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An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Addressing Criminal Law, Released by Our New York State Appellate Courts and Posted on the New York Appellate Digest Website in November 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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BRADY MATERIAL, CASEWORKER'S NOTES.

THE CASEWORKER WAS PART OF THE CRIMINAL INVESTIGATION IN THIS "COURSE OF SEXUAL CONDUCT WITH A CHILD" PROSECUTION; THE PEOPLE WERE THEREFORE DEEMED TO HAVE HAD CONTROL OVER OR TO HAVE BEEN IN POSSESSION OF THE CASWORKER'S NOTES; THE NOTES INCLUDED BRADY MATERIAL WHICH SHOULD HAVE BEEN TURNED OVER TO THE DEFENSE BEFORE TRIAL; NEW TRIAL ORDERED (THIRD DEPT).

The Third Department, reversing defendant's "course of sexual conduct with a child" conviction and ordering a new trial, determined that the caseworker's notes taken during an interview of the child constituted Brady material which should have been turned over to the defendant before trial. The caseworker was part of the criminal investigation. Therefore the notes were deemed to have been under the People's control or in the People's possession. There was a notation by the caseworker to the effect the victim "was acting normal and as if nothing happened…".:

"[W]hether knowledge of a government official or employee may be imputed to the People . . . turn[s] on whether participation in the criminal probe was an ancillary law enforcement task" and, thus, "while social workers are generally not agents of the police, in situations where they engage in a joint venture with police agencies to collaborate on child abuse or sexual abuse investigations, share information and a common purpose, and have a cooperative working arrangement

with police, an agency relationship may exist such that the social workers' knowledge is imputed to the People" … . * * *

The People's provision of this material after the close of all proof deprived defendant of "a meaningful opportunity to use the allegedly exculpatory material to cross-examine the People's witnesses or as evidence during his case" … . People v Baez, 2024 NY Slip Op 05844, Third Dept 11-21-24

Practice Point: When a caseworker is part of a criminal investigation, the caseworker's notes taken when interviewing a child victim are deemed to be under the control of or possessed by the People, such that any Brady material in the notes must be turned over to the defense prior to trial.

November 21, 2024

DISCOVERY, NO OBLIGATION TO TURN OVER DEPARTMENT OF CORRECTIONS AND COMMUNITY SERVICES DOCUMENTS, SPEEDY TRIAL, APPEALS.

SUPREME COURT DISMISSED THE INDICTMENT ON SPEEDY-TRIAL GROUNDS, FINDING THAT THE PEOPLE HAD NOT COMPLIED WITH THEIR DISCOVERY OBLIGATIONS AT THE TIME THE PEOPLE INDICATED THEY WERE READY FOR TRIAL; THE DISMISSAL ORDER WAS NEVER SERVED ON THE PEOPLE SO THE 30-DAY APPEAL PERIOD NEVER STARTED RUNNING RENDERING THE PEOPLE'S APPEAL TIMELY; THE FAILURE TO TURN OVER "DEPARTMENT OF CORRECTIONS AND COMMUNITY SERVICES" DOCUMENTS DID NOT VIOLATE THE PEOPLE'S DISCOVERY OBLIGATIONS BECAUSE THE PEOPLE DID NOT POSSESS THOSE DOCUMENTS (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined (1) the People's appeal was timely because defendant never served the order dismissing the indictment on them so the 30-day appeal period never started running, and (2) the People were not obligated to turn over Department of Corrections and Community Supervision (DOCCS) documents to comply with their discovery obligations because the People did not possess those documents:

The Court of Appeals has "interpreted CPL 460.10 (1) (a) 'to require prevailing party service'—not just the handing out of an order by the court—'to commence the time for filing a notice of appeal' " … . Here, the record establishes that the People received a copy of the original order, but there is "no evidence that [defendant] ever served the order as required by CPL 460.10 (1) (a)" … . Inasmuch as the record fails to establish that defendant ever served the People with a copy of the original order, the People's 30-day period to appeal never began to run and the People's appeal is therefore timely … . * * *

… [A]ssuming … that the parole officer's disciplinary records from DOCCS met the relevancy prong as being related to the subject matter of the case, we conclude that the People established that those records did not meet the possessory prong required to prompt their initial discovery obligation with respect thereto (see CPL 245.20 [1] …). "[F]or the purposes of discovery, DOCCS is not a 'law enforcement' agency" and is " 'outside of the legal or practical control of local prosecutors' and, therefore, the People cannot be deemed to be in constructive possession of that which DOCCS possesses" … . People v Walker, 2024 NY Slip Op 05662, Fourth Dept 11-15-24

Practice Point: If the defendant wins a motion to dismiss the indictment, the defendant must serve the People with the dismissal order or the People's 30-day appeal period does not start running.

