hudson, 2024 NY Slip Op 04571, Second Dept 9-25-24

Practice Point: As part of a negotiated plea agreement, a defendant may waive a DVSJA reduced-sentence-eligibility hearing.

September 25, 2024

RESTITUTION.

DEFENDANT PLED GUILTY TO THE SEXUAL ABUSE OF HIS GIRLFRIEND'S DAUGHTER; THE GIRLFRIEND ALLEGED SHE WAS UNABLE TO WORK BECAUSE OF THE RESULTING STRESS AND SUGHT RESTITUTION FOR UNPAID RENT AND HOUSEHOLD EXPENSES; THE CLAIM FOR LOST WAGES WAS NOT DIRECTLY CAUSED BY DEFENDANT'S OFFENSES (FOURTH DEPT).

The Fourth Department modified the judgment by eliminating the restitution aspect of the sentence. The ordered restitution was not directly caused by defendant's offenses. Defendant pled guilty to sexual abuse of his girlfriend's daughter:

The girlfriend requested restitution for the unpaid balance of rent for the house she had shared with defendant and for a bill for garbage and recycling collection that was not yet due. The People argued that the girlfriend was entitled to restitution for those expenses because, according to the girlfriend's statements, defendant's offenses caused the victim emotional and psychological harm and caused the girlfriend stress that resulted in serious health issues and several hospitalizations, all of which rendered her unable to work, thereby ultimately resulting in financial hardship and her inability to pay the claimed household expenses. The court, over defense counsel's objection that the claimed expenses were not directly caused by defendant's offenses, imposed the requested restitution. That was error.

"Penal Law § 60.27 (1) addresses the related concepts of restitution and reparation, allowing a court to order a defendant to 'make restitution of the fruits of [their] offense or reparation for the actual out-of-pocket loss caused thereby' " … . Restitution and reparation may be required for expenses that "were not voluntarily incurred, but stem from legal obligations that are directly and causally related to the crime" … . Conversely, the statute "does not impose a duty on the defendant to pay for the costs associated [ ]with . . . expenses [that] are not directly caused by the defendant's crime" … .

Here, we conclude that the claimed expenses do not constitute "actual out-of-pocket loss caused" by defendant's offenses (Penal Law § 60.27 [1]) inasmuch as the girlfriend's unpaid rent and utility bill are costs "not directly caused by . . . defendant's crime[s]" … . Contrary to the People's assertion, the girlfriend's

request did not constitute a claim for lost wages directly caused by defendant's offenses … . People v Figueroa, 2024 NY Slip Op 04691, Fourth Dept 9-27-24

Practice Point: Restitution applies only to expenses or losses "directly caused by defendant's offenses." Here defendant pled guilty to sexual abuse of his girlfriend's daughter. The girlfriend alleged she could not work because of the resulting stress and was unable to pay her rent. That loss was not "directly caused by defendant's offenses" and, therefore, restitution was not available for the girlfriend's lost wages.

September 27, 2024

RIGHT TO A JURY OF TWELVE FORFEITED, CONSTITUTIONAL LAW.

THE MAJORITY HELD DEFENDANT, BY APPROACHING A JUROR AT THE JUROR'S HOME DURING DELIBERATIONS, FORFEITED HIS RIGHT TO A TRIAL BY A JURY OF 12; OVER A DEFENSE MOTION FOR A MISTRIAL, DEFENDANT WAS CONVICTED BY A JURY OF 11 AND THE MAJORITY AFFIRMED; THERE WAS A STRONG DISSENT (SECOND DEPT).

The Second Department, in a comprehensive decision discussing a defendant's constitutional right to a trial by a jury of 12, over a dissent, determined defendant had forfeited his right to a 12-member jury by approaching a juror at the juror's home as deliberations were proceeding. Over a defense motion for a mistrial, the trial judge ordered the jury to continue deliberations with 11 jurors. Defendant was convicted:

From the dissent:

… I respectfully disagree with the conclusion of my colleagues in the majority that the defendant's New York State constitutional rights were not violated upon permitting the jury to proceed with deliberation and conviction of the defendant by an 11-member jury.

