NEW YORK APPELLATE DIGEST, INC.

Criminal Law
Reversal Report
January 2025

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 January 2025. 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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THE STANDARD FOR AN INTERMEDIATE APPELLATE COURT'S REVIEW OF A SENTENCE CLARIFIED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Troutman, over a three-judge dissenting opinion, remitted the matter to the Appellate Division for a determination whether a sentence reduction is warranted using the correct standard. The defendant need not demonstrate extraordinary circumstances or an abuse of discretion by the sentencing court to warrant a review of the sentence by the intermediate appellate court:

The intermediate appellate courts are empowered to reduce a sentence that, though legal, is "unduly harsh or severe" (CPL 470.15 [6] [b]). The decisions whether a sentence warrants reduction under that standard, and the extent to which the sentence should be reduced, are committed to the discretion of the intermediate appellate court, which has "broad, plenary power" to reduce the sentence "without deference to the sentencing court" … . A defendant need not demonstrate extraordinary circumstances or abuse of discretion by the sentencing court in order to obtain a sentence reduction … . People v Brisman, 2025 NY Slip Op 00123, CtApp 1-9-25

Practice Point: The correct standard for review of a sentence in an intermediate appellate court is whether the sentence is "unduly harsh or severe." The decision to reduce a sentence is committed to the discretion of the intermediate court without deference to the sentencing court. The defendant need not show extraordinary circumstances or an abuse of discretion by the sentencing court.

January 9, 2025

ATTORNEYS, INEFFECTIVE ASSISTANCE, CONSTITUTIONAL LAW.

THE MAJORITY AFFIRMED WITHOUT DISCUSSION; JUDGE RIVERA IN A DISSENTING OPINION JOINED BY JUDGE WILSON WOULD HAVE REVERSED ON INEFFECTIVE ASSISTANCE GROUNDS (CT APP).

The Court of Appeals affirmed defendant's burglary, assault, criminal contempt and resisting arrest convictions without discussion. Judges Rivera and Wilson would have reversed on ineffective assistance grounds:

From the dissent:

Counsel's performance here was deficient in several respects and no reasonable defense strategy explains those failings. Before trial, counsel's boilerplate motion referenced matters not at issue and lacked factual support in several respects, evincing counsel's failure to properly investigate defendant's case. Counsel also failed to show defendant video crucial to the prosecution's case until shortly before trial—and even then, only after defendant complained to the court and the court ordered counsel to provide the video. During trial, counsel's cross-examination of the victim resulted in admission of defendant's criminal history, even though the trial court had denied the prosecution's request to present that same history should defendant testify. Counsel then failed to object to an obviously-ambiguous jury instruction that might have resulted in a conviction on the top count. Despite these glaring errors, the majority concludes that defendant received constitutionally-acceptable representation. This outcome ignores our precedents and reduces the right to effective counsel to a platitude spoken to appease defendants. Our State Constitution's guarantee of effective assistance ensures the integrity of the process and a fair trial—including for those defendants who appear guilty. Counsel's many errors fell below that standard. I would therefore reverse and order a new trial. People v Howard, 2025 NY Slip Op 00184, CtApp 1-14-25

Practice Point: Although the majority affirmed the convictions without discussion, the two-judge dissenting opinion described "glaring errors" by defense counsel in detail.

January 14, 2025

ATTORNEYS, PROSECUTORIAL MISCONDUCT, APPEALS, EVIDENCE.

DURING SUMMATION THE PROSECUTOR REPEATEDLY ACCUSED DEFENDANT OF LYING, VOUCHED FOR THE CREDIBILITY OF THE COMPLAINANT AND MISSTATED CRITICAL EVIDENCE; NEW TRIAL ORDERED (SECOND DEPT).

The Second Department, reversing defendant's convictions and ordering a new trial, determined the attempted murder and burglary convictions were against the weight of the evidence and prosecutorial misconduct deprived defendant of a fair trial:

… [D]uring summation, the prosecutor, inter alia, repeatedly accused the defendant of lying, improperly vouched for the credibility of the complainant, and misstated the critical evidence to support the charge of attempted murder in the second degree. Indeed, the prosecutor repeatedly accused the defendant of lying on the witness stand by stating, among other things, that the defendant was "caught in a lie" and was being "less than truthful," and that "[w]hen she thinks it is going to benefit her, she is quick to tell you a lie" … . The prosecutor also improperly stated that to believe the defendant's version of the events, the jury would have to believe "that [the complainant] is lying about everything she told you, you have to believe she's a complete liar," that the police officers "are lying too," and that "[e]veryone is out to get this defendant" … . Additionally, the prosecutor improperly vouched for the complainant's credibility by repeatedly telling the jury that the complainant was, inter alia, "honest" and "telling the truth," and that her testimony "was plausible and true" … . Further, the prosecutor misstated the critical evidence as to a doctor's testimony regarding the depth of the stab wound to puncture the complainant's chest cavity by stating that "at a minimum it would need to be a[n] inch or two to puncture someone's chest cavity" … . Rather, the doctor estimated that the stab wound would have to be "about an inch" deep. As this evidence was critical to support the charge of attempted murder in the second degree, the prosecutor's remarks were improper. People v Gallardo, 2025 NY Slip Op 00460, Second Dept 1-29-25

Practice Point: Here the prosecutor, in summation, accused defendant of lying, vouched for the credibility of the complainant, and misstated critical evidence. That was enough to warrant a new trial.