Practice Point: The People do not violate their discovery obligations by failing to turn over documents which are in the possession of another agency, here the Department of Corrections and Community Services (DOCCS).

November 15, 2024

JURORS, FOR CAUSE EXCUSAL REQUIRED.

PROSPECTIVE JUROR WHO SAID HE OR SHE WOULD HOLD THE REFUSAL TO TESTIFY AGAINST THE DEFENDANT SHOULD HAVE BEEN EXCUSED FOR CAUSE; NEW TRIAL ORDERED (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction and ordering a new trial, determined a prospective juror's indication he or she would hold defendant's refusal to testify against the defendant required excusal "for cause:"

Here, the prospective juror gave "some indication of bias" … by stating that he "[a]bsolutely" might hold it against defendant if defendant chose not to testify … .

Contrary to the court's determination, the prospective juror did not "give unequivocal assurance that [he could] set aside any bias and render an impartial verdict based on the evidence" … . Although CPL 270.20 (1) (b) "does not require any particular expurgatory oath or 'talismanic' words . . . , [a prospective] juror[ ] must clearly express that any prior experiences or opinions that reveal the potential for bias will not prevent [the prospective juror] from reaching an impartial verdict" … . "If there is any doubt about a prospective juror's impartiality, [the] trial court[ ] should err on the side of excusing the juror, since at worst the court will have 'replaced one impartial juror with another' " … . We conclude that the prospective juror's act of nodding his head affirmatively after the court gave an instruction and posed a question to the entire jury panel was "insufficient to constitute such an unequivocal declaration" … . People v Cheese, 2024 NY Slip Op 05712, Fourth Dept 11-15-24

Practice Point: Here the prospective juror indicated bias requiring excusal for cause by indicating he or she would hold the refusal to testify against the defendant.

November 15, 2024

JUSTIFICATION DEFENSE, JUDGES.

THE TRIAL JUDGE ERRED IN FAILING TO INSTRUCT THE JURY ON THE JUSTIFICATION DEFENSE TO THE MURDER CHARGE; THAT FAILURE ALSO MAY HAVE TAINTED THE CRIMINAL-POSSESSION-OF-A-WEAPON CONVICTION, WHICH REQUIRES THE INTENT TO USE THE WEAPON UNLAWFULLY (CT APP).

The Court of Appeals, reversing defendant's murder and criminal possession of a weapon convictions, in a full-fledged opinion by Judge Garcia, determined the judge erred by failing to instruct the jury on the justification defense. The victim threatened defendant with a razor just before shooting. The Court of Appeals noted that if the shooting was justified the "intent to use the weapon unlawfully" element of criminal possession of a weapon may not have been proven:

Defendant was charged with criminal possession of a weapon in the second degree, requiring the People to prove that he possessed the gun with the intent to use it unlawfully against another person … . The model Criminal Jury Instruction provides that "a person acts with intent to use a loaded firearm unlawfully . . . when his . . . conscious . . . purpose is to use that loaded firearm unlawfully against another, and that intent need only exist at the very moment that a person engages in an unlawful use of the firearm against another" … . But if the jury in this case was properly instructed on justification, it might have concluded that defendant acted lawfully when he shot and killed the victim in self-defense. If so, then the jury might have also concluded that defendant lacked the requisite intent (to use unlawfully) for the possession charge … . In other words, it is possible the jury here relied solely on evidence of the potentially justified shooting in finding defendant guilty of possession of the weapon with the intent to use it unlawfully.

To be clear, a jury finding of justification as to the use of a firearm does not preclude that jury from finding that the defendant nevertheless possessed the weapon with intent to use it unlawfully … . But with respect to the possessory offense, the jury must be instructed that, while justification is not a defense to that crime, in the event the jury finds that the shooting was justified, that lawful use of the weapon cannot be considered as proof of the unlawful intent element of the possession charge. For example, the jury's intent determination may rest on defendant's conduct "during the continuum of time that he possessed it prior to the shooting" … . People v Castillo, 2024 NY Slip Op 05817, CtApp 11-21-24

Practice Point: If a defendant is charged with murder and criminal possession of a weapon and is entitled to a jury instruction on the the justification defense, the jury should be instructed that it cannot find the defendant possessed the weapon with the intent to use it unlawfully solely on the basis of the shooting, if the shooting is deemed justified.

November 21, 2024

MANSLAUGHTER, FAILURE TO MAINTAIN LIMOUSINE, BRAKE FAILURE.