… [T]he New York State Constitution specifically guarantees defendants a right to a jury of 12 (see NY Const, art I, § 2; art VI, § 18; …). New York Constitution, article I, § 2 describes the right to a trial by jury as "inviolate forever" and requires the waiver of a jury trial to be achieved by "written instrument signed by the defendant in person in open court before and with the approval of a judge or justice

of a court having jurisdiction to try the offense." … [T]he Court of Appeals has determined that a defendant may, upon a written waiver executed in the manner specified by the State Constitution, consent to a jury of 11 if a deliberating juror becomes incapacitated and no alternate juror is available … * * *

Here, there is no dispute that the defendant's conduct was egregious and unacceptable. He feigned an illness so that he could approach a juror, at the juror's home, clearly in an attempt to influence his trial. While the defendant should not be permitted to "tak[e] advantage of his . . . own wrongdoing" … , I believe it was error for the Supreme Court to utilize the "extreme, last-resort analysis" of denying the defendant his inviolate right to a jury of 12 before considering alternate sanctions for this egregious behavior … . People v Sargeant, 2024 NY Slip Op 04580, Second Dept 9-25-24

Practice Point: Here the defendant was deemed to have forfeited his right to a trial by a jury of 12 by approaching a juror at the juror's home during deliberations. Defendant's conviction by a jury of 11 was affirmed over a strong dissent.

September 25, 2024

SENTENCING, JUDGES.

THE SENTENCING JUDGE MUST "PRONOUNCE SENTENCE ON EACH COUNT;" MATTER REMITTED FOR RESENTENCING (FOURTH DEPT).

The Fourth Department affirmed defendant's conviction but noted that the judge should have "pronounced sentence on each count" and remitted the matter for resentencing:

… [T]he court erred in failing to "pronounce sentence on each count" of the conviction (CPL 380.20 …). Although the uniform sentence and commitment form states that defendant was sentenced on each count to concurrent terms of incarceration of five years with three years of postrelease supervision, the court in fact did not "impose a sentence for each count of which defendant was convicted" … . We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court for resentencing. People v Gause, 2024 NY Slip Op 04686, Fourth Dept 9-27-24

Practice Point: Sentence must be "pronounced on each count."

September 27, 2024

SEX OFFENDER REGISTRATION ACT (SORA) JUDGES.

COUNTY COURT, SUA SPONTE, IN GRANTING THE PEOPLE'S REQUEST FOR AN UPWARD DEPARTURE, RELIED ON FACTORS ABOUT WHICH THE DEFENDANT WAS NOT NOTIFIED BEFORE THE SORA HEARING; MATTER REMITTED FOR A NEW HEARING AFTER PROPER NOTICE (THIRD DEPT).

The Third Department, reversing County Court, determined the SORA court should not have, sua sponte, relied on factors for which defendant was not provided notice in granting the People's request for an upward department. The matter was remitted:

County Court sua sponte relied upon certain additional factors for which defendant was not provided any notice — namely, that the points assessed under factor 4 did not adequately account for defendant's prolonged course of conduct that continued over 21 months; that defendant was not scored any points under factor 7, which did not take into account defendant's relationship with the mother of the victim that was arguably established or promoted for the primary purpose of victimizing the mother's child; and that defendant's psychiatric conditions and history increase his risk of reoffending.

With regard to these three additional areas of concern noted by County Court, "defendant was entitled to a sufficient opportunity to consider and muster evidence in opposition to the request for an upward departure" on the specific bases upon which County Court would rely in considering that relief … . "As defendant did not have notice or a fair opportunity to present arguments and evidence pertaining to those factors in the context of whether upward departure from the presumptive classification was warranted, the matter must be remanded for a new hearing, upon proper notice to defendant of the justifications relied upon by the People [and/or court] specific to their request for such relief" … . People v Furgeson, 2024 NY Slip Op 04644, Third Dept 9-26-24

Practice Point: A defendant is entitled to prior notice of the factors which will be considered by the court during a SORA risk-level assessment proceeding.

September 25, 2024

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

THE PORTION OF THE CORRECTION LAW WHICH REQUIRED DEFENDANT BE DESIGNATED A "SEXUALLY VIOLENT OFFENDER," BASED UPON AN OHIO TELEPHONE-SOLICITATION OFFENSE WHICH DID NOT INVOLVE VIOLENCE, IS UNCONSTITUTIONAL AS APPLIED TO DEFENDANT (FOURTH DEPT).

