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An Organized Compilation of Summaries of Selected Decisions Addressing Criminal Law, Mostly Reversals, Released by Our New York State Appellate Courts and Posted on the New York Appellate Digest Website in October 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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ACCOMPLICE LIABILITY, POSSESSION OF A WEAPON, APPEALS.

ALTHOUGH THERE WAS PROOF DEFENDANT WAS AWARE THE CO-DEFENDANT POSSESSED A WEAPON, THERE WAS NO PROOF DEFENDANT ACTED AS AN ACCOMPLICE IN THE CO-DEFENDANT'S POSSESSION OF A WEAPON; DEFENDANT'S CONVICTION OF CRIMINAL POSSESSION OF A WEAPON UNDER AN ACCOMPLICE THEORY WAS AGAINST THE WEIGHT OF THE EVIDENCE (THIRD DEPT).

The Third Department, reversing defendant's conviction and dismissing the indictment, determined that, although the proof demonstrated defendant's awareness that the co-defendant possessed a firearm, that awareness alone did not give rise to accomplice liability for the co-defendant's criminal possession of a weapon: Defendant was convicted after a four-day trial. The Third Department held the conviction was not supported by the weight of the evidence:

We agree with defendant that his conviction is against the weight of the evidence. … [T]he jury could rely on testimony by the People's witnesses describing defendant's conduct during the incident as evidence that defendant was aware the codefendant possessed the subject handgun before the codefendant displayed it to those witnesses … . Still, accessorial liability requires evidence directed at the equally important actus reus element, i.e., that " 'the accomplice must have intentionally aided the principal in bringing forth a result' " … . Here, even though

"defendant's conduct suggested that he may have known that [the codefendant] had a gun, there was no proof that . . . defendant solicited, requested, commanded, importuned, or intentionally aided him to possess the gun" … . What defendant did or said in furtherance of the codefendant's possession of the subject handgun was left to the jurors' imaginations … . Such speculation cannot be the basis for defendant's guilt beyond a reasonable doubt … . People v Goodman, 2024 NY Slip Op 05249, Third Dept 10-24-24

Practice Point: To be convicted of a co-defendant's criminal possession of a weapon under an accomplice theory, the proof must demonstrate the defendant solicited, requested, commanded, importuned or intentionally aided the co-defendant to possess the gun (in addition to the mens rea, the actus reus must be proven).

October 24, 2024

ADJOURNMENTS, ERROR TO DENY REQUEST, SEX OFFENDER REGISTRATION ACT (SORA), JUDGES, ATTORNEYS.

DEFENSE COUNSEL'S REQUEST FOR AN ADJOURNMENT OF THE SORA RISK-LEVEL PROCEEDING TO ALLOW REVIEW OF DOCUMENTS WHICH MAY BE RELEVANT TO A DOWNWARD DEPARTURE SHOULD HAVE BEEN GRANTED, CRITERIA EXPLAINED (SECOND DEPT).

The Second Department, reversing County Court and ordering a new SORA risk-level assessment, determined defendant's attorney's request for an adjournment to allow review of documents relevant to a downward departure should have been granted:

… County Court improvidently exercised its discretion when it denied the defendant's request for an adjournment. The defendant's open release date two days after the hearing was not a sufficient reason to deny the defendant's request for an adjournment (see Correction Law § 168-l[8]). Further, the documents discussed by the defendant, including documents relating to his participation in treatment programs, may be relevant to support an application for a downward departure from his presumptive risk level. "A defendant seeking a downward departure from the presumptive risk level has the initial burden of '(1) identifying, as a matter of law, an appropriate mitigating factor, namely, a factor which tends to

establish a lower likelihood of reoffense or danger to the community and is of a kind, or to a degree, that is otherwise not adequately taken into account by the . . . Guidelines; and (2) establishing the facts in support of its existence by a preponderance of the evidence'" … . "In making the determinations the court shall review . . . any relevant materials and evidence submitted by the sex offender" … . "An offender's response to treatment, if exceptional, can be the basis for a downward departure" … . As the documents cited by the defendant were potentially material, the adjournment request was not made for the purposes of delay, and the necessity of the request was not due to a failure of due diligence, the court should have granted the request to adjourn the SORA hearing so that the defendant's counsel could review the documents and determine whether they should be offered to the court as evidence at the hearing. People v Eldridge, 2024 NY Slip Op 05117, Second Dept 10-16-24

Practice Point: Here defense counsel's request for an adjournment of the SORA risk-level proceeding to allow review of documents which may be relevant to a downward departure should have been granted. Defense counsel was not able to meet with the defendant until 15 minutes before the hearing, the request was not made to delay, and the fact that defendant had an upcoming open release date was not a sufficient reason to deny an adjournment.

October 16, 2024

APPEALS, WEIGHT OF THE EVIDENCE REVIEW.

THE CRITERIA FOR A COURT-OF-APPEALS REVIEW OF AN APPELLATE DIVISION'S WEIGHT-OF-THE-EVIDENCE ANALYSIS IS EXPLAINED; HERE DEFENDANT'S MANSLAUGHTER CONVICTION, BASED ENTIRELY ON CIRCUMSTANTIAL EVIDENCE, WAS PROPERLY REVIEWED BY THE APPELLATE DIVISION, WHICH AFFIRMED THE CONVICTION (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Halligan, over two concurring opinions and an extensive dissenting opinion by Judge Wilson, determined the Appellate Division properly conducted a weight-of-the-evidence review of an entirely circumstantial manslaughter prosecution (affirming the conviction):

Jorge Baque's five-month-old daughter was found unresponsive in her crib at 6:30 a.m. on July 30, 2016. Despite efforts to resuscitate her, she was declared dead. An autopsy revealed that the victim had sustained injuries consistent with abusive head trauma and violent shaking. Baque was arrested and charged with manslaughter in the second degree and endangering the welfare of a child. * * *