DEFENDANT, WHO WAS IN CHARGE OF RENTING OUT THE LIMOUSINE, FAILED TO KEEP THE BRAKES IN GOOD REPAIR; BRAKE FAILURE CAUSED A CRASH WHICH KILLED 20 PEOPLE; DEFENDANTS' MANSLAUGHTER CONVICTIONS AFFIRMED (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Garry, affirmed the manslaughter convictions of the defendant who was responsible for renting out a limousine which experienced catastrophic brake failure resulting in the deaths of 17 passengers, the driver and two pedestrians: The opinion is too detailed to fairly summarize here. Each argument raised by the defense was rejected after a thorough discussion of the relevant facts:

In October 2018, a stretch limousine for hire crashed at the bottom of a hill in Schoharie County, killing all 17 of its passengers, two pedestrians and the driver of the vehicle. An investigation revealed that the limousine had experienced catastrophic brake failure, attributable to protracted neglect of proper inspection, maintenance and repairs. During the relevant period, defendant was handling the day-to-day affairs of the business that rented out the limousine, including putting the vehicle into service on the day of the accident. Defendant was subsequently indicted on 20 counts of manslaughter in the second degree and 20 counts of criminally negligent homicide. Following his guilty plea to the lesser counts and later withdrawal of that plea, the matter proceeded to trial. A jury found defendant guilty of the manslaughter counts, and Supreme Court sentenced him to 20 concurrent prison terms of 5 to 15 years. * * *

The … proof was sufficient for the jury to conclude beyond a reasonable doubt that defendant was aware of and consciously disregarded the state of disrepair of the limousine's braking system — including by avoiding proper inspection, neglecting appropriate maintenance and affirmatively rejecting necessary repairs. Given the circumstances, including the age of this oversized vehicle transporting passengers, the jury could find that defendant disregarded a substantial and unjustifiable risk of death. As the proof also made clear that such disregard was a gross deviation from the standard of conduct of reasonable persons in defendant's situation, the People proffered legally sufficient evidence to establish the required mental state for second degree manslaughter. People v Hussain, 2024 NY Slip Op 05513, Third Dept 11-7-24

Practice Point: Here defendant's failure to keep the brakes of a rental limousine in good repair, leading to the deaths of 20 people when the brakes failed, demonstrated disregard of a substantial and unjustifiable risk of death, warranting the manslaughter convictions.

November 7, 2024

PLAIN VIEW EXCEPTION TO WARRANT REQUIREMENT NOT APPLICABLE.

THE POLICE HAD TO "MANIPULATE" THE CHECKS TO DETERMINE THEY WERE FORGED; THEREFORE THE "PLAIN VIEW" EXCEPTION TO THE SEARCH WARRANT REQUIREMENT WAS NOT APPLICABLE; INDICTMENT DISMISSED (FOURTH DEPT).

The Fourth Department, suppressing evidence seized under the "plain view" exception to the warrant requirement, held the police had to "manipulate" the checks which were in plain view to determine they were forged. Because the nature of the checks was not apparent until they were "manipulated," the "plain view" exception was not applicable:

… [W]e conclude that the People did not meet their burden of establishing the third element of the plain view exception—i.e., that the incriminating nature of the seized items was immediately apparent. In making such a determination, we must consider whether "the facts available to the [police] officer would warrant a [person] of reasonable caution in the belief . . . that [the] items may be contraband or stolen property or useful as evidence of a crime" … . This is a probable cause standard—i.e., there need not be "certainty or near certainty" about the incriminating nature of the seized items … . That element is not satisfied, however, "where the object [to be seized] must be moved or manipulated before its illegality can be determined" … . Indeed, "[s]uch a search or seizure may not be upheld without proof that the [police] officer who moved or manipulated the object had probable cause to believe that the object was evidence or contraband at the time that it was moved or manipulated" … . Still, "[a] truly cursory inspection—one that involves merely looking at what is already exposed to view, without disturbing it—is not a search" … . People v Howard, 2024 NY Slip Op 05733, Fourth Dept 11-15-24

Practice Point: Here the fact the checks were forged was not apparent until the police "manipulated" them. Therefore the "plain view" exception to the search-warrant requirement was not applicable and the checks should have been suppressed.

November 15, 2024

RESTITUTION, JUDGES.

COUNTY COURT SHOULD NOT HAVE ORDERED RESTITUTION, WHICH WAS NOT MENTIONED IN DEFENDANT'S COOPERATION AGREEMENT, WITHOUT FIRST GIVING DEFENDANT THE OPPORTUNITY TO WITHDRAW HIS GUILTY PLEA (THIRD DEPT).