January 29, 2025

CONSTITUTIONAL LAW, RIGHT TO REMAIN SILENT, APPEALS, HARMLESS ERROR.

DEFENDANT'S UNEQUIVOCAL ASSERTION OF HIS RIGHT TO REMAIN SILENT WAS IGNORED REQUIRING SUPPRESSION OF THE SUBSEQUENT STATEMENTS; THE ERROR WAS DEEMED HARMLESS (THIRD DEPT).

The Third Department determined defendant was improperly questioned after he unequivocally asserted his right to remain silent, but found the error harmless:

Approximately 45 minutes into the interview, after defendant had been provided his Miranda rights and answered numerous inquiries, defendant told the investigators that just prior to the shooting he observed a fight between a man and a woman on Crane Street. Defendant then provided no audible responses to investigators' questions for several minutes. One of the investigators repeated the inquiry as to the next thing defendant remembered, and, after about eight seconds of silence, defendant said "get the f**k out of here b***h, you trying to play me." The investigator then asked defendant what he said and defendant repeated his statement. This prompted the investigator to respond that he would leave if defendant wanted him to. However, the investigator then attempted to persuade defendant to continue the interview, stressing that the investigators needed defendant's side of the story in light of the damaging evidence against him. It is evident from this interaction that the investigators understood defendant's statement as an unequivocal request for them to leave the room and for the interview to end … . By continuing the interview without providing further warnings, defendant's right to remain silent was violated and the remainder of the recorded interview should have been suppressed … .

Nevertheless, our inquiry is not complete, as we must assess whether that error was harmless. "Where, as here, the asserted error is of a constitutional dimension, the error may be deemed harmless only if there is no reasonable possibility that the error might have contributed to defendant's conviction and that it was thus harmless beyond a reasonable doubt" … . … [T]he … evidence of defendant's guilt, which included multiple angles of video footage that depicted defendant on scene and discharging several projectiles from his firearm at a crowd, together with

witness testimony that corroborated the footage, was overwhelming. * * * … [W]e conclude that the error was harmless under the constitutional standard and that reversal is not required … . People v Dorvil, 2025 NY Slip Op 00246, Third Dept 1-16-25

Practice Point: Ignoring defendant's unequivocal assertion of his right to remain silent is an error of constitutional dimension which will be deemed harmless only if there is "no reasonable possibility" the error might have contributed to defendant's conviction.

January 16, 2025

INVENTORY SEARCH OF VEHICLE, EVIDENCE.

THE IMPOUNDMENT OF DEFENDANT'S VEHICLE WAS NOT DEMONSTRATED TO HAVE BEEN NECESSARY AND THE PROCEDURES FOR AN INVENTORY SEARCH OF THE VEHICLE WERE NOT FOLLOWED; THE SEIZED HANDGUN SHOULD HAVE BEEN SUPPRESSED (THIRD DEPT).

The Third Department, granting defendant's motion to suppress a handgun, over a dissent, determined the impoundment of defendant's vehicle after a traffic stop was unnecessary and the search of the vehicle was not a valid inventory search:

Maggs' [the arresting officer's] ambiguous testimony — essentially asserting that any vehicle parked on the street would be unsafe if unattended — falls short of demonstrating that the subject vehicle was not reasonably secure and safe in this residential area, among the many other vehicles parked curbside … . Further, although departmental policy did not require Maggs to investigate whether defendant's father, who was not present at the scene, was in fact willing and able to take control of the vehicle, "facts were brought to [Maggs'] attention to show that impounding would be unnecessary" … . Moreover, defendant's inquiry as to whether the vehicle could be picked up at some later point is tantamount to a request to leave the vehicle where it was, presenting yet another situation in which a vehicle should not be towed per written departmental policy. Given the People's failure to demonstrate that the vehicle was lawfully impounded at the time of the inventory search, defendant's motion should have been granted.

The People also failed to demonstrate that the so-called inventory search was conducted in compliance with established procedures … . * * *

There is also considerable indicia that the purported inventory search was a pretext to search for contraband, including the canvassing of defendant's residence, the absence of any traffic citation, and the fact that the decision to arrest defendant and impound the vehicle came only after defendant refused to provide his consent to search the vehicle … . People v Gray, 2025 NY Slip Op 00249, Third Dept 1-16=25

Practice Point: Here the vehicle could have been safely left parked where it was, or it could have been picked up by someone. To impound the vehicle therefore violated the police department's regulations. Because the People did not prove the vehicle was legally impounded at the time it was searched the suppression motion should have been granted.

Practice Point: The hallmark of a valid inventory search is an inventory list, which was not created here.

January 16, 2025

JUDGES, MOLINEUX ERROR WARRANTED NEW TRIAL, ATTORNEYS, FAILURE TO FILE REDUCED ACCUSATORY INSTRUMENT REQUIRED DISMISSAL.

