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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 February 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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DEFENDANT'S COMPLAINTS ABOUT THE ACTIONS OF DEFENSE COUNSEL WERE NOT SPECIFIC OR SERIOUS ENOUGH TO WARRANT AN INQUIRY BY THE JUDGE; THREE-JUDGE DISSENT (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Troutman, over a three-judge dissent, determined defendant had not made specific and serious allegations

about the behavior of his attorney which were sufficient to warrant an inquiry by the judge:

… [D]efendant argues that the complaints contained in his letter were factually specific and serious enough to require a minimal inquiry. He points to his accusations that defense counsel was not working in his best interest; disregarded his request to visit, "even via [v]ideo"; hung up on him; disrespected him and his wife; was prolonging the proceedings; and told him to accept a plea even though he was "in fact innocent." Contrary to defendant's contention, these statements did not constitute "specific factual allegations of 'serious complaints about counsel' " … . Defendant's assertions that counsel was not working in his best interest, was prolonging the proceedings, and was advising him to take a plea were too general and conclusory to require a minimal inquiry. There are simply no facts elucidating these allegations that would have signaled to the trial court that a serious conflict emerged between defendant and his counsel.

… The seriousness of defendant's allegation that counsel failed to visit him was undermined by other statements in the letter, which clearly indicated that counsel and his private investigator were communicating with defendant. Moreover, defendant failed to explain how defense counsel allegedly disrespected him and his wife. Nor did he provide any context regarding defense counsel allegedly hanging up on him. For instance, it is entirely unclear whether defense counsel intentionally or inadvertently hung up on defendant or whether defense counsel simply hung up because the conversation had ended. … [D]efendant's complaints … lacked sufficient elaboration to signal to the trial court that the complaints were serious enough to warrant minimal inquiry … . People v Fredericks, 2025 NY Slip Op 01011, CtApp 2-20-25

Practice Point: The nature of defendant's complaints about the behavior of defense counsel were not specific or serious enough to trigger the need for an inquiry by the judge. There was a three-judge dissent.

February 20, 2025

ATTORNEYS, DEFENDANT DEPRIVED OF RIGHT TO COUNSEL BY ADMISSIONS MADE BY DEFENSE COUNSEL IN SEEKING COMPETENCY HEARING.

IN AN EFFORT TO CONVINCE THE COURT TO GRANT THEIR REQUEST FOR A COMPETENCY HEARING BASED UPON DEFENDANT'S REJECTION OF A FAVORABLE PLEA OFFER, THE DEFENSE ATTORNEYS REVEALED CONFIDENTIAL COMMUNICATIONS WITH DEFENDANT ABOUT THE STRENGTH OF THE EVIDENCE; ALTHOUGH THE DEFENSE ATTORNEYS WERE ATTEMPTING TO HELP THE DEFENDANT, THE DEFENSE ATTORNEYS BECAME WITNESSES AGAINST THE DEFENDANT, DEPRIVING HIM OF HIS RIGHT TO COUNSEL (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined defendant received ineffective assistance of counsel. Defendant was offered a plea deal which avoided incarceration for robbery and assault. When defendant rejected the offer, the defense attorneys requested a competency examination. In arguing for the competency examination, the defense attorneys described their efforts to convince defendant to accept the plea bargain, including a mock trial in the defense attorneys' office finding defendant guilty. The Second Department determined the defense attorneys, by describing their confidential communications with defendant, which included the strength of the evidence, had become witnesses against the defendant:

… [T]he defendant's right to counsel was adversely affected, and he received ineffective assistance of counsel when his attorneys revealed confidential communications on the record and, in effect, took a position adverse to him … . Contrary to the People's contention, defense counsels did more than merely express concern that the defendant misunderstood the nature of the relevant issues … . Instead, defense counsels emphasized the strength of the evidence against their client, including revealing that a mock trial conducted in their office resulted in the defendant being found guilty … . These detailed statements, in effect, made defense counsels witnesses against their client, regardless of whether defense counsels allegedly made these statements in order to aid the application for an examination pursuant to CPL article 730 or in an attempt to persuade the defendant

to accept what they viewed as a highly favorable plea offer. Although defense counsels had an obligation to advise the defendant regarding the plea offer … , the defendant retains the authority to accept or reject a plea offer, even having accepted the assistance of counsel … , and defense counsels must provide meaningful representation consistent with the defendant's desire to proceed to trial … . People v Montgomery, 2025 NY Slip Op 01111, Second Dept 2-26-25

Practice Point: Here the defense was trying to help the defendant by requesting a competency hearing after he rejected a favorable plea offer. In arguing for the competency hearing, the defense revealed confidential discussions with the defendant about the strength of the evidence, thereby becoming witnesses against the defendant and depriving him of his right to counsel.