The Fourth Department, reversing County Court, over a dissent, determined the portion of "Correction Law § 168-a (3) (b), which defines a 'sexually violent offense' as 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'" is unconstitutional as applied to defendant. Defendant pled guilty to an Ohio offense which prohibits "soliciting" a person 13 to 15 years old by telephone. Violence is not an element of the Ohio offense:

… [W]e conclude that defendant established that he is an "individual[ ] . . . for whom the [sexually violent] offender designation 'is unmerited' " … because the out-of-state conviction was "not sexual[ly violent] in nature and his conduct provides no basis to predict risk of future sexual[ly violent] harm" … . * * *

… [W]e conclude that, as applied to him, the designation of defendant as a sexually violent offender pursuant to the second disjunctive clause of Correction Law § 168-a (3) (b) "unconstitutionally impacts defendant's liberty interest in a criminal designation that rationally fits his conduct and public safety risk" … . People v Brightman, 2024 NY Slip Op 04654, Fourth Dept 9-27-24

Practice Point: Here the Correction Law required that defendant be designated a "sexually violent offender" based on an Ohio conviction for telephone solicitation of a person between 13 and 15 which did not involve violence. That portion of the Correction Law was deemed unconstitutional as applied to the defendant.

September 27, 2024

SEX OFFENDER REGISTRATION ACT (SORA), JUDGES.

DEFENDANT WAS ENTITLED TO NOTICE COUNTY COURT INTENDED TO RELY ON FAMILY COURT RECORDS WHEN CONSIDERING DEFENDANT'S APPLICATION FOR RECLASSIFICATION AS A LEVEL-ONE SEX OFFENDER; THE THIRD DEPARTMENT NOTED THAT THE PROPER INQUIRY IS WHETHER RECLASSIFICATION IS WARRANTED BY A CHANGE IN CONDITIONS, NOT WHETHER THERE IS SUPPORT FOR THE INITIAL LEVEL-TWO CLASSIFICATION (THIRD DEPT).

The Third Department, reversing County Court, determined defendant was entitled to be notified of County Court's intention to rely on Family Court records in considering defendant's application to be reclassified as a level one sex offender. The matter was remitted for a new hearing:

Upon his release from incarceration in 2003, defendant was classified as a risk level two sex offender and designated a sexually violent offender. In 2020, defendant applied, for the fifth time, for a modification of his risk level classification pursuant to Correction Law § 168-o (2), seeking to be reclassified as a risk level one sex offender as his conditions have changed subsequent to the initial risk level classification given, among other things, that he has remained arrest free, successfully completed sex offender treatment while incarcerated and gained custody of his daughter, which helped him understand the impact of his underlying criminal actions. * * *

In discrediting defendant's sworn statements in support of his application and in finding his statements to be misleading, County Court relied heavily upon various Family Court proceedings, including neglect proceedings as far back as 2012, and a family offense petition containing allegations against defendant [*2]that were subsequently withdrawn. The court detailed the allegations in the petitions, finding that the allegations contradicted defendant's sworn statements in his application and that, by excluding such information from his sworn affidavit, defendant attempted to mislead the court. Defendant was not given an opportunity to respond to or defend himself against consideration of such information. * * *

… Contrary to County Court's finding here, the proper level of review is not whether there is clear and convincing evidence to support defendant's initial risk level classification, but rather, whether defendant has met his burden of

establishing by clear and convincing evidence that a modification of his risk assessment level is warranted based upon a change in conditions. People v Johns, 2024 NY Slip Op 04640, Third Dept 9-26-24

Practice Point: In a SORA risk-level assessment proceeding, a defendant is entitled to timely notice of the court's intention to rely on additional information of which defendant had not been made aware, here Family Court records.

Practice Point: When a defendant applies for reclassification of his sex offender risk level status (here from level two to level one), the court's inquiry should be confined to whether a change in conditions warrants reclassification, not whether the original classification was justified.

September 26, 2024

STREET STOPS, PROBABLE CAUSE TO ARREST, EVIDENCE.

THE OBSERVATIONS BY THE POLICE OF THE INTERACTIONS BETWEEN DEFENDANT AND A WOMAN WHO WAS A "KNOWN DRUG USER" PROVIDED PROBABLE CAUSE TO ARREST FOR A DRUG SALE; STRONG, EXTENSIVE DISSENT (FIRST DEPT).