"MOLINEUX" EVIDENCE DEFENDANT HAD PREVIOUSLY THREATENED HIS WIFE WITH A HANDGUN FOR PERCEIVED INFIDELITY SHOULD NOT HAVE BEEN ADMITTED IN THIS PROSECUTION ALLEGING DEFENDANT POSSESSED A HANDGUN WITH THE INTENT TO USE IT AGAINST HIS STEPCHILDREN; NEW TRIAL ORDERED; THE PEOPLE'S FAILURE TO FILE A REDUCED ACCUSATORY INSTRUMENT AFTER THE JUDGE REDUCED THE CHARGE IN COUNT 3 REQUIRED DISMISSAL OF THAT COUNT (FOURTH DEPT).

The Fourth Department determined that the judge's Molineux ruling was an error requiring reversal and the People's failure to file an amended accusatory instrument after the judge reduced the charge required dismissal of the related count:

… [T]he charge of criminal possession of a weapon in the second degree is based on allegations that defendant possessed a handgun with the intent to use it unlawfully against his stepchildren, and the People sought to admit the evidence of defendant's "systematic abuse" of his wife to show defendant's motive, intent, absence of mistake, and identity in this case. The evidence, however, is not directly relevant to motive. The evidence of defendant's past conduct demonstrated a pattern of threatening his wife with the gun for perceived infidelity, but it did not complete a narrative that would explain or support defendant's sudden aggression against his stepchildren … . The evidence also is entirely unnecessary to establish defendant's intent. Mere possession of a firearm is "presumptive evidence of intent to use [it] unlawfully against another" (Penal Law § 265.15 [4]). Further, there is no question whether defendant's alleged actions were the result of accident or mistake … , and defendant's identity is not at issue.

Moreover, even if the evidence is relevant to an exception under Molineux, the court abused its discretion in determining that its probative value outweighed its potential for prejudice … . Evidence that defendant previously threatened his wife with a gun showed that defendant " 'had allegedly engaged in similar behavior on a prior occasion . . . —classic propensity evidence' " … . It is " 'of slight value when compared to the possible prejudice to [defendant]' and therefore should not have been admitted" … .

… [B]efore jury selection and at the People's request, the court reduced the charge in count 3 of the indictment from criminal possession of a weapon in the third degree … to criminal possession of a weapon in the fourth degree … . The People thereafter failed to file a reduced or amended accusatory instrument. Inasmuch as " '[a] valid and sufficient accusatory instrument is a nonwaivable jurisdictional prerequisite to a criminal prosecution' " … , count 3 of the indictment must be dismissed … . People v Alexander, 2025 NY Slip Op 00539, Fourth Dept 1-31-25

Practice Point: Consult this decision for a clear demonstration of when evidence of a prior bad act which is similar to the charged offense should be excluded because the prejudice outweighs the probative value.

Practice Point: If the judge grants the People's request to reduce a charge prior to jury selection, the People must file a reduced accusatory instrument. Failure to do so requires dismissal of the related count in the indictment.

January 31, 2025

JUDGES, TRIAL IN DEFENDANT'S ABSENCE.

THE JUDGE DID NOT PROVIDE AN ADEQUATE STATEMENT OF THE REASONS FOR CONDUCTING THE TRIAL IN DEFENDANT'S ABSENCE; NEW TRIAL ORDERED (SECOND DEPT).

The Second Department, reversing defendant's convictions and ordering a new trial, determined the judge failed to provide an adequate statement of the reasons for conduction the trial in defendant's absence:

… [T]he defendant is entitled to a new trial because the County Court improperly conducted the trial in the defendant's absence. "Before proceeding in [a] defendant's absence, the court [must make an] inquiry and recite[ ] on the record the facts and reasons it relied upon in determining that [the] defendant's absence was deliberate" … . Here, the court failed to provide an adequate statement of reasons or bases for its determination that the defendant's absence from the trial was deliberate. Although the court stated that it was basing its determination on the defendant's "history" and "conduct within the last few days," it failed to detail the history and conduct upon which its determination was based … . People v Kerr, 2025 NY Slip Op 00236, Second Dept 1-15-25

Practice Point: Before a judge can conduct a trial in a defendant's absence, an adequate statement of the reasons must be in the record. If the statement is inadequate a new trial will be necessary.

January 15, 2025

JURORS, BATSON PROCEDURE, JUDGES, APPEALS.

THE TRIAL JUDGE COMPLETELY BYPASSED THE BATSON PROCEDURE WHEN DEFENSE COUNSEL OBJECTED TO THE PEOPLE'S PEREMPTORY CHALLENGES TO FOUR JURORS; ALTHOUGH THE JURORS HAD BEEN EXCUSED, THE BATSON OBJECTION WAS TIMELY; ALTHOUGH THE ERROR WAS NOT PRESERVED, THE APPEAL WAS CONSIDERED IN THE INTEREST OF JUSTICE; CONVICTION HELD IN ABEYANCE AND MATTER REMITTED; TWO JUSTICE DISSENT (FIRST DEPT).