The Third Department, reversing County Court, determined the judge should not have made restitution part of defendant's sentence without giving the defendant the opportunity to withdraw his guilty plea or accept the enhanced sentence:

"[A] sentencing court may not impose a more severe sentence than one bargained for without providing the defendant the opportunity to withdraw his or her plea" … . The People concede that the payment of restitution was not part of the cooperation/plea agreement and that defendant should have been given the opportunity to either withdraw his plea or accept the enhanced sentence of restitution. Accordingly, we must remit the matter to County Court to either impose the agreed-upon sentence or give defendant the option of withdrawing his plea before imposing the restitution … . People v Nolasco-Gutierrez, 2024 NY Slip Op 05606, Third Dept 11-14-24

Practice Point: Here defendant pled guilty in accordance with a cooperation agreement which did not include restitution as part of the sentence. Imposing restitution without giving the defendant the opportunity to withdraw his plea required vacation of the restitution order.

November 14, 2024

RESTITUTION, JUDGES.

THE JUDGE SHOULD NOT HAVE DELEGATED THE COURT'S AUTHORITY TO DETERMINE RESTITUTION TO THE PROSECUTOR, MATTER REMITTED FOR A HEARING (THIRD DEPT).

The Third Department, remitting the matter for a restitution hearing despite defendant's failure to preserve the error, determined the record was insufficient to support the ordered restitution. The judge merely accepted the People's restitution order, thereby improperly delegating the court's role to the prosecutor:

… [I]t appears County Court impermissibly delegated its authority to the People to determine the amount of restitution owed and that said amount has no factual predicate in the record before us. "Whenever the court requires restitution . . . to be made, the court must make a finding as to the dollar amount of the fruits of the offense and the actual out-of-pocket loss to the victim[s] caused by the offense. In making this finding, the court must consider any victim impact statement provided to the court. If the record does not contain sufficient evidence to support such finding or upon request by the defendant, the court must conduct a hearing upon the issue" (Penal Law § 60.27 [2] …). At the time of sentencing, the People noted that they had submitted a restitution order for the court to sign[*2]. Seemingly reading from that order, the court ordered defendant to pay restitution in the amount of $773, plus a five percent surcharge in the amount of $38.65, for a total sum of $811.65. The restitution order provided to this Court is not accompanied by any documentation, and neither the presentence report nor the victims' impact statements at sentencing addressed pecuniary losses. Although defendant's failure to object at the time of sentencing renders his restitution arguments unpreserved … , as the record before us does not include any proof to substantiate the amount of restitution ordered, we find it appropriate to exercise our discretion in the interest of justice and remit for the sole purpose of a restitution hearing … . People v Lester, 2024 NY Slip Op 05848, Third Dept 11-21-24

Practice Point: It is the judge, not the prosecutor, who makes a restitution determination, which must be supported by the record.

November 21, 2024

SENTENCING, CONSECUTIVE SENTENCES IMPROPER.

THE PROOF DID NOT SUPPORT A FINDING THAT THE ASSAULT SECOND AND CRIMINAL POSSESSION OF A WEAPON THIRD CONVICTIONS WERE BASED ON SEPARATE AND DISTINCT ACTS, THEREFORE CONSECUTIVE SENTENCES WERE NOT WARRANTED; DEFENDANT SHOULD NOT HAVE BEEN ADJUDICATED A SECOND FELONY OFFENDER BASED ON A NEW JERSEY CONVICTION WHICH WAS NOT A FELONY IN NEW YORK (SECOND DEPT).

The Second Department, remitting the matter for resentencing, determined consecutive sentences were not supported by the proof and defendant should not have been adjudicated a second felony offender based upon a New Jersey conviction of burglary in the third degree which is not a felony under New York law:

The defendant contends that the Supreme Court erred in imposing consecutive sentences upon his convictions of assault in the second degree and criminal possession of a weapon in the third degree under count 7 of the indictment. Under Penal Law § 70.25(2), a sentence imposed "for two or more offenses committed through a single act or omission, or through an act or omission which in itself constituted one of the offenses and also was a material element of the other . . . must run concurrently" … . Further, "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" (id. [internal quotation marks omitted]). Here, the defendant correctly argues, and the People correctly concede, that because there was no designation of the alleged dangerous instrument used in committing the offense of assault in the second degree, the People failed to establish that this count and the charge of criminal possession of a weapon in the third degree under count 7 of the indictment were based upon separate and distinct acts … . Therefore, the court erred in sentencing the defendant to consecutive prison terms on the second-degree assault count and the criminal possession of a weapon in the third degree count with respect to his possession of pepper spray … .

Further, although the defendant failed to preserve for appellate review his contention that he was improperly sentenced as a second felony offender, we

consider this issue in the exercise of our interest of justice jurisdiction (see CPL 470.15[6] …). The defendant's prior conviction of burglary in the third degree in New Jersey does not constitute a felony in New York for the purposes of enhanced sentencing … . People v Frank, 2024 NY Slip Op 05452, Second Dept 11-6-24

Practice Point: If the record does not demonstrated two convictions were based separate and distinct acts, consecutive sentences are not available.