February 26, 2025

EVIDENCE, BOLSTERING VICTIM'S CREDIBILITY, EXCLUDING PRIOR INCONSISTENT STATEMENT BY VICTIM.

ALTHOUGH THE ERRORS WERE NOT PRESERVED, DEFENDANT'S CONVICTIONS WERE REVERSED IN THE INTEREST OF JUSTICE; THE CREDIBILITY OF ONE OF THE VICTIMS WAS IMPROPERLY BOLSTERED IN OPINION TESTIMONY BY A POLICE OFFICER AND A PSYCHOLOGIST ASSERTING THAT THE VICTIM WAS BELIEVABLE AND RELIABLE; A PRIOR INCONSISTENT STATEMENT BY ONE OF THE VICTIMS, IN WHICH THE VICTIM DENIED DEFENDANT HAD EVER MOLESTED THE VICTIM, SHOULD HAVE BEEN ADMITTED (THIRD DEPT).

The Third Department, in the interest of justice, reversed the "predatory sexual assault against a child" convictions which involved two victims, and ordered a severance if a new trial is held. The Third Department determined the credibility of one of the victims was improperly bolstered by the testimony by a police officer and a psychologist that they found the victim's version of events believable and reliable. In addition, the Third Department held that a prior inconsistent statement by one of the victims, denying that defendant ever molested the victim, should have been admitted in evidence:

… [W]e find merit in defendant's contention that he was deprived of a fair trial based upon the testimonies of Breslin [a police officer] and Spagli [a psychologist], who each offered their opinion as to victim 2's credibility. Accordingly, notwithstanding defendant's failure to properly preserve his claim, we exercise our discretion and reverse in the interest of justice (see CPL 470.15 [6] [a] …). "It is always within the sole province of the jury to decide whether the testimony of any witness is truthful or not" … . As such, "to bolster the testimony of another witness . . . by explaining that his [or her] version of the events is more believable than the defendant's, the . . . testimony is equivalent to an opinion that the defendant is guilty, and the receipt of such testimony may not be condoned" … . Here, Breslin testified that he "felt . . . [victim 2] was telling the truth." Spagli, in turn, agreed that the goal of reaching the truth "was done in this case" and further testified that she "felt [victim 2] was reliable throughout the course of the investigation." Supreme Court did not provide a curative instruction.

We are similarly persuaded by defendant's claim that he was improperly denied the opportunity to impeach victim 2 about an alleged prior inconsistent statement given in an unrelated Family Court matter, in which victim 2 reportedly denied ever having been molested by defendant. * * * The impeachment testimony sought here … concerned the ultimate issue before the jury. Accordingly, we conclude that it was error to preclude defendant from exercizing his right to confront victim 2 about their prior statement; the court could have crafted limitations to prevent the disclosure of unduly prejudicial information upon such questioning … . People v Swartz, 2025 NY Slip Op 01015, Third Dept 2-20-25

Practice Point: If trial errors are severe enough, as they were here, an appellate court has the power to overlook the failure to preserve the errors and reverse in the interest of justice.

February 20, 2025

EVIDENCE, CONVICTION BASED ENTIRELY ON VICTIM'S TESTIMONY, EFFECT OF ALLEGED PRIOR INCONSISTENT STATEMENT BY VICTIM.

HERE AN ALLEGED PRIOR INCONSISTENT STATEMENT BY THE ROBBERY VICTIM, OFFERED AT TRIAL SOLELY FOR IMPEACHMENT, DID NOT RENDER THE EVIDENCE LEGALLY INSUFFICIENT; THE VICTIM WAS THE SOLE WITNESS TO TESTIFY ABOUT THE FACTS (CT APP).