The First Department, holding the judgment of conviction in abeyance and remitting the matter, in a full-fledged opinion by Justice Pitt-Burke, over a two-justice dissent, determined (1) the appeal raising an unpreserved objection to the trial judge's handling of a Batson challenge could be considered "in the interest of justice," and (2) the trial judge erroneously bypassed the Batson procedure for addressing whether racial discrimination was the basis for four of the prosecution's peremptory challenges. Defense raised the Batson challenge after the four jurors had been excused. The trial judge argued the challenge was untimely and the only remedy was a mistrial. Defense counsel argued, and the prosecution conceded, the challenge was timely, but defense counsel declined to request a mistrial. The First Department noted that remedies other than a mistrial were available—recalling the excused jurors, limiting the prosecution's peremptory challenges, or granting the defense additional peremptory challenges, for example:

Even if we were to agree that defendant's claim is unpreserved, we find that the trial court's errors here were critical, and not merely a case of putting the proverbial cart before the horse … . The trial court's actions, whether intentional or not, sidestepped the entire Batson protocol.

This Court's recent precedent has been to exercise its interest of justice jurisdiction to correct unpreserved Batson errors where a trial court has substantially deviated from the Batson protocol. * * *

Crucially, here we are not faced with a circumstance in which the trial court erroneously concluded that defendant did not meet his prima facie burden at step one … . In fact, as noted above, the trial court took notice of the preemptory challenges implemented by the prosecution.

This is also not a circumstance in which the court deviated from the Batson protocol by improperly combining steps two and three … . Rather, we are faced with a circumstance where the trial court failed to provide any inquiry into the question of discrimination by circumventing all three steps of the Batson protocol. People v Luke, 2025 NY Slip Op 00297, First Dept 1-21-25

Practice Point: The failure to adhere to the Batson three-step procedure for addressing discrimination in jury selection can be considered by an appellate court "in the interest of justice" despite the failure to preserve the error.

Practice Point: A Batson challenge raised after the jurors had been excused, but before jury selection is complete, is timely.

Practice Point: Remedies for a Batson challenge first raised after the jurors have been excused include recalling the excused jurors, limiting the prosecution's peremptory challenges, and granting the defense additional peremptory challenges.

January 21, 2025

JURORS, SUBSTITUTION OF ALTERNATE, EVIDENCE, JUDGES.

THE DEFENDANT DID NOT CONSENT, IN A WRITING SIGNED IN OPEN COURT, TO THE SUBSTITUTION OF AN ALTERNATE JUROR AFTER DELIBERATIONS HAD BEGUN REQUIRING A NEW TRIAL; THE SHOWUP IDENTIFICATION OF DEFENDANT WAS UNREASONABLE AND UNDULY SUGGESTIVE REQUIRING DISMISSAL OF THE COUNTS RELATED TO ONE OF THE TWO ROBBERIES (SECOND DEPT).

The Second Department, reversing one of defendant's robbery convictions and ordering a new trial, determined (1) a new trial is required because the judge did not obtain defendant's written and signed consent to the substitution of an alternate juror after deliberations had begun, and (2) the showup identification of the defendant was unreasonable and unduly suggestive, requiring dismissal of the counts relating to one of the two robberies (there was no identification testimony at the trial):

"Under CPL 270.35, once the jury has commenced deliberations an alternate juror may not be substituted for a regular juror unless the defendant consents to the

replacement . . . in writing . . . signed by the defendant in person in open court in the presence of the court" … . * * *

… [T]the People failed to establish that the showup identification was conducted in close temporal proximity to the crime … . Further, there was no unbroken chain of events or exigent circumstances that justified the showup identification, as the defendant was already under arrest for the second robbery … .

… [T]he People failed to establish that the showup identification was not unduly suggestive. Here, prior to the showup identification, the complainant was informed by the police officers that they had someone in custody who matched the description provided by the complainant. During the showup identification, the defendant was handcuffed with his hands behind his back and there were one to two police officers near the defendant as he was treated by emergency medical service providers. While these factors alone do not necessarily render a showup identification unduly suggestive, when viewed cumulatively with other factors, including that the officers informed the complainant that the defendant committed another crime around the corner, that the defendant's face was severely bruised and bleeding, and that it was "an active crime scene" with several surrounding officers dealing with witnesses "[y]elling and screaming," the showup identification was unduly suggestive … . People v Simon, 2025 NY Slip Op 00117, Second Dept 1-8-25

Practice Point: A defendant's consent to the substitution of an alternate juror after deliberations have begun must be in writing signed in open court.

Practice Point: Consult this decision for an example of a showup identification deemed unreasonable and unduly suggestive.

January 8, 2025

JURY INSTRUCTIONS, CIRCUMSTANTIAL EVIDENCE, JUDGES.

THE JUDGE'S FAILURE TO GIVE THE CIRCUMSTANTIAL-EVIDENCE JURY INSTRUCTION IN THIS ARSON/MURDER CASE REQUIRED REVERSAL AND A NEW TRIAL (FOURTH DEPT).

The Fourth Department, reversing defendant's arson, murder and reckless endangerment convictions, determined the trial judge should have given the circumstantial evidence instruction to the jury:

"It is well settled that a trial court must grant a defendant's request for a circumstantial evidence charge when the proof of the defendant's guilt rests solely on circumstantial evidence . . . By contrast, where there is both direct and circumstantial evidence of the defendant's guilt, such a charge need not be given" … . …[T]his was not a case with " 'both direct and circumstantial evidence of . . . defendant's guilt,' " which would negate the need for a circumstantial evidence charge … . Indeed, none of the evidence presented at trial "prove[d] directly a disputed fact without requiring an inference to be made" … .