The First Department, affirming the denial of defendant's suppression motion, over an extensive dissent, determined the police had probable cause to arrest defendant for a drug sale based upon their observations of the interaction between defendant and a woman, "a known drug user," outside a motel:

In determining whether probable cause exists in a drug sale case, courts must consider factors such as: "telltale signs" of a drug transaction (for example, an exchange of a glassine envelope for money); whether the area has a high incidence of drug trafficking; the police officer's "experience and training" in drug sale investigations; and "additional evidence of furtive or evasive behavior on the part of the participants" … . Another factor to consider is an officer's knowledge of a participant's past involvement in drug crimes … . Here, in a locale known for drug sales, an experienced officer witnessed a woman who was a known drug user give defendant something, saw defendant put his hands into his pants, and saw defendant touch hands with the woman. Based upon this testimony, the hearing court properly found that the officers had probable cause to arrest defendant. This peculiar interaction between defendant and the woman, under the circumstances, is

not susceptible to innocent interpretation. People v Tapia, 2024 NY Slip Op 04487, First Dept 9-19-24

Practice Point: Here the police observed only body movements and did not see any identifiable objects exchanged between defendant and a woman who was "a known drug user." The police saw the defendant and the woman "touch hands" and defendant had reached inside his pants before "touching hands" with the woman. The majority concluded the police had probable cause to arrest for a drug sale. There was a strong, extensive dissent.

September 19, 2024

TRAFFIC STOPS, FRISK AND SEIZURE, EVIDENCE, APPEALS.

DEFENDANT'S BEHAVIOR BEFORE AND DURING THE TRAFFIC STOP DID NOT CREATE "REASONABLE SUSPICION" THE DEFENDANT WAS ARMED; THE FRISK AND SEIZURE OF SMALL PACKETS OF PCP FROM DEFENDANT'S SOCK WAS NOT JUSTIFIED; THE MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Rodriguez, over a concurrence, reversing Supreme Court, determined the police, during a traffic stop, did not have "reasonable suspicion the suspect was armed" at the time defendant was frisked and small packets of PCP were seized from his sock, requiring suppression of the drugs. The concurrence argued that the evidence the officers smelled PCP provided "reasonable suspicion" sufficient to warrant a search, but, because Supreme Court did not credit that testimony, the appellate court could not consider it (the lower court's ruling on that issue was not adverse to the defendant). The facts surrounding the traffic stop and frisk are too detailed to fully summarize here:

The issue presented is … "whether the circumstances in this case support a reasonable suspicion that defendant was armed and dangerous" … , thereby justifying the level three frisk. More precisely, the issue is whether Mr. Torres's failure to produce his license and registration; his presentation as "nervous" and "fidgety"; the dark lighting under the Manhattan Bridge; the smell of PCP; and Officer McDevit's observation that the van was shaking as he approached supports, in the totality, "a reasonable view that [defendant] was armed" … .

Ultimately, the circumstances here supported, at most, a level two intrusion to gain explanatory information but not an escalation to level three. Critically, Officer Galarza testified that when he asked Mr. Torres for his license and registration, Mr. Torres was "not able to produce [them]." It was "[a]t this point" that Officer Galarza had Mr. Torres "step out of the vehicle [] for [Officer Galarza's] safety after [Officer Galarza] felt like [Mr. Torres] wasn't compliant enough" with the request. * * *

… [A]lthough Mr. Torres's failure to respond to Officer Galarza's request for his license and registration "clearly served to heightened the suspicions of the officer" … and "represented a basis for further inquiry," "it did not provide a predicate for reasonable suspicion to believe that [defendant] . . . [was] armed, thereby justifying a frisk" … . People v Torres, 2024 NY Slip Op 04442, First Dept 9-12-24

Practice Point: Here the defendant's behavior before and during the traffic stop did not raise "reasonable suspicion" that he was armed. Therefore the frisk and seizure of drugs from his sock was not justified.

Practice Point: The concurrence argued the evidence that the officers smelled drugs (PCP) warranted a search. However, because the suppression court did not credit that evidence, the appellate court could not consider it.

September 12, 2024