The question before us is whether the Appellate Division erred as a matter of law in conducting its review of the weight of the evidence, in this purely circumstantial case. Weight of the evidence review is a "unique" power afforded to intermediate appellate courts, and one that they exercise regularly … . It requires the Appellate Division to "independently assess all the proof" and "to serve, in effect, as a second jury" … . * * *

This Court reviews a weight of the evidence determination to assess whether the "order and writings of the intermediate appellate court manifest a lack of application of [its] review power" … . "[W]e cannot review a weight of the evidence challenge unless the intermediate appellate court manifestly failed to consider the issue or did so using an incorrect legal principle" … . We have never required the Appellate Division to "manifest its weight of evidence review power by writing in all criminal cases" … . Indeed, the Appellate Division "could have summarily affirmed without explicitly addressing the merits of defendant's challenge to the weight of the evidence" … . People v Baque, 2024 NY Slip Op 05244, CtApp 10-24-22

Practice Point: This decision is a rare Court-of-Appeals review of an appellate division's weight-of-the-evidence affirmance of a conviction based entirely on circumstantial evidence. The unique criteria for review by the Court of Appeals is explained.

October 24, 2024

ASSAULT, SERIOUS INJURY.

ALTHOUGH THERE WAS EVIDENCE THE VICTIM'S JAW WAS FRACTURED, THERE WAS INSUFFICIENT PROOF THE VICTIM SUFFERED "SERIOUS PHYSICAL INJURY" WITHIN THE MEANING OF PENAL LAW SECTION 10 (10); DEFENDANT'S ASSAULT SECOND CONVICTION WAS REDUCED TO ASSAULT THIRD (THIRD DEPT).

The Third Department, finding that the proof the victim suffered "serious physical injury" in this assault case insufficient, reduced defendant's conviction from assault second to assault third. There was evidence the victim suffered a fractured jaw which was wired shut for weeks. But the evidence did not establish a "protracted impairment of health or … function of any bodily organ:"

As to the victim's injuries, an oral surgeon who examined the victim diagnosed him with a fracture to the left side of his mandible, consistent with facial trauma, and performed a surgical procedure to wire the victim's jaw shut. The victim testified that his jaw was wired shut for several weeks and that he was unable to eat solid food for six weeks, causing him to lose approximately 25 pounds. At the trial, which was approximately 10 months after the incident, the victim continued to experience very occasional pain that he described as similar to arthritis. Although we do not minimize the trauma and pain suffered by the victim, the record is devoid of evidence about the injury's effect on the victim's daily living to support a finding that he sustained a "protracted impairment of health or . . . of the function of any bodily organ" (Penal Law § 10.00 [10] …). Consequently, we are constrained to find that the verdict convicting defendant of assault in the second degree is against the weight of the evidence, as the record does not establish that the victim suffered a "serious physical injury," as that term is defined in Penal Law § 10.00 (10) … . People v Dillon, 2024 NY Slip Op 05246, Third Dept 10-24-24

Practice Point: Consult this decision to gain some insight into what "serious physical injury" means as an element of Assault 2nd.

October 24, 2024

ATTORNEYS, INEFFECTIVE ASSISTANCE, JUDGES.

DEFENSE COUNSEL WAS DEEMED INEFFECTIVE FOR FAILING TO OBJECT TO THE PROSECUTOR'S REPEATED PREJUDICIAL REMARKS MADE TO PROSPECTIVE JURORS (TO THE EFFECT "I CAN SLEEP AT NIGHT BECAUSE I AM NO LONGER A DEFENSE ATTORNEY"), AND FOR AGREEING TO THE JUDGE'S REQUEST TO HAVE THE TWO SIDES ALTERNATE GOING FIRST IN EXERCISING PEREMPTORY JUROR CHALLENGES (IN VIOLATION OF THE CRIMINAL PROCEDURE LAW) (FOURTH DEPT).

The Fourth Department, over a two-justice dissent, reversed defendant's conviction on ineffective-assistance grounds. Defense counsel did not object to the prosecutor's repeated statements to prospective jurors that he can sleep at night because he is a prosecutor and no longer a defense attorney. Defense counsel agreed to alter the statutory peremptory juror-challenge procedure, which requires that the People must exercise their peremptory challenges first. Defense counsel agreed to alternate which side went first:

The first error occurred during voir dire when defense counsel failed to object to patently improper comments from the prosecutor regarding his ability to sleep at night now that he is a prosecutor and no longer a defense attorney. Perhaps it was a legitimate strategy for defense counsel not to object to the first improper comment of that nature given that defense counsel may not have wanted to draw more attention to the prejudicial comment. For the same reason, defense counsel might be excused for not objecting when the prosecutor repeated the comment to the same group of prospective jurors. We can discern no legitimate strategy, however, for defense counsel to remain quiet when the prosecutor made the same comment for the third, fourth and fifth times during voir dire. At some point, defense counsel was obligated to protect defendant from the prejudice arising from the repeated acts of prosecutorial misconduct and, at the very least, request a curative instruction from the court.

Defense counsel also erred in not objecting—and, indeed, consenting—to the court's unlawful procedure of having the parties alternate which side went first in declaring whether they wished to exercise a peremptory challenge to a particular prospective juror. CPL 270.15 (2) provides that the People "must exercise their

peremptory challenges first and may not, after the defendant has exercised [the defendant's] peremptory challenges, make such a challenge to any remaining prospective juror who is then in the jury box." After the court stated that its practice was to have parties alternate their exercise of peremptory challenges, defense counsel, evidently unaware of the statute's mandate, said, "I'll go first. He can go first. I don't care." As a result, on numerous occasions during voir dire defense counsel stated whether or not she was peremptorily challenging a prospective juror before the prosecutor was required to state his position.