Practice Point: The New Jersey "burglary third degree" offense is not a felony under New York law and cannot be the basis for second felony offender status.

November 6, 2024

SENTENCING, DOMESTIC VIOLENCE SURVIVORS JUSTICE ACT, APPEALS.

NO APPEAL LIES FROM COUNTY COURT'S DISMISSAL WITHOUT PREJUDICE OF DEFENDANT'S APPLICATION FOR RESENTENCING UNDER THE DOMESTIC VIOLENCE SURVIVORS JUSTICE ACT (DVSJA).

The Third Department, in a full-fledged opinion by Justice Powers, affirming County Court, determined no appeal lies from the dismissal-without-prejudice of defendant's application for resentencing under the Domestic Violence Survivors Justice Act (DVSJA):

… [County Court] dismissed the application without prejudice finding that, although she met the step one eligibility criteria for an alternative sentence, "there [was] no [corroborating] evidence nor even allegations presented that [d]efendant was, at the time of the offense, a victim of domestic violence subjected to substantial abuse inflicted by a member of her family or household" as required by CPL 440.47 (2) (c) … . * * *

Where, as here, the Legislature specifically provides for appealability of certain orders but not others, "an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded" … . "[S]ince the Legislature failed to provide for an appeal from the [dismissal] of an application for resentencing pursuant to [Penal Law § 60.12 and CPL 440.47 (2) (c)], no appeal was intended" … . "Where the statutory language is clear and unambiguous, the court should construe it so as to give effect to the plain meaning

of the words used" … . Here, the Legislature intended a different result as to the appealability of orders dismissing without prejudice under step one or step two and an order denying an application on the merits after a hearing under step three, and this Court must give effect to that intention … . Had an appeal from a dismissal without prejudice been intended under step one or step two of the DVSJA, "the [L]egislature could easily have so stated" … . Rather, the language utilized by the Legislature — specifically that dismissal is without prejudice — mandates that the appropriate remedy in this situation is for a defendant to file a new application satisfying the evidentiary requirements of CPL 440.47. Thus, as "[a]ppeals in criminal cases are strictly limited to those authorized by statute," this appeal is not properly before this Court and must be dismissed … . People v Melissa OO., 2024 NY Slip Op 05920, Third Dept 11-27-24

Practice Point: Criminal appeals are creatures of statutes. Here the DVSJA did not provide for an appeal of the dismissal-without-prejudice of defendant's application for resentencing. County Court dismissed the application because defendant did not submit evidence she was a victim of domestic abuse.

November 27, 2024

SENTENCING, FAILURE TO FILE SECOND FELONY OFFENDER STATEMENT.

THE PEOPLE'S FAILURE TO FILE A SECOND FELONY OFFENDER STATEMENT RENDERED THE SENTENCE INVALID AS A MATTER OF LAW (THIRD DEPT).

The Third Department, vacating defendant's sentence, noted that, absent defendant's consent, the People's failure to file a second felony offender statement rendered the sentence invalid as a matter of law:

… [D]efendant first argues that Supreme Court sentenced him illegally as a second felony offender. Although the People note that defendant's argument is unpreserved, they concede that they neglected to file a second felony offender statement prior to sentencing (see CPL 400.21 [2]). "While we have previously held that substantial compliance with this statute is adequate when the defendant admits the prior felony and that errors or omissions in the statement may be waived by an admission by the defendant, we have also held that compliance with the

statute is mandatory and that complete failure to file a second felony offender statement prior to sentencing renders the sentence invalid as a matter of law" … . Accordingly, we vacate the sentence imposed and remit the matter to Supreme Court for the filing of a predicate felony offender statement and resentencing in accordance with the law. People v Kane, 2024 NY Slip Op 05850, Third Dept 11-21-24

Practice Point: Where a defendant does not admit the prior felony, the People's failure to file a second felony offender statement invalidates the sentence.

November 21, 2024

SENTENCING, PRIOR DEFECTIVE GUILTY PLEA CANNOT BE USED AS A PREDICATE.

DEFENDANT'S 2013 GUILTY PLEA WAS DEEMED DEFECTIVE BECAUSE THE JUDGE FAILED TO ENSURE THE DEFENDANT UNDERSTOOD THE CHARGE; BECAUSE THE 2013 CONVICTION WAS UNCONSTITUTIONALLY OBTAINED, IT CANNOT BE A BASIS, IN 2020, FOR SENTENCING THE DEFENDANT AS A PERSISTENT VIOLENT PREDICATE FELON; SENTENCE VACATED (FIRST DEPT).