Further, this is not "the exceptional case where the failure to give the circumstantial evidence charge was harmless error" … . Although " 'overwhelming proof of guilt' cannot be defined with mathematical precision" … , it necessarily requires more evidence of guilt than proof beyond a reasonable doubt. If that were not so, all errors would be harmless in cases where the verdict is not against the weight of the evidence … .

Here, the strongest evidence linking defendant to the crime is the video surveillance recording. As noted, that video, which is grainy and shot from a distance, depicts a flickering or glow as defendant exits the premises, which promptly grows into a blaze as defendant walks away. There is no way to discern from the video the exact moment that the fire is set or precisely how the fire began. "In order for the jury to find defendant guilty it had to make a number of logical leaps connecting defendant to the crimes charged. Had the trial court given the circumstantial evidence charge, alerting the jury of the need to exclude to a moral certainty every other reasonable hypothesis of innocence," we conclude that the verdict may have been different … . People v Exford, 2025 NY Slip Op 00536, Fourth Dept 1-30-25

Practice Point: In this arson and murder case, the failure to give the circumstantial-evidence jury instruction warranted a new trial. The jury was required to make several "logical leaps," based upon grainy video evidence showing defendant walking away from a building which caught fire, to convict.

January 31, 2025

PROBATION CONDITIONS, APPEALS, JUDGES.

THE WARRANTLESS SEARCH PROBATION CONDITION WAS NOT REASONABLY RELATED TO THE UNDERLYING OFFENSES; THE APPEAL WAIVER WAS INVALID; EVEN IF THE WAIVER WERE VALID THE IMPROPER PROBATION CONDITION COULD BE CONSIDERED ON APPEAL (FIRST DEPT).

The First Department determined defendant's waiver of appeal was invalid and the probation condition allowing warrantless searches of defendant's home, person and vehicle was not reasonable related to the underlying offenses. The court noted that defendant could appeal the probation condition even if the appeal waiver were valid:

We find defendant's appeal waiver invalid and unenforceable because the court did not adequately explain the nature of the appellate rights defendant was waiving, that the right to appeal was separate and distinct from the rights automatically forfeited upon a guilty plea or the limited claims that survive an appeal waiver … . The written waiver of appeal defendant signed "[was] not a complete substitute for an on-the-record explanation of the nature of the right to appeal, and some acknowledgment that the defendant is voluntarily giving up that right" … .

Although defendant's waiver of the right to appeal was invalid, defendant's sentence was not excessive. However, the special probation condition permitting warrantless searches of defendant's home, person and vehicle was not reasonably related to defendant's rehabilitation since the crime of which defendant was convicted did not involve weapons or drugs … . Contrary to the People's contention, a defendant's challenge to the condition of probation requiring consent to searches of their person, vehicle and place of abode by a probation officer for drugs, drug paraphernalia, weapons and contraband would have survived the

appeal waiver had it not been invalid … . People v Amparo, 2025 NY Slip Op 00389, First Dept 1-23-25

Practice Point: A written appeal waiver does not cure deficiencies in the judge's explanation of the forfeited rights.

Practice Point: A condition of probation which does not reasonably relate to the underlying offenses will be struck on appeal.

Practice Point: An improper probation condition can be appealed even if the error has not been preserved by objection.

January 23, 2025

PROBATION, REVOCATION OF, EVIDENCE, FAMILY LAW.

HEARSAY ALONE IS NOT ENOUGH TO SUPPORT REVOCATION OF PROBATION (FOURTH DEPT).

The Fourth Department, vacating the declaration of delinquency, determined the hearsay testimony of a police investigation was not sufficient to prove defendant violated the terms and conditions of a probationary sentence:

… [T]he evidence at the hearing that he committed a criminal offense while on probation consisted entirely of hearsay testimony from a police investigator. "While hearsay is admissible at a probation revocation hearing, hearsay alone does not satisfy the requirement that a finding of a probation violation must be based upon a preponderance of the evidence" … . Based on this record, we conclude that County Court's determination "was based on hearsay alone and therefore cannot stand" … . People v Hawkey, 2025 NY Slip Op 00569, Fourth Dept 1-31-25

Practice Point: Hearsay is admissible at a probation revocation hearing, but hearsay alone will not support revocation.

January 31, 2025

SEARCH INCIDENT TO ARREST, EVIDENCE.

THE PEOPLE DID NOT DEMONSTRATE THE OFFICER WHO SEARCHED DEFENDANT'S PERSON INTENDED TO ARREST THE DEFENDANT AT THE TIME OF THE SEARCH; THEREFORE THE SEARCH WAS NOT A VALID SEARCH INCIDENT TO ARREST AND THE SEIZED EVIDENCE SHOULD HAVE BEEN SUPPRESSED (FIRST DEPT).