Although the court's violation of CPL 270.15 (2) does not constitute a mode of proceedings error, it was certainly prejudicial to defendant and we can conceive of no legitimate strategy for defense counsel's acquiescence to the unlawful procedure. Viewing the evidence, the law and the circumstances of this case in totality and as of the time of the representation, "[o]ur review of this record indicates that defendant was not afforded meaningful representation and was therefore deprived of a fair trial" … . People v Stewart, 2024 NY Slip Op 04863, Fourth Dept 10-4-24

Practice Point: Although it is not a mode of proceedings error to alternate which side goes first in exercising peremptory challenges to prospective jurors in violation of the criminal procedure law, here defense counsel's agreement to the procedure was deemed ineffective assistance of counsel and a new trial was ordered.

October 4, 2024

ATTORNEYS, INEFFECTIVE ASSISTANCE.

THE FAILURE TO MOVE TO SUPPRESS THE EVIDENCE SEIZED PURSUANT TO A SEARCH WARRANT ON THE GROUND THE POLICE VIOLATED THE "KNOCK AND ANNOUNCE" RULE DOES NOT CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE THE ISSUE IS "NOVEL" (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Troutman, affirming the Appellate Division, over a three-judge concurrence which argued the case should have been disposed of based on the inadequacy of the record and not on the merits, determined the "single error" attributed to defense counsel did not amount to

ineffective assistance. Defendant argued a motion to suppress should have been made on the ground the police violated the knock-and-announce rule when executing the warrant:

We have recognized that a single error in an otherwise competent performance may be sufficiently "egregious and prejudicial as to deprive a defendant of [the] constitutional right to effective legal representation" … . To "rise to that level," however, defense counsel's omission "must typically involve an issue that is so clear-cut and dispositive that no reasonable defense counsel would have failed to assert it, and it must be evident that the decision to forgo the contention could not have been grounded in a legitimate trial strategy" … .

That standard is not satisfied if the "omitted argument was not so compelling that a failure to make it amounted to ineffective assistance of counsel" … . We have stated that counsel is not ineffective when the success of the argument the defendant claims should have been made by counsel "depended on the resolution of novel questions" … , or when, at the time of the defendant's trial, "there was no clear appellate authority" supporting the argument the defendant claims that counsel should have made … .

The United States Supreme Court has held that a violation of the knock-and-announce rule by police when executing a search warrant does not require the application of the exclusionary rule under the Federal Constitution (see generally Hudson v Michigan, 547 US 586 [2006]). Defendant acknowledges that no New York appellate decision has decided to the contrary, either by distinguishing Hudson, on the basis of the New York Constitution, or otherwise. Indeed, defendant concedes that the issue is novel. We need not and do not resolve the merits of that question on this appeal. We merely hold that the issue was not so clear-cut and dispositive that no reasonable defense attorney would have failed to assert it, and therefore "defendant's claim of ineffective assistance must fail" … . People v Hayward, 2024 NY Slip Op 05243, CtApp 10-22-24

Practice Point: A single error by defense counsel may rise to the level of ineffective assistance, but not, as here, where the issue defense counsel failed to raise is deemed "novel."

October 24, 2024

CHILD PORNOGRAPHY, STIPULATION CONCEDED MENS REA.

THE STIPULATION SIGNED BY DEFENSE COUNSEL, IN AN EFFORT TO AVOID SHOWING CHILD PORNOGRAPHY TO THE JURY, EFFECTIVELY REMOVED THE MENS REA ELEMENT OF THE CHILD PORNOGRAPHY CHARGES FROM THE JURY'S CONSIDERATION; CONVICTION REVERSED ON INEFFECTIVE ASSISTANCE GROUNDS (SECOND DEPT).

The Second Department, reversing defendant's child-pornography conviction, over a two-justice dissent, determined that the stipulation signed by defense counsel and presented to the jury (in an effort to avoid showing the pornography to the jury) effectively removed from the jury consideration of the mens rea element. Therefore, defendant did not receive effective assistance of counsel:

A few days before the trial commenced, defense counsel and the prosecutor executed a stipulation entitled "Stipulation Elements of Crime." Among other things, they stipulated to the fact that certain videos underlying the counts of promoting a sexual performance by a child "depicted . . . a performance, which included sexual conduct by a child less than 17 years of age," and similarly stipulated as to the content of certain images underlying the counts of possessing a sexual performance by a child. …

… [T]he stipulation went on to state, in pertinent part, that "whoever possessed each of the . . . videos, promoted a performance, which included sexual conduct by a child . . . with knowledge of the character and content of the videos," and "whoever possessed these videos and images, knowingly had in his or her possession or control, or knowingly accessed with intent to view, a performance which included sexual conduct by a child" … . A reasonable reading of this additional language in the stipulation is that possession alone is tantamount to promoting a performance with knowledge "of the character and content of" the videos, which is required to support a conviction of promoting a sexual performance by a child under Penal Law § 263.15, and that possession alone is tantamount to knowing "possession or control" or "access[ ] with intent to view," which is required to support a conviction of possessing a sexual performance by a child under Penal Law § 263.16. Thus, this additional language in the stipulation set forth definitions of the crimes that had no mens rea element … , under which

possession alone could support a guilty verdict for each crime. People v Guerra, 2024 NY Slip Op 04978, Second Dept 10-9-24

Practice Point: Defense counsel signed a stipulation in an effort to avoid showing child pornography to the jury. The majority concluded the stipulation effectively eliminated the mens rea element from the jury's consideration. The conviction was reversed on ineffective assistance grounds.

October 9, 2024

DEFENDANT'S REQUEST TO REPRESENT HIMSELF, JUDGES, ATTORNEYS.