The Court of Appeals, affirming defendant's conviction. over a three-judge concurring opinion, determined that an alleged prior inconsistent statement made by the robbery victim, the only fact witness, offered at trial solely for impeachment, did not render the evidence legally insufficient. Neither the memorandum decision nor the concurring opinion discusses the underlying facts:

The victim, who was the sole person to testify about the facts concerning defendant's conviction of robbery in the third degree, gave a statement to police, through an interpreter, several hours after the alleged robbery that was inconsistent on a material element of the offense with his trial testimony. That statement was introduced through the officer's testimony at trial, solely for the purpose of impeachment. When an alleged contradictory prior statement is admitted solely for the purpose of impeachment, the rule of People v Ledwon (153 NY 10 [1897]) and People v Jackson (65 NY2d 265 [1985]) is not implicated. The evidence was legally sufficient to support the inference that defendant intended to steal property forcibly … . People v Howard, 2025 NY Slip Op 00804, CtApp 2-13-25

Practice Point: Here a prior inconsistent statement by the robbery victim, the only fact witness at trial, did not render the evidence legally insufficient.

February 13, 2025

EVIDENCE, LEGAL SUFFICIENCY OF EVIDENCE DEFENDANT ENTERED THE STORE WITH THE INTENT TO STEAL.

THE EVIDENCE WAS LEGALLY SUFFICIENT TO DEMONSTRATE DEFENDANT INTENDED TO STEAL TWO CANS OF RED BULL WHEN HE ENTERED THE CVS; THE DISSENT ARGUED THE EVIDENCE OF FELONY BURGLARY WAS LEGALLY INSUFFICIENT, NOTING THAT THE PROSECUTOR COULD HAVE CHARGED PETTY LARCENY OR TRESPASS, THEREBY SAVING THE STATE THE MILLION DOLLARS IT COST TO INCARCERATE THE HOMELESS, MENTALLY ILL AND DRUG-ADDICTED DEFENDANT FOR AN ATTEMPT TO STEAL ITEMS WORTH $6 (CT APP).

The Court of Appeals affirmed defendant's burglary conviction rejecting the "legally insufficient evidence" argument. In a dissenting opinion, Judge Wilson (Judge Halligan concurring), argued the evidence was legally insufficient. Judge Wilson wrote "no evidence in the case could have led a jury to conclude beyond a reasonable doubt that Mr. Williams intended to steal the two Red Bulls" when he entered the CVS:

From the dissent:

Two cans of Red Bull cost about $6. Seven years of incarceration costs anywhere between $800,000 and $4 million, depending on the location within New York State … . For attempting to take two cans of Red Bull from a CVS, Raymond Williams was convicted of third-degree burglary, a felony, and sentenced to three and a half to seven years in prison. Mr. Williams was a perpetual petty shoplifter with substance abuse and mental health problems, so perhaps this result makes sense to someone. It does not to me.

Mr. Williams's story is not uncommon. For much of his life, he has struggled with homelessness and drug addiction. Both factors disproportionately increase the risk of being caught up in the criminal justice system and sentenced to spend time in prison. Mr. Williams had previously been found guilty of many minor shoplifting offenses, including from other CVS stores. His problems were addressed by sentences of incarceration and probation, not treatment. * * *

Putting both psychiatric and fiscal wisdom aside, although it was within the discretion of prosecutors to charge Mr. Williams with felony burglary instead of, for example, petty larceny or trespass, the trial evidence was legally insufficient to convict him of burglary. No evidence in the case could have led a jury to conclude beyond a reasonable doubt that Mr. Williams intended to steal the two Red Bulls. I would therefore reverse his conviction. People v Williams, 2025 NY Slip Op 00901, CtApp 2-18-25

Practice Point: Consult the dissent for a strong argument for prosecutorial discretion in shoplifting cases, especially where the defendant is homeless, mentally ill and addicted to drugs. Here the defendant was sentenced to three and a half to seven years in prison for attempting to steal two cans of Red Bull from a CVS (burglary third).

February 18, 2025

EVIDENCE, TRIAL EVIDENCE DIFFERS FROM THEORY OF INDICTMENT.

IF THE TRIAL EVIDENCE VARIES FROM THE THEORY OF THE INDICTMENT, THE RELATED CONVICTIONS WILL BE VACATED (FIRST DEPT).

The First Department, vacating defendant's convictions on some counts, determined the trial evidence varied from the theory of the indictment. The facts were not explained:

This Court agrees with the parties that defendant's conviction under count 2 of the indictment charging grand larceny in the fourth degree, as well as criminal acts 1 and 6 alleged in count 1 of the indictment charging enterprise corruption, must be reversed because the trial evidence, which included evidence suggesting that defendant threatened physical damage to construction sites through vandalism, varied from the theory of the indictment (see People v Grega, 72 NY2d 489, 496-498 [1988]). People v Correll, 2025 NY Slip Op 00796, First Dept 2-11-25

Practice Point: If the trial evidence does not comport with the theory of the indictment, the related counts will be vacated.