The First Department, reversing defendant's conviction and dismissing the indictment, determined the People did not prove the officer who searched defendant's person intended to arrest the defendant at the time of the search. Therefore the People did not prove the evidence was seized pursuant to a valid search incident to arrest and the evidence should have been suppressed:

Defendant was entitled to suppression of the cocaine and money recovered in a search of his person, which occurred after officers pulled over the minivan in which he was a passenger for two traffic violations and detected a strong odor of marijuana as they approached the van. An officer saw loose marijuana on defendant's lap, asked him to step out of the car, and immediately frisked him, finding a small plastic bag in defendant's pocket and a significantly larger one inside the top of his underwear. The drugs were not recovered in a valid search pursuant to a lawful arrest because the record fails to show that the officer had any intention of arresting defendant before recovering the cocaine … . People v Aragon, 2025 NY Slip Op 00055, First Dept 1-7-25

Practice Point: Unless the People prove the officer who searched defendant's person intended to arrest the defendant when the search was done, the search is not a valid search incident to arrest and suppression is required.

January 7, 2025

SEARCH OF A CELL PHONE, SCOPE OF THE WARRANT, EVIDENCE, ATTORNEYS.

THE WARRANT REQUIRED THE SEIZED CELL PHONE BE "RETURNED TO THE COURT;" INSTEAD THE CELL PHONE WAS TURNED OVER TO A CYBERSECURITY CENTER WHICH CONDUCTED A FORENSIC EXAMINATION AND MEMORY EXTRACTION; DEFENSE COUNSEL'S FAILURE TO MOVE TO SUPPRESS THE INFORMATION GLEANED FROM THE CELL PHONE CONSTITUTED INEFFECTIVE ASSISTANCE; MANSLAUGHTER CONVICTION VACATED (FOURTH DEPT).

The Fourth Department determined defendant's motion to vacate her manslaughter conviction on the ground of ineffective assistance of counsel should have been granted. The search of defendant's cell phone far exceeded the scope of the warrant. The warrant required that the seized cell phone be "returned to the court." Instead the phone was turned over to a cybersecurity and forensics center where a forensic examination and memory extraction was conducted. A considerable amount of trial evidence was gleaned from the cell phone. Defense counsel did not move to suppress the cell-phone evidence:

We agree with defendant that she was denied effective assistance of counsel inasmuch as defense counsel failed to properly move to suppress the evidence obtained from her cell phone. "[I]ndiscriminate searches pursuant to general warrants 'were the immediate evils that motivated the framing and adoption of the Fourth Amendment' " … . A person's cell phone now contains at least as much personal and private information as their home and, thus, indiscriminate searches of cell phones cannot be permitted … . As defendant correctly contends, the forensic examination and memory extraction of her cell phone's contents exceeded the scope of the warrant, which only authorized OCSO to seize the cell phone and return it to the court … . Furthermore, the warrant failed to meet the particularity requirement inasmuch as it, inter alia, did not "specify the items to be seized by their relation to designated crimes" … . Thus, we conclude that defendant "established that a motion to suppress would likely be successful, and that defense counsel had no strategic or other legitimate explanation for not moving to suppress the evidence" … . People v Conley, 2025 NY Slip Op 00597, Fourth Dept 1-31-25

Practice Point: The Fourth Department noted that the search of a cell phone can reveal as much information as the search of a home. To be valid, a cell -phone search must be confined to the terms of the warrant, and the warrant must specify the items to be seized by their relation to the crimes.

January 31, 2025

SENTENCING, APPEALS, ATTORNEYS, JUDGES.

AT SENTENCING THE PROSECUTOR REFERENCED EXCULPATORY STATEMENTS ATTRIBUTED TO DEFENDANT IN THE PRESENTENCE REPORT BUT, WHEN GIVEN THE OPPORTUNITY, NEITHER DEFENDANT NOR DEFENSE COUNSEL ADDRESSED THE ISSUE; NOTWITHSTANDING THE SILENCE OF THE DEFENSE THE JUDGE SHOULD HAVE INQUIRED INTO WHETHER THE GUILTY PLEA WAS KNOWING AND VOLUNTARY; THERE WAS NO NEED TO PRESERVE THE ERROR FOR APPEAL (FIRST DEPT).

The First Department, vacating defendant's guilty plea, in a full-fledged opinion by Judge Singh, determined the prosecutor's mention of defendant's (Dupree's) exculpatory statements in the presentence report (PSR) required the judge to conduct an inquiry to ensure the guilty plea was knowing and voluntary, despite the defendant's and defense counsel's failure to address the statements at sentencing. Defendant and defense counsel were asked by the judge whether they wished to address the court and both said "no." The issue need not be preserved and was properly raised on appeal:

Before sentencing, Dupree was interviewed by the Department of Probation. He made the following statement: "I admitted to shooting someone in the leg and back and the bullet went through his chest. I was fighting with him (stranger) and was defending myself. I was drinking at the club and someone slipped something in my drink and I was leaving the club to get home. He saw me staggering and wanted to rob me." This statement was included in the presentence report (PSR).