THE JUDGE SHOULD NOT HAVE SUMMARILY DENIED DEFENDANT'S REQUEST TO REPRESENT HIMSELF WITHOUT CONDUCTING A COLLOQUY TO DETERMINE THE WAIVER WAS VOLUNTARY AND INTELLIGENT; THE INFORMATION IN THE WARRANT DID NOT PROVIDE PROBABLE CAUSE TO SEARCH DEFENDANT'S CELL PHONE, CRITERIA EXPLAINED (THIRD DEPT).

The Third Department, reversing the conviction and ordering a new trial, determined the judge should not have summarily denied defendant's request to represent himself and the motion to suppress evidence retrieved from the defendant's cell phone should have been granted:

A court may not summarily deny a defendant's request to represent himself or herself, even if the court believes it to be in the defendant's best interest to be represented by counsel … . Once defendant made his request, which was unequivocal and timely, County Court was required to conduct a colloquy to determine whether he was making a voluntary and intelligent waiver of his right to counsel … . * * *

… [T]he warrant was supported by [the investigator's] affidavit, which stated that he believed the phones "may" contain digital data, including call histories, that would evidence the commission of criminal possession of a controlled substance in the third degree. However, the statute requires that a statement of reasonable cause based upon information and belief must also state "the sources of such information

and the grounds of such belief" (CPL 690.35 [3] [c]), which was lacking here. Stated differently, even where there is probable cause to suspect the defendant of a crime, law enforcement may not search his or her cell phone unless they have information demonstrating that evidence is likely to be found there; some link sufficient to connect the two must be provided. Our review of the affidavit of probable cause in this case reveals no such link. People v Poulos, 2024 NY Slip Op 05152, Third Dept 10-17-24

Practice Point: A defendant's request to represent himself should not be summarily denied. The judge must conduct a colloquy to ensure the waiver of the right to counsel is voluntary and intelligent.

Practice Point: Here the search warrant did not demonstrate probable cause to believe the search of defendant's cell phone would reveal evidence of criminal possession of a controlled substance.

October 17, 2024

FALSIFYING A BUSINESS RECORD, ATTEMPTED CRIMINAL POSSESSION OF A WEAPON, EVIDENCE.

IN THIS "ATTEMPTED CRIMINAL POSSESSION OF A WEAPON" AND "FALSIYFING BUSINESS RECORDS" PROSECUTION, THE PEOPLE DID NOT PROVE DEFENDANT WAS SUBJECT TO A RESTRAINING ORDER ISSUED AFTER A HEARING OF WHICH HE HAD NOTICE AND IN WHICH HE COULD HAVE PARTICIPATED; THEREFORE THE PEOPLE DID NOT PROVE HIS ANSWERING "NO" TO THE QUESTION WHETHER HE WAS SUBJECT TO A RESTRAINING ORDER WAS FALSE; CONVICTIONS REVERSED (THIRD DEPT).

The Third Department reversed defendant's "attempted criminal possession of a weapon" and "falsifying business records" convictions as against the weight of the evidence. Defendant, when attempting to purchase a shotgun, answered "no" to the question whether he was subject to a court order. Although restraining orders were produced by the People, there was no proof any restraining order "was issued after a hearing of which such person received actual notice, and at which such person

had an opportunity to participate" as required by 18 USC 922 (g) (8) (an element of the charged offenses):

… [T]he People failed to prove beyond a reasonable doubt that defendant attempted to buy a shotgun knowing his possession of same was "prohibited by law" (Penal Law § 265.17 [1]). People v Rock, 2024 NY Slip Op 05162, Third Dept 10-17-24

October 17, 2024

JURY INSTRUCTIONS, CROSS-RACIAL IDENTIFICATION, JUDGES, EVIDENCE.

THE DENIAL OF DEFENDANT'S REQUEST FOR A CROSS-RACIAL IDENTIFICATION JURY INSTRUCTION WAS REVERSIBLE ERROR (THIRD DEPT).

The Third Department, reversing the conviction and ordering a new trial, determined the denial of defendant's request for a cross-racial identification jury instruction was reversible error:

As held by the Court of Appeals in People v Boone (30 NY3d 521 [2017]), "when identification is an issue in a criminal case and the identifying witness and defendant appear to be of different races, upon request, a party is entitled to a charge on cross-racial identification" … . Here, at the close of proof, defendant requested that the jury be given a cross-racial identification instruction pursuant to Boone. County Court denied his request noting, among other things, that in the present case, the identifying witness … knew defendant. County Court, however, misinterpreted the Boone standard and erred in denying defendant's request for a cross-racial identification jury instruction upon defendant's request for same … . People v Alexander, 2024 NY Slip Op 05160, Third Dept 10-17-24

Practice Point: Where the witness who identifies the defendant as the perpetrator and the defendant appear to be of different races, defendant's request for a cross-racial identification jury instruction must be granted.

October 17, 2024

JURY INSTRUCTIONS, INTOXICATION, JUDGES, EVIDENCE.

THE DENIAL OF DEFENDANT'S REQUEST FOR AN INTOXICATION JURY INSTRUCTION WAS REVERSIBLE ERROR (THIRD DEPT).

The Third Department, reversing defendant's conviction, determined the denial of defendant's request for the intoxication jury instruction was reversible error:

… County Court improperly refused to instruct the jury as to the defense of intoxication. "An intoxication charge is warranted if, viewing the evidence in the light most favorable to the defendant, there is sufficient evidence of intoxication in the record for a reasonable person to entertain a doubt as to the element of intent on that basis" … . The charge should be given when there is "evidence of the recent use of intoxicants of such nature or quantity to support the inference that their ingestion was sufficient to affect defendant's ability to form the necessary criminal intent" … . It is true that more is required than "a bare assertion by a defendant that he was intoxicated," but the threshold to demonstrate entitlement to the charge is nevertheless "relatively low" … . We find that the evidence presented at trial regarding defendant's consumption of alcohol during the afternoon and evening on the date in question easily surpassed this low bar. People v Smith, 2024 NY Slip Op 05158, Third Dept 10-17-24

Practice Point: The evidence of defendant's consumption of alcohol was more than sufficient to warrant instructing the jury on the intoxication defense.