The First Department, remanding the matter for resentencing, determined defendant should not have been sentenced as a persistent violent predicate felon based on a 2013 guilty plea because the plea to attempted burglary second was constitutionally invalid. In the plea allocution, defendant indicated he formulated the intent to steal after he entered the dwelling, prompting the need for further questioning by the judge. The intent to steal must be formulated before entry:

During the allocution on defendant's 2013 plea to attempted burglary in the second degree, he asserted that, although he stole property from the subject dwelling, his intent at the time he unlawfully entered the premises was to tell its occupant to close the door. Because "the intent to commit a crime in the dwelling must be contemporaneous with the entry" under the burglary statute … , defendant's statement that he formed the requisite intent "only after [he] had entered . . . the [premises] unlawfully" negated an element of the crime to which he pleaded guilty … . This statement triggered the court's duty to make further inquiry in order to

ensure that defendant understood "the nature of the charge and that the plea [was] intelligently entered" … . The court failed to do so. To the extent that the court conducted a further inquiry, its questions did no more than establish that defendant stole property once he was inside the dwelling, without refuting his statement that he had not intended to steal the property at the time of entry, nor did defendant confirm that he wished to waive a defense on that basis … . On this record, "we cannot conclude that defendant's guilty plea was knowingly, voluntarily and intelligently made" … . Accordingly, since the requirements for enhanced sentencing have not been met, defendant's sentence as a persistent violent felony offender must be vacated … . People v Stewart, 2024 NY Slip Op 05546, First Dept 11-12-24

Practice Point: Here it appears defense counsel demonstrated the 2013 guilty plea was unconstitutionally obtained because of an error by the sentencing judge during the allocution. Defense counsel then successfully argued the 2013 conviction could not be a basis for the 2020 sentencing of defendant as a persistent violent predicate felon. The current status of the 2013 conviction was not discussed.

November 12, 2024

SEX OFFENDER REGISTRATION ACT (SORA), CONSIDERATION OF PRIOR CONVICTIONS WHICH DID NOT INVOLVE VIOLENCE OR SEXUAL CONDUCT.

MISDEMEANOR CONVICTIONS WHICH DID NOT INVOLVE VIOLENCE OR SEXUAL CONDUCT WERE PROPERLY CONSIDERED BY COUNTY COURT IN DENYING DEFENDANT'S REQUEST FOR A SORA RISK-LEVEL REDUCTION TO LEVEL ONE, DESPITE THE BOARD OF EXAMINERS OF SEX OFFENDERS' STATEMENT IT "WOULD NOT OPPOSE" A LEVEL ONE RISK ASSESSMENT (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Troutman, over an extensive three-judge dissent, determined County Court properly reduced defendant's SORA risk-level from three to two, and properly refused to reduce the risk-level to one. The Court of Appeals concluded the 2003 misdemeanor

convictions, which did not involve violence or sexual conduct, were properly considered by County Court in denying the level one assessment:

Defendant served 21 years in prison. At first, he denied responsibility for his criminal conduct and refused to participate in sex offender treatment, but he eventually took responsibility and enrolled in treatment, which he completed. Defendant was released to parole in 1998, and the sentencing court determined him to be a level three risk pursuant to SORA. … In 2003, while still on parole, defendant was convicted of two misdemeanors: attempted auto stripping and attempted possession of burglary tools. He has no other convictions since his 1998 release.

In 2021, defendant petitioned under Correction Law § 168-o (2) to modify his risk level classification to level one. Defendant argued that he posed a low risk of reoffense based on his engagement in one-on-one outpatient sex offender treatment from 1998 to 2008; his steady full-time employment, including his current job, which he had held for 17 years; his stable and loving relationship with his wife, whom he met in 2008; his role as stepfather to his wife's daughter; and his age of 66 years. Defendant also noted that he had fully complied with his SORA obligations since his release 23 years earlier and, aside from his 2003 misdemeanor conviction, had not reoffended. He submitted letters of support from his counselor, wife, and stepdaughter. In addition, he submitted the report of an expert psychologist who examined him and concluded that his risk of reoffense was low, and that requiring him to register at risk level three was no longer necessary for purposes of public safety. At the court's request … , the Board submitted an "updated recommendation" stating that it "would not oppose" defendant's request for a modification to level one. * * *

[The] evidence included the nature of the underlying offense, which defendant committed while on parole for a prior sex crime, defendant's prior offenses, and defendant's 2003 misdemeanor conviction of crimes committed while on parole for the underlying offense, for which he received a parole violation. Although the misdemeanors appear to have involved no violence or sexual component, we cannot conclude that the court's consideration of that factor, along with all the other factors, constitutes an abuse of discretion as a matter of law. * * *

… [T]he question is whether his more recent criminal conduct bears on the risk of his committing future sex offenses. Under the dissent's proposed rule, the SORA court would be prohibited from considering that defendant violated the law and his

parole [in 2003] when he was caught with burglary tools after being convicted of raping a young woman during the course of a burglary also committed while defendant was on parole … . We decline to endorse that untenable result. People v Shader, 2024 NY Slip Op 05873, CtApp 11-26-24

Practice Point: Here the Board of Examiners of Sex Offenders (Board) did not oppose a defendant's request for a risk-level reduction to level one. The Court of Appeals upheld County Court's level-two designation, which was based in part of two misdemeanor convictions of nonviolent offenses which did not involve sexual conduct. There was an extensive dissent.