At sentencing, Supreme Court asked whether the parties had any factual difficulties with the PSR. The prosecution replied, "I do have some factual difficulty relating to the defendant's statement which I do not believe there was a

valid self-defense claim. In fact, it is not a valid self-defense claim. . . . So I do take issue with that part of his statement as well as his claimed intoxication." The court then asked, "and anything for the defense?" to which defense counsel replied, "no." The court later asked whether the defense would like to be heard as to the promised sentence and, finally, asked Dupree himself if there was anything he would like to add. Neither Dupree nor his attorney addressed the statement in the PSR or the prosecution's comment made in open court. * * *

The prosecution … argues that if Supreme Court had to inquire further, it did so by asking if defense counsel had anything to say. Yet the Court of Appeals has never held that a court may satisfy its obligation merely by allowing the defense to speak. Neither have we. Rather, the law is clear that "the trial court has a duty to inquire further to ensure that defendant's guilty plea is knowing and voluntary" … . People v Dupree, 2025 NY Slip Op 00199, First Dept 1-14-25

Practice Point: Here the prosecutor, at sentencing, expressed disagreement with exculpatory statements attributed to defendant in the presentence report but neither defendant nor defense counsel chose to address the issue when given the opportunity by the judge. The prosecutor's reference to the statements triggered the need for an inquiry by the judge into whether the plea was knowing and voluntary, notwithstanding the silence of the defense. There was no need to preserve the issue for appeal.

January 14, 2025

SENTENCING, SECOND FELONY OFFENDER, LOUISIANA OFFENSE, JUDGES.

DEFENDANT SHOULD NOT HAVE BEEN ADJUDICATED A SECOND FELONY OFFENDER BASED ON A LOUISIANA CONVICTION FOR AN OFFENSE WHICH IS NOT A FELONY IN NEW YORK (SECOND DEPT).

The Second Department, remitting the matter for resentencing, determined the Louisiana conviction for an offense which is not a felony in New York should not have been the basis for adjudicating defendant as a second felony offender:

The defendant … contends that his adjudication as a second felony offender was illegal because the predicate Louisiana offense was not a felony under New York

law. “Penal Law § 70.06 requires the imposition of enhanced sentences for those found to be predicate felons” … . An out-of-state felony conviction qualifies as a predicate felony under Penal Law § 70.06 only if it is for a crime whose elements are equivalent to those of a felony in New York … . Here, as conceded by the People, the defendant’s Louisiana conviction of simple robbery did not constitute a felony in New York for the purpose of enhanced sentencing and thus, the defendant should not have been adjudicated a second felony offender on the basis of that conviction … . People v Harris, 2025 NY Slip Op 00331, Second Dept 1-22-25

Practice Point: If an out-of-state conviction is for an offense which is not a felony in New York, an enhanced sentence as a second felony offender is not available.

January 22, 2025

SEX OFFENDER REGISTRATION ACT (SORA), CONSTITUTIONAL LAW.

THE DEFENDANT WAS NOT NOTIFIED HE WOULD BE CLASSIFIED AS A SEXUALLY VIOLENT OFFENDER, A VIOLATION OF HIS RIGHT TO DUE PROCESS WHICH DEPRIVED HIM OF THE OPPORTUNITY TO CHALLENGE THE DESIGNATION ON CONSTITUTIONAL GROUNDS; MATTER REMITTED (THIRD DEPT).

The Third Department, vacating the sexually violent offender designation, determined the failure to notify defendant that he would be classified as a violent sexual offender deprived defendant of due process resulting in his inability to argue his constitutional objections to the designation on appeal. The matter was remitted:

Here, neither the Board nor the People requested that County Court designate defendant a sexually violent offender, and the designation was never mentioned at the hearing … . Although the court appropriately concluded that the foreign registration clause compelled it to designate defendant a sexually violent offender … , the court erred when it failed to provide defendant with notice and an opportunity to be heard on his designation before issuing a determination (see Correction Law § 168-k [2] …). This error prejudiced defendant, as he could not timely assert, and thereby preserve, the constitutional defenses he presses on

appeal … . Specifically, defendant contends that his designation as a sexually violent offender violates his rights to substantive due process and equal protection of the laws and runs afoul of the Privileges and Immunities Clause … . People v Schultz, 2025 NY Slip Op 00251, Third Department 1-16-25

Practice Point: Although the judge was required to designate defendant as a sexually violent offender, the failure to notify him and give him an opportunity to be heard deprived him of his right challenge the designation on constitutional grounds. The sexually-violent-offender designation was vacated and the matter remitted.

January 16, 2025

SEX OFFENDER REGISTRATION ACT (SORA), STATUTORY RAPE, DOWNWARD DEPARTURE.

IN THIS STATUTORY RAPE CASE WHERE THE VICTIM WAS FIVE YEARS YOUNGER THAN DEFENDANT, DEFENDANT WAS ENTITLED TO A DOWNWARD DEPARTURE FROM LEVEL TWO TO LEVEL ONE (SECOND DEPT).

The Second Department reduced defendant's SORA risk level from two to one. This was a statutory rape case in which the victim was five years younger than defendant:

"In cases of statutory rape, the Board [of Examiners of Sex Offenders] has long recognized that strict application of the Guidelines may in some instances result in overassessment of the offender's risk to public safety" … . The Guidelines provide that "[t]he Board or a court may choose to depart downward in an appropriate case and in those instances where (i) the victim's lack of consent is due only to inability to consent by virtue of age and (ii) scoring 25 points [under risk factor 2, sexual contact with the victim,] results in an over-assessment of the offender's risk to public safety" … .