October 17, 2024

LARCENY, FORGERY, ACCEPTANCE OF A DELIVERY.

DEFENDANT, PRETENDING TO BE SOMEONE ELSE, TOOK DELIVERY OF TIRES AND FALSELY SIGNED THE INVOICE; THE DEFENDANT WAS PROPERLY SENTENCED TO CONSECUTIVE TERMS OF INCARCERATION FOR LARCENY AND FORGERY; THE CRITERIA FOR CONSECUTIVE AND CONCURRENT SENTENCES EXPLAINED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Rivera, determined consecutive sentences were properly imposed for defendant's larceny and forgery convictions:

… [T]he Exxpress Tire Delivery Company received a telephone order from Basil Ford Truck Center by someone identifying themselves as Joe Basil Jr., for next-day delivery. The following day, … the driver called a number … for "Joe Junior" for additional delivery instructions. The man who answered the call told the driver to take the tires to a business adjacent to the Basil Ford Truck Center. When the driver arrived at the location he saw "a truck with a trailer" parked "on the side of the building" with a man standing next to it. He asked the man—who he identified in-court as defendant—"if he was taking the tires for delivery," to which the man responded "yes." Defendant … told the driver that he was an employee of the Basil family. The two loaded the tires onto the trailer and the driver then presented defendant with the tire invoice, which defendant falsely signed: "Joe Basil." * * *

… [I]n accordance with section 70.25 (2), "sentences imposed for two or more offenses may not run consecutively: (1) where a single act constitutes two offenses, or (2) where a single act constitutes one of the offenses and a material element of the other" … .

Under the first prong, "where the actus reus is a single inseparable act that violates more than one statute, [a] single punishment must be imposed" … . * * * Here … defendant accomplished the taking once the driver loaded the tires onto defendant's trailer, which preceded defendant falsely signing the invoice … .

As to the second prong, courts "first look to the statutory definitions of the crimes at issue to discern whether the actus reus elements overlap" … . * * *

… [B]ecause forgery is not the exclusive means to accomplish a larceny by false pretenses, forgery is not "a necessary component" of the larceny count "in the legislative classification and definitional sense" … . … [U]nder this prong, we do not consider "the act-specific circumstances and proof of a crime" … . People v McGovern, 2024 NY Slip Op 05242, CtApp 10-24-24

Practice Point: Consult this decision for an explanation of the criteria for consecutive versus concurrent sentences where two crimes stem from closely related actions—here taking possession of property by false pretenses (larceny) and then falsely signing an invoice for the property(forgery).

October 24, 2024

MENTAL HYGIENE LAW, TEMPORARY CONFINEMENT OF SEX OFFENDERS, CONSTITUTIONAL LAW.

THE PROVISION OF THE MENTAL HYGIENE LAW WHICH ALLOWS TEMPORARY CONFINEMENT OF SEX OFFENDERS WITHOUT THE OFFENDER'S PARTICIPATION AT THE PROBABLE CAUSE STAGE IS CONSTITUTIONAL (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Singas, affirming the Appellate Division, over a two-judge dissenting opinion, determined the procedure under the Mental Hygiene Law which allows the temporary confinement of sex offenders without the offender's participation at the probable cause stage is constitutional:

This appeal requires us to examine whether certain provisions of Mental Hygiene Law § 10.11 (d) (4) satisfy procedural due process. Those provisions govern the procedure for the temporary confinement of sex offenders adjudicated to have "mental abnormalities"—but released from confinement to strict and intensive supervision and treatment (SIST)—pending a final SIST revocation hearing. * * *

This appeal concerns the initial step in the process for revoking SIST. "If a parole officer has reasonable cause to believe that" a respondent has violated a SIST condition, or if an "evaluation or report by a treating professional indicat[es] that the person may be a dangerous sex offender requiring confinement," a parole officer may take the violator into custody and transport them to a facility for a

psychiatric evaluation, which must take place within five days … . Once the violator is taken into custody, DOCCS must "promptly" notify the Attorney General and the Mental Hygiene Legal Service (MHLS), which provides legal representation to article 10 respondents … . The Attorney General may then petition for confinement or a petition to modify the conditions within five days … The petition must "be served promptly on the respondent and [MHLS]," and the court must appoint legal counsel to represent the respondent and provide counsel with a copy of the psychiatric evaluation … . If the Attorney General files a petition seeking confinement,

"then the court shall promptly review the petition and, based on the allegations in the petition and any accompanying papers, determine whether there is probable cause to believe that the respondent is a dangerous sex offender requiring confinement. Upon the finding of probable cause, the respondent may be retained in a local correctional facility or a secure treatment facility pending the conclusion of the proceeding" … .

* * * "The respondent shall not be released pending the completion of the hearing" … . People ex rel. Neville v Toulon, 2024 NY Slip Op 05178, CtApp 10-22-24

Practice Point: The provision of the Mental Hygiene Law which allows temporary confinement of sex offenders without the offender's participation at the probable cause stage is constitutional.

October 22, 2024

RIGHT TO COUNSEL, WAIVER OF, SPEEDY TRIAL, JUDGES.