November 26, 2024

SEX OFFENDER REGISTRATION ACT (SORA), OUT-OF-STATE CONVICTION.

THE NEW YORK STATUTE DESIGNATING DEFENDANT A SEXUALLY VIOLENT OFFENDER WOULD BE UNCONSTITUTIONAL AS APPLIED IF THE CALIFORNIA OFFENSE UPON WHICH THE DESIGNATION IS BASED WAS NON-VIOLENT; MATTER REMITTED FOR A RULING WHETHER THE CALIFORNIA OFFENSE WAS VIOLENT OR NON-VIOLENT (FOURTH DEPT).

The Fourth Department, remitting the matter to County Court, over a five-justice concurrence, determined County Court must rule on whether defendant's California conviction involved a violent or a non-violent sexual offense. If the facts of the case indicate the California offense was non-violent, the New York statute which requires designation of the defendant as a sexually violent offender would be unconstitutional as applied:

Defendant appeals from an order insofar as it designated him a sexually violent offender under the Sex Offender Registration Act ([SORA] Correction Law § 168 et seq.). Due to the designation, which is based on a felony conviction in California requiring defendant to register as a sex offender in that state, defendant is subject to lifetime registration as a sex offender in New York even though County Court determined that he is only a level one risk. The designation was made pursuant to Correction Law § 168-a (3) (b) insofar as it 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." Although defendant concedes that he qualifies as a sexually violent offender under the foreign registration clause of § 168-a (3) (b), he contends that the provision is unconstitutional on its face and as applied to him under the Due Process Clause of the Fourteenth Amendment to the Federal Constitution (US Const, 14th Amend, § 1), inasmuch as his out-of-state felony conviction was for a nonviolent offense. Defendant further contends that the foreign registration clause violates the Privileges and Immunities Clause of the Federal Constitution … . * * *

If the felony of conviction, by virtue of its statutory elements … , involved sexually violent conduct, then the foreign registration clause of Correction Law § 168-a (3) (b) is not unconstitutional as applied to defendant inasmuch as he committed a violent sex offense even if it does not include all of the essential elements of one of the sexually violent offenses in New York enumerated in Correction Law § 168-a (3) (a). If, however, defendant was convicted of an out-of-state felony that is nonviolent in nature, we would conclude that the statute is unconstitutional as applied to defendant … . People v Grzegorzewski, 2024 NY Slip Op 05657, Fourth Dept 11-15-24

Practice Point: The statute which requires defendant be designated a sexually violent offender based upon an out-of-state conviction is unconstitutional as applied if the out-of-state offense was non-violent.

November 15, 2024

SEX OFFENDER REGISTRATION ACT (SORA), UPWARD DEPARTURE NOT JUSTIFIED.

DEFENDANT'S BIPOLAR DIAGNOSIS AND A STATEMENT INDICATING HIS FAILURE TO TAKE RESPONSIBILITY FOR THE OFFENSE DID NOT JUSTIFY AN UPWARD DEPARTURE FROM SORA RISK-LEVEL TWO TO THREE; TWO JUSTICE DISSENT (FOURTH DEPT).

The Fourth Department, over a two-justice dissent, determined the People did not demonstrate that an upward departure from SORA risk-level two to three was warranted:

… [W]e conclude that the People failed to prove by clear and convincing evidence that defendant is more likely to reoffend based on his bipolar diagnosis. The only evidence offered by the People at the SORA hearing was the report prepared by defendant's expert, who opined that "impaired judgment is a common disability in Bipolar Disorder, as is impulsiveness." The expert further opined that defendant's "judgment was impaired by his disorder" when he committed the crimes, and that he "acted impulsively because of his then undiagnosed (and inadequately treated) illness." The fact that defendant's bipolar condition may have impaired his judgment and decreased his ability to control impulsive sexual behavior when he committed the qualifying offenses does not mean, ipso facto, that he is at a greater risk of reoffending in the future as a result of his bipolar condition. Defendant's mental illness was undiagnosed and untreated when he committed the qualifying offenses, and there is no evidence in the record indicating a reluctance or inability on defendant's part to follow treatment recommendations and take prescribed medications now that he has been properly diagnosed.