Here, considering all of the circumstances, including the five-year age difference between the defendant and the victim, the fact that the defendant's overall score of 75 points was near the low end of the range applicable to a presumptive level two designation, and that the subject offense is the only sex-related crime in the

defendant's history, the assessment of 25 points under risk factor 2 results in an overassessment of the defendant's risk to public safety … . Accordingly, a downward departure is warranted, and the defendant should be designated a level one sex offender. People v Rivera, 2025 NY Slip Op 00467, Second Dept 1-29-25

Practice Point: Here, in reducing defendant SORA risk level from two to one, the court noted that the risk to the public can be over-assessed in statutory rape cases where the defendant and the victim are close in age.

January 29, 2025

SEX OFFENDER REGISTRATION ACT (SORA), JUDGES, FINDINGS OF FACT AND CONCLUSIONS OF LAW.

THE JUDGE DID NOT MAKE THE REQUIRED FINDINGS OF FACT AND CONCLUSIONS OF LAW BEFORE DETERMINING DEFENDANT'S SORA RISK-LEVEL; MATTER REMITTED (SECOND DEPT).

The First Department, remitting the matter, determined the judge did not make the required findings of fact and conclusions of law when designating the defendant's risk level under SORA:

In designating a sex offender's risk level under SORA, "[t]he court shall render an order setting forth its determinations and the findings of fact and conclusions of law on which the determinations are based" (Correction Law § 168-n[3]). Here, the court's statement at the conclusion of the hearing "did not adequately set forth the findings of fact and conclusions of law on which it based its decision" to assess the points at issue on appeal and deny defendant's motion for a downward departure … . Instead, the court simply stated: "The People have met their burden of proof of clear and convincing evidence, that 135 points were properly assessed, which corresponds to a Level 3 sex offender designation. The motion for downward departure is denied." The court's written order repeated those statements. Therefore, we remand the matter to Supreme Court "to specify the required findings and conclusions, based on the evidence already introduced" … . People v Tolliver, 2025 NY Slip Op 00489, First Dept 1-30-25

Practice Point: A judge's designation of a defendant's SORA risk level must be supported by findings of fact and conclusions of law.

January 30, 2025

SPEEDY TRIAL, ILLUSORY CERTIFICATE OF COMPLIANCE, APPEALS.

DEFENDANT MADE A DISCOVERY DEMAND FOR "LINE OF DUTY" DOCUMENTS RELEVANT TO THE DEFENSE; THE PEOPLE DID NOT ADDRESS THE DEMAND; ON APPEAL THE PEOPLE ARGUED FOR THE FIRST TIME THAT THERE WERE NO SUCH DOCUMENTS; BY FAILING TO ADDRESS THE DEMAND IN THE MOTION COURT, THE PEOPLE WERE DEEMED TO HAVE CONCEDED THE EXISTENCE OF THE DOCUMENTS; THE CERTIFICATE OF COMPLIANCE WAS THEREFORE ILLUSORY; INDICTMENT DISMISSED (SECOND DEPT).

The Second Department, reversing the conviction and dismissing the indictment, determined the certificate of compliance (COC) with the People's discovery obligations was illusory and defendant's motion to dismiss on speedy trial grounds should have been granted:

Officer Soto testified before the grand jury that the defendant was sitting in a parked car when the plainclothes officers approached him, that Officer Soto did not identify himself as a police officer, that he could not recall whether Officer Cruz identified himself as a police officer, that a struggle ensued over some suspected marijuana in the defendant's hand, and that the defendant drove away, causing injury to each officer. The indicted charges included aggravated assault upon a police officer and assault in the second degree, alleging, among other things, that the defendant caused serious physical injury to Officer Soto and physical injury to Officer Cruz. * * *

The defendant … identified the failure to disclose any "line of duty" paperwork, despite the defendant's request for the same, and the facts that both officers were out "line of duty" for a period of time due to their injuries and Officer Soto ultimately retired due to his injuries. The defendant asserted that the "line of duty" paperwork would include documents relating to the independent medical examinations by the New York City Police Department District Surgeon used to certify that the officers were, in fact, injured and unable to return to full duty, as well as written statements by the officers regarding the manner in which their injuries occurred. * * *

On appeal, the People assert that there is no indication that any "line of duty" paperwork exists. In opposition to the defendant's motion, however, the People did not refute the defendant's assertion that the paperwork existed. "Normally what is not disputed is deemed to be conceded" … . Moreover, as the People bear the burden of establishing that they did, in fact, exercise due diligence and make reasonable inquiries to ascertain the existence of material and information subject to discovery prior to filing the COC, it was incumbent on the People to address the defendant's assertion regarding the "line of duty" paperwork in opposing his motion. People v Serrano, 2025 NY Slip Op 00338, Second Dept 1-22-25

Practice Point: If the People ignore a defendant's discovery demand for relevant documents, they will be deemed to have acknowledged that the documents exist rendering the COC illusory.

January 22, 2025