IN ORDER TO KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY WAIVE THE RIGHT TO COUNSEL, THE DEFENDANT NEED NOT BE INFORMED OF HIS MAXIMUM SENTENCING EXPOSURE IN YEARS; THE "SPEEDY TRIAL" TIME ASSOCIATED WITH THE JOINDER OF A CO-DEFENDANT FOR TRIAL IS CHARGED TO THE DEFENDANT, EVEN WHERE THE DEFENDANT HAD NOT YET BEEN ARRAIGNED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Halligan, over a dissenting opinion by Judge Rivera, affirming the Appellate Division, determined (1) in order to effectively waive the right to counsel, a defendant need not be

informed of his maximum sentencing exposure in years, and (2) the pre-arraignment delay associated with the joinder for trial with a co-defendant is not chargeable to the People:

Defendant Anthony Blue challenges his criminal conviction for five counts of second-degree burglary. Blue argues that a criminal defendant cannot make a knowing, voluntary, and intelligent waiver of the right to counsel unless the trial judge specifically apprises the defendant of his maximum sentencing exposure in years. Rather than imposing a bright-line rule such as this, we have said that a court must ensure a defendant is adequately warned of the dangers and disadvantages of self-representation before allowing him to proceed pro se. A review of the record here confirms that Blue had such an understanding at the time he waived his right to counsel.

Blue also argues that his indictment should have been dismissed on statutory speedy-trial grounds. CPL 30.30 (4) (d), broadly speaking, excludes from the time chargeable to the People a reasonable period of delay when a defendant is joined for trial with a co-defendant. Blue contends this provision does not apply to pre-arraignment time, but the Appellate Division correctly concluded that it does. Thus the 57 days between indictment and arraignment chargeable to Blue's co-defendant were also chargeable to Blue, even though he had not yet been arraigned. People v Blue, 2024 NY Slip Op 05175, CtApp 10-22-24

Practice Point: A defendant can effectively waive the right to counsel without being informed of his maximum sentencing exposure in years.

Practice Point: Even though defendant had not yet been arraigned, the time associated with joining a co-defendant for trial was chargeable to the defendant.

October 22, 2024

RIGHT TO COUNSEL.

AFTER TWO MENTIONS OF THE POSSIBLE NEED FOR AN ATTORNEY WHICH DID NOT AMOUNT TO AN UNEQUIVOCAL REQUEST, THE DEFENDANT STATED "THAT'S WHAT I WANT A LAWYER FOR," HE WAS "SCARED TO TALK," AND HE "COULD STILL COOPERATE LATER;" THOSE STATEMENTS SHOULD HAVE BEEN UNDERSTOOD BY THE POLICE AS A REQUEST FOR COUNSEL (THIRD DEPT).

The Third Department, vacating defendant's guilty plea, determined statements made by defendant after he invoked his right to counsel should have been suppressed:

In the course of the investigators' questioning of defendant, they transitioned away from asking defendant about his flight from the police and turned to the underlying domestic violence incident. When they began focusing on how he had first encountered the victim earlier that morning, defendant expressed that he did not wish to discuss that subject. After the investigators continued with a couple of follow-up questions on this topic, defendant stated, "that's what I want a lawyer for." He then went on to say that he was scared to talk and noted that he could still cooperate with the District Attorney at a later time.

… [We conclude that defendant clearly invoked his right to counsel. Although the first two alleged invocations … did not constitute requests for an attorney, they nevertheless serve to indicate that the subject of obtaining a lawyer was on defendant's mind while he was being questioned. … [O]nce the interrogation moved to the underlying incident, defendant "articulated his desire to have counsel present such that a reasonable police officer should have understood that he was requesting an attorney" … . Accordingly, any statements made by defendant thereafter should have been suppressed … . People v Lipka, 2024 NY Slip Op 05153, Third Dept 10-17-24

Practice Point: Defendant's statements "that's what I want a lawyer for," he was "scared to talk," and he "could still cooperate later" constituted an unequivocal request for counsel. Statements made thereafter should have been suppressed.

October 17, 2024

RIGHT TO PUT ON A DEFENSE, PRO SE DEFENDANT, JAIL PHONE CALLS ACCESSED BY THE PEOPLE, CONSTITUTIONAL LAW.

UNDER THE FACTS, THE PRO SE DEFENDANT WAS NOT DEPRIVED OF HIS RIGHT TO PUT ON A DEFENSE BY THE PEOPLE'S ACCESS TO HIS RECORDED JAIL PHONE CALLS; DEFENDANT EFFECTIVELY WAIVED HIS RIGHT TO COUNSEL (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Troutman, affirming the Appellate Division, determined (1) the fact that the People had access to defendant's recorded jail phone calls did not, under the facts, deprive the pro se defendant of his right to present a defense, and (2) the defendant effectively waived his right to counsel:

Under the particular facts of this case, however, we conclude that defendant's right to present a defense was not impaired by the monitoring of his jail phone calls. Defendant was out on bail for nearly the entire two years between indictment and his mid-trial remand, including more than six months while representing himself, giving him ample time to prepare his witnesses. Even after remand, there is no dispute that defendant had means other than the recorded phone lines to prepare his witnesses. Indeed, the record establishes that defendant's daughter visited him in jail at his request before he called her to testify so that they could continue their trial preparations in person. The court was proactive in protecting defendant's rights, permitting him time in the courtroom to speak to each of his witnesses in private before their testimony. In addition, when defendant asked to adjourn for the weekend to prepare his witnesses, the court stated that it would take the matter up in the morning, at which time it was agreed that defendant would testify for most of the remainder of the week. The court also noted that defendant had been assigned a legal advisor and an investigator, both of whom had the expertise and wherewithal to assist in the preparation of the defense.

Although the People's monitoring of an incarcerated pro se defendant's jail phone calls may have a chilling effect on the defendant's trial preparation that threatens the right to present a defense—particularly if the People are able to make use of the information in the calls in the pending trial—the facts here are otherwise. Defendant became aware that the People were listening to his phone conversations only after he had presented the direct testimony of his daughter and an expert. Aside from himself, the only remaining defense witnesses provided character

testimony and little else that could be considered relevant to the case. Thus, any chilling effect here was negligible. People v Dixon, 2024 NY Slip Op 05176, CtApp 10-22-24

Practice Point: Under the facts of this case, the pro se defendant was not deprived of his right to present a defense by the People's access to his recorded jail phone calls.