We further conclude that an upward departure was not warranted based on defendant's post-offense statement to one of the victims. Although the statement in question may show, as the People asserted, that defendant failed to accept responsibility for his crimes, an offender's failure to accept responsibility is taken into account under risk factor 12 on the risk assessment instrument. Thus, an upward departure cannot be granted based on defendant's statement … . People v Cohen, 2024 NY Slip Op 05658, Fourth Dept 11-15-24

Practice Point: Here defendant's bipolar diagnosis and a statement to the victim indicating his failure to take responsibility for the offense did not justify an upward department from SORA risk-level two to three. The evidence did not demonstrate the bipolar disorder increased the risk of reoffending and the statement was already taken into account under risk factor 12.

November 15, 2024

WAIVER OF INDICTMENT INVALID.

THERE WAS NO PROOF THE WAIVER OF INDICTMENT WAS SIGNED IN OPEN COURT IN THE PRESENCE OF COUNSEL; GUILTY PLEA VACATED AND SUPERIOR COURT INFORMATION DISMISSED (THIRD DEPT).

The Third Department, vacating the guilty plea and dismissing the superior court information, determined the record did not demonstrate the defendant signed the waiver of appeal in open court in the presence of counsel:

… [T]he plea minutes are silent as to when the undated waiver was executed by defendant, and during the colloquy County Court referred to defendant as having "signed" the waiver in the past tense … . Neither the waiver nor the plea colloquy confirms that defendant signed the written waiver in the presence of counsel. Further, although County Court indicated in the undated order approving the waiver that it was generally satisfied that the requirements of CPL 195.10 and 195.20 had been met, nothing in the order explicitly confirms "that the waiver was signed in open court" in the presence of counsel . Thus, … the record does not reflect that defendant's waiver of indictment passes constitutional and statutory muster, and it follows that defendant's guilty plea must be vacated and the underlying SCI dismissed … . People v Trapani, 2024 NY Slip Op 05846, Third Dept 11-21-24

Practice Point: When a defendant waives his right to an indictment and agrees to plead to a superior court information, the record must reflect the waiver was made in open court and in the presence of counsel. Absent proof of those statutory and constitutional requirements the waiver is invalid.

Similar issue and result in People v Rupp, 2024 NY Slip Op 05845, Third Dept 11-21-24.

November 21, 2024

WITNESS-IDENTIFICATION, EXPERT EVIDENCE.

THE CRITERIA FOR ALLOWING EXPERT TESTIMONY ON WITNESS-IDENTIFICATION OF A DEFENDANT CLARIFIED; WHETHER TO ALLOW SUCH EVIDENCE DOES NOT TURN ON THE EXISTENCE OR THE STRENGTH OF CORROBORATING EVIDENCE; HERE EXPERT TESTIMONY ON CROSS-RACIAL IDENTIFICATION WAS PROPERLY ALLOWED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Troutman, over an extensive dissent, affirming defendant's conviction, clarified the criteria for admitting expert testimony on witness identification of a defendant. Here limited expert testimony was allowed on cross-racial identification:

Questions of the admissibility and scope of expert testimony concerning the factors that affect the reliability of eyewitness identifications in a particular case are addressed to the trial court's sound discretion … . Courts deciding those questions apply traditional evidentiary principles … , which require the courts to weigh the testimony's probative value against its prospect of causing undue prejudice to the opposing party, confusing the issues, misleading the jury, or unduly delaying trial … .

On an application to admit expert testimony of this sort, the trial court may need to determine whether the expert testimony is beyond the ken of the average juror or generally accepted in the scientific community … . Indeed, in Abney, we reversed and ordered a new trial where the trial court abused its discretion in denying an application to present expert testimony on several factors, concluding that the court should have held a Frye hearing to resolve the issue of general acceptance … . While general acceptance may be established at a Frye hearing, a hearing is not necessary in all cases … . General acceptance may be established through legal precedent … . Where the defendant fails to demonstrate that a topic of the proffered expert testimony is generally accepted in the relevant scientific community, the trial court should exclude or limit the testimony as appropriate … .

Courts must not decide whether evidence is admissible based solely on the existence or strength of corroborating evidence … . Nor should courts require adequate corroborating evidence as a prerequisite to weighing other considerations pertinent to admissibility … . Rather, courts should be guided by "whether the

proffered expert testimony ‘would aid a lay jury in reaching a verdict’ ” … . People v Vaughn, 2024 NY Slip Op 05874, CtApp 111-26-24

Practice Point: Whether to allow expert testimony on witness-identification of a defendant does not turn on the existence or strength of corroborating evidence.

November 26, 2024