Practice Point: Here the defendant effectively waived his right to counsel.

October 22, 2024

SANDOVAL/MOLINEUX HEARING, DEFENDANT'S RIGHT TO BE PRESENT.

DEFENDANT HAD A RIGHT TO BE PRESENT DURING THE SANDOVAL/MOLINEUX DISCUSSIONS OF THE ADMISSIBILITY OF HIS PRIOR CONVICTIONS; THE FACT THAT THE JUDGE ANNOUNCED HIS SANDOVAL/MOLINEUX RULINGS IN THE DEFENDANT'S PRESENCE WAS NOT ENOUGH; NEW TRIAL ORDERED (CT APP).

The Court of Appeals, reversing defendant's conviction, in a full-fledged opinion by Judge Rivera, determined defendant had a right to be present during the Sandoval/Molineux discussions concerning the admissibility of defendant's prior convictions. The fact that the judge announced his rulings in defendant's presence was not enough:

We reverse defendant's conviction and grant him a new trial. The trial court held a conference in defendant's absence on the prosecution's motion to cross examine him on his prior criminal conduct, in violation of his right to be present (see CPL 260.20 …). The court held a subsequent hearing on the motion in defendant's presence. However, the court did not hear arguments on the merits, did not confirm defendant's understanding of the underlying facts or the merits of the application, and merely announced its decision. Thus, the subsequent proceeding did not provide for defendant's meaningful participation in the determination of the merits of the motion and did not cure the earlier violation. People v Sharp, 2024 NY Slip Op 05132, CtApp 10-17-24

Practice Point: Defendant's right to be present at trial includes the right to be present during the arguments about the admissibility of defendant's prior convictions under Sandoval/Molineux. Defendant's presence when the judge announced the Sandoval/Molineux rulings is not sufficient.

October 17, 2024

SEX OFFENDER REGISTRATION ACT (SORA), ASSESSMENT FOR FAILURE TO TAKE RESPONSIBILITY IMPROPER.

DEFENDANT'S DENIAL OF GUILT MADE WHEN HIS APPEAL WAS PENDING CANNOT BE USED AS THE BASIS FOR THE ASSESSMENT OF POINTS IN A SORA RISK-LEVEL PROCEEDING FOR "FAILURE TO ACCEPT RESPONSIBILITY" (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court in this SORA risk-assessment proceeding, determined defendant should not have been assessed 10 points for failure to accept responsibility because his denial of guilt was made when his appeal was pending:

… [T]he court should not have assessed 10 points under risk factor 12 for failure to accept responsibility. Defendant's denials of guilt were made at the time his appeal from his underlying conviction was pending. "Requiring defendant to accept responsibility could potentially result in his admissions being used against him in any retrial, violating his Fifth Amendment right against self-incrimination" … . People v Wallace, 2024 NY Slip Op 05189, First Dept 10-22-24

Practice Point: A denial of guilt made when defendant's appeal was pending and there was a chance for a retrial cannot be used against him in a SORA risk-level assessment.

October 22, 2024

SEX OFFENDER REGISTRATION ACT (SORA), DOWNWARD DEPARTURE.

THE FACT THAT DEFENDANT HAD BEEN AT LIBERTY FOR 11 YEARS WITHOUT COMMITTING A SEX OFFENSE AND THE FOUR-YEAR DIFFERENCE IN AGE BETWEEN DEFENDANT AND THE VICTIM WARRANTED A DOWNWARD DEPARTURE TO LEVEL ONE (SECOND DEPT).

The Second Department, granting defendant a downward departure to level one in this SORA risk-assessment proceeding, determined the fact that during 11 years of liberty defendant has not committed a sex offense, and the four-year age-difference between defendant and the victim, should have been considered by the SORA court:

… [T]he defendant has been at liberty for more than 11 years without committing an additional sex offense or violent felony. Additionally, although the Supreme Court properly assessed the defendant points on the risk assessment instrument based on both the victim's age (risk factor 5) and the defendant's age at the time of his first offense (risk factor 8), the court did not adequately account for the age difference between the victim and the defendant, which was approximately four years and two months, as an appropriate mitigating factor … .

Under the totality of the circumstances, including that the defendant was already on the cusp of the range applicable to a presumptive risk level two designation … , we designate the defendant a level one sex offender … . People v Wildman, 2024 NY Slip Op 05229, Second Dept 10-23-24

Practice Point: 11 years of liberty without committing a sex offense and the four-year age gap between defendant and the victim warranted a downward departure to level one in this SORA risk-level proceeding.

October 23, 2024

SPEEDY TRIAL, ATTORNEYS, INEFFECTIVE ASSISTANCE.

THE DELAY IN PRODUCING THE DEFENDANT FOR ARRAIGNMENT AFTER THE PEOPLE BECAME AWARE HE WAS IN CUSTODY WAS ATTRIBUTABLE TO THE PEOPLE (A "CONTRADICTORY HOLDING" BY THE FOURTH DEPARTMENT WAS NOTED); DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO MOVE TO DISMISS ON SPEEDY TRIAL GROUNDS; INDICTMENT DISMISSED (THIRD DEPT).

The Third Department, reversing defendant's conviction and dismissing the indictment, determined the People were not timely ready for trial and defense counsel was ineffective for failing to move for dismissal on "speedy trial" grounds:

… [T]he People became aware that defendant was in the custody of DOCCS at the May 13, 2019 appearance, and they requested to have the arraignment adjourned to "May 28th, as soon as we can get [defendant] from downstate." Yet, the record reflects that the People engaged in no efforts to have defendant produced until May 29, when they filed their application pursuant to CPL 560.10, and we reject their generic assertion that this constituted diligent and reasonable efforts … . The People could not proceed to trial without having first arraigned defendant and because the delay was caused by the People's own inaction, the 16 days from May 13 through May 29 are chargeable to the People, thus exceeding the seven days remaining on the speedy trial clock. As such, we conclude that the People were not ready for trial within the applicable six-month statutory period … .

Having concluded that defense counsel failed to make a meritorious speedy trial motion, we must determine whether this failure, alone, was so egregious and prejudicial as to amount to ineffective assistance … . We reject the People's contention that this speedy trial motion involved the resolution of various novel and complex issues … , as it has long been settled in this Department that CPL 560.10 (1) (a) imposes upon the People a "responsibility to petition the trial court for an order producing defendant for 'arraignment or prosecution' " … — a principle which is not diminished by the Fourth Department's contradictory holding in People v Taylor (57 AD3d at 1518-1519 …). As such, and noting that the timeline underlying the speedy trial analysis is uncontroverted, we find that defendant was denied meaningful representation due to defense counsel's failure to pursue a meritorious speedy trial motion and, thus, his motion to vacate should have been granted … .. Lastly, as the time to prosecute defendant under this

indictment has expired, the indictment must be dismissed. People v Shuler, 2024 NY Slip Op 05154, Third Dept 10-17-24

Practice Point: In the Third Department [but apparently not in the Fourth Department (People v Taylor (57 AD3d at 1518-1519)?] any delay in producing a defendant for arraignment after the People become aware the defendant is in custody is attributable to the People.

Practice Point: Defense counsel's failure to move to dismiss on speedy-trial grounds is ineffective assistance.

October 17, 2024

TRAFFIC STOPS.

THE FACT THAT THE POLICE WERE AWARE THE VAN THEY STOPPED HAD REPORTEDLY BEEN INVOLVED IN TWO PRIOR INCIDENTS—(1) A ROAD RAGE SHOOTING AND (2) NEARLY RUNNING OVER A TRAFFIC AGENT ABOUT TO ISSUE A PARKING TICKET—PROVIDED REASONABLE SUSPICION SUPPORTING THE LEVEL THREE TRAFFIC STOP, DESPITE THE FACT THE POLICE DID NOT KNOW WHO WAS DRIVING THE VAN DURING THE PRIOR INCIDENTS (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice O'Neill, affirming defendant's conviction, over an extensive dissent, determined the police had reasonable suspicion supporting a level three traffic stop. The registration number of the van defendant was driving had been the subject of police reports for two prior incidents, a road rage incident during which a firearm was discharged, and nearly running a traffic agent over when the agent was about to place a parking ticket on the van. When the van was stopped, the driver was asked to step out of van because of the firearm incident. Defendant refused to get out and picked up a firearm. One of the officers tased the defendant three times and he was arrested:

A forceable stop and detention is authorized "[w]here a police officer entertains a reasonable suspicion that a particular person has committed, is committing or is about to commit a felony or misdemeanor" … .

"Reasonable suspicion is the quantum of knowledge sufficient to induce an ordinarily prudent and cautious [person] under the circumstances to believe criminal activity is at hand. To justify such an intrusion, the police officer must indicate specific and articulable facts which, along with any logical deductions, reasonably prompted that intrusion" … .

Here, before stopping the van, the BOLO [be-on-the-lookout] alert notified Officers Amaral and Stokes of the criminal activity involving the van on April 28th; the officers were also aware of the May 17th incident because they both responded to the traffic enforcement agent's call for backup. The officers' knowledge of either incident alone furnished reasonable suspicion of criminal activity at hand … . People v Zubidi, 2024 NY Slip Op 04824, First Dept 10-3-24

Practice Point: Here the fact that defendant's van had reportedly been involved in a road rage shooting and had nearly run over a traffic agent about to issue a parking ticket provided reasonable suspicion justifying a level three traffic stop, despite the fact that the identity of the driver involved in the prior incidents was not known at the time of the stop.

October 3, 2024

WAIVER OF INDICTMENT AND PLEADING TO A SUPERIOR COURT INFORMATION NOT AVAILABLE.

DEFENDANT WAS CHARGED WITH PREDATORY SEXUAL ASSAULT AGAINST A CHILD, A CLASS A-II FELONY PUNISHABLE BY A MANDATORY MAXIMUM TERM OF LIFE IMPRISONMENT; PURSUANT TO CRIMINAL PROCEDURE LAW 195.10[1][B] DEFENDANT CANNOT WAIVE INDICTMENT AND PLEAD TO A SUPERIOR COURT INFORMATION (SCI) (THIRD DEPT).

The Third Department, reversing defendant's conviction by guilty plea to a superior court information (SCI), determined defendant could not waive indictment to an A felony for which a life sentence is available:

CPL 195.10 provides, in relevant part, that a defendant may waive indictment and consent to be prosecuted pursuant to an SCI where "the defendant is not charged with a class A felony punishable by death or life imprisonment" (CPL 195.10 [1]

[b] …). Predatory sexual assault against a child is a class A-II felony and "is punishable by an indeterminate sentence with a mandatory maximum term of life imprisonment" (… Penal Law §§ 70.00 [2] [a]; 130.96). Hence, consistent with both CPL 195.10 and prevailing case law, a waiver of indictment "is not available where the defendant is charged with a class A felony" … . Defendant's waiver of indictment was therefore "expressly prohibited under CPL 195.10 and . . . invalid, rendering the resulting procedure employed to procure defendant's guilty plea unauthorized" … . Accordingly, defendant's guilty plea must be vacated and the SCI dismissed … . People v White, 2024 NY Slip Op 04850, Third Dept 10-3-24

Practice Point: A defendant cannot waive indictment and plead to a superior court information (SCI) when charged with an A-II felony punishable by an indeterminate sentence with a mandatory maximum term of life imprisonment.

October 3, 2024