February 11, 2025

FAMILY LAW, REMOVAL FROM COUNTY COURT UNDER THE "RAISE THE AGE ACT."

COUNTY COURT PROPERLY GRANTED THE PEOPLE'S REQUEST TO PREVENT REMOVAL OF DEFENDANT'S CASE TO FAMILY COURT UNDER THE "RAISE THE AGE ACT;" THERE WAS A COMPREHENSIVE DISSENT (FOURTH DEPT).

The Fourth Department, over a comprehensive dissent, determined County Court properly granted the People's motion to prevent removal of defendant's case to Family Court pursuant to the Raise the Age Law:

In 2017, the New York State Legislature enacted the Raise the Age Law, which defines a person who was charged with a felony committed on or after October 1, 2018 when the person was 16 years old, or committed on or after October 1, 2019 when the person was 17 years old, as an " '[a]dolescent offender' " … . The Raise the Age Law created in each county a youth part of the superior court to make appropriate determinations with respect to the cases of, inter alia, adolescent offenders … . Where, as here, an adolescent offender is charged with a violent felony as defined in Penal Law § 70.02, within six calendar days of the adolescent offender's arraignment, the youth part of superior court is required to review the accusatory instrument and determine whether the prosecutor has proven by a preponderance of the evidence that the adolescent offender caused "significant physical injury" to someone other than a participant in the crime, displayed a "firearm, shotgun, rifle or deadly weapon as defined in the penal law" in furtherance of the crime, or unlawfully engaged in sexual intercourse, oral sexual conduct, anal sexual conduct or sexual contact as defined in section 130.00 of the Penal Law … . If none of those factors exist, the matter must be transferred to Family Court unless the prosecutor moves to prevent the transfer of the action to Family Court and establishes that extraordinary circumstances exist … . … [I]n making an extraordinary circumstances determination, courts should "look at all the circumstances of the case, as well as . . . all of the circumstances of the young person," … . …

… [T]he court did not abuse its discretion in granting the prosecutor's motion to prevent removal inasmuch as the prosecutor established that there are extraordinary circumstances. … [D]efendant's prior adjudications as a juvenile

delinquent or any evidence obtained as a result of those proceedings cannot be used in determining whether to grant the People's motion (Family Ct Act § 381.2 [2] …).. Nevertheless, although it is impermissible to raise any issue related to the adjudication or evidence obtained therefrom, it is still permissible to raise " 'the illegal or immoral acts underlying such adjudications' " … .

Here … defendant was charged with participating in a violent crime, i.e., a home invasion robbery involving weapons and resulting in injuries to the victim. Moreover, despite the various services and programs provided to defendant over the last five years while defendant had been involved in the criminal justice system, defendant has made no appreciable positive response and continues to engage in escalating criminal behavior. People v Guerrero, 2025 NY Slip Op 00766, Fourth Dept 2-7-25

Practice Point: Under the "Raise the Age Act" the People can move to prevent the transfer of felony cases to Family Court where the defendant was 16 or 17 at the time of the alleged offense.

February 7, 2025

POSSESSION OF A WEAPON, EVIDENCE.

THE BULLET CASINGS IN EVIDENCE COULD HAVE COME FROM A PISTOL OR A RIFLE; DEFENDANT WAS CHARGED WITH ILLEGAL POSSESSION OF A PISTOL AND THE JURY WAS SO INSTRUCTED; BECAUSE THERE WAS NO BASIS FOR THE JURY TO CONCLUDE DEFENDANT POSSESSED A PISTOL, AS OPPOSED TO A RIFLE, THE CONVICTION WAS AGAINST THE WEIGHT OF THE EVIDENCE (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction as against the weight of the evidence, determined the People did not prove defendant possessed a "pistol" as opposed to a "rifle" at the time of the shooting. There was video evidence showing a muzzle flash from the area in the car where defendant was sitting, but the weapon could not be seen. Because the indictment and the jury instructions charged defendant with possession of a "pistol," the conviction could not stand:

… [T]he indictment and the jury charge specifically narrowed the theory of the case to require the People to establish that defendant possessed a loaded pistol at the time in question. Here, the evidence permitted, at best, mere speculation that the firearm defendant allegedly possessed was a pistol, and not a rifle. Video footage of the shooting shows multiple muzzle flashes indicative of gunfire from the vehicle—it does not directly depict the firearm that is firing the shots. Moreover, the angle of the video does not permit an observer to make any reasonable inferences about what type of firearm is being fired at the relevant time. Nothing in the video establishes that the firearm being fired was a pistol rather than another type of firearm. People v Brumfield, 2025 NY Slip Op 00764, Fourth Dept 2-7-25

Practice Point: The People are held to the theory presented in the indictment and charged to the jury. Since the indictment charged defendant with illegal possession of a pistol and the jury was so charged, the People's failure to prove the type of firearm defendant possessed required reversal of the conviction.

February 7, 2025

SEARCH AND SEIZURE, DESCRIPTION OF PREMISES TO BE SEARCHED.

THE APPEAL WAIVER WAS INVALID, CRITERIA EXPLAINED; THERE ARE UNRESOLVED QUESTIONS (RAISED BY A DEFENSE INVESTIGATION SUBMITTED WITH THE MOTION TO SUPPRESS) ABOUT WHETHER THE DESCRIPTON OF THE SEARCHED PREMISES IN THE WARRANT WAS ACCURATE, REQUIRING A HEARING; MATTER REMANDED (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Higgitt, remanding the matter for a suppression hearing, and finding the appeal waiver invalid, determined there were questions about whether the search warrant described the premises to be searched with sufficient particularity. The warrant indicated there was only one apartment, with an unmarked tan door. The defendant's investigator submitted evidence demonstrating there were two apartments, neither with a tan door, and the door to the searched apartment was marked with a number one, while the other apartment door was unmarked:

The plea colloquy contained several defects. It did not make clear, expressly or tacitly, that the right to appeal was separate and distinct from the Boykin rights defendant was automatically forfeiting with the plea; the colloquy suggested that the appeal waiver was absolute, offering no clue that some core appellate claims would survive; and, relatedly, the colloquy wrongly indicated that no appeal was permissible on the fundamental issues of whether the plea was entered into knowingly and voluntarily, and whether the sentence was legal.

The written waiver cannot save the oral appeal waiver. The plea court did not confirm that defendant had read the written waiver; the court did not confirm that defendant had discussed the written waiver with counsel; and the court did not confirm that defendant understood the written waiver … . * * *

… [D]efendant's submissions in support of his omnibus motion call into question whether the search warrant contains a misdescription of the premises to be searched, and, if there is a misdescription, whether it renders the warrant invalid. Specifically, defendant's omnibus motion submissions raise a question of fact as to whether, based on what the police officer knew or should have known about the premises when the search warrant was sought, the warrant's description of the target premises was accurate … . [D]efendant here submitted evidence (in particular, the affirmation of the investigator who visited the premises and the photographs of 955 Bruckner Boulevard taken by the investigator) about the "actual conditions of the premises" in support of his omnibus motion … . Additionally, assuming there was a misdescription of the premises to be searched, a question of fact exists as to whether there was no reasonable possibility that the wrong premises would have been searched … .

We cannot resolve the issues raised by defendant's omnibus motion submissions without a hearing (see CPL 710.60[4]; see also CPL 710.60[2] …). This is not a situation where it is plain from the existing record that there was no reasonable possibility that the wrong premises would be searched regardless of any misdescription … . People v Trulove, 2025 NY Slip Op 01178, First Dept 2-27-25

Practice Point: Consult this opinion for a detailed explanation of the criteria for a valid waiver of appeal.

Practice Point: Here the defense investigator submitted evidence which raised a question whether the search warrant accurately described the premises to be searched. The matter was remanded for a hearing.

February 27, 2025

SEARCH AND SEIZURE, VALIDITY OF INVENTORY SEARCH.

ANY DEVIATIONS FROM THE STATE POLICE INVENTORY-SEARCH POLICY WERE MINOR AND DID NOT WARRANT SUPPRESSION OF THE HANDGUN FOUND IN THE SEARCH; THERE WAS A TWO-JUSTICE DISSENT (THIRDD DEPT).

The Third Department, reversing County Court's suppression of a handgun found in an inventory search, determined any deviations from the State Police's inventory-search procedure were minor and did not warrant suppression of evidence seized during the search:

As for whether the trooper who conducted the search of the Kia sufficiently complied with that policy, County Court determined that the trooper did not because "there [were] a great many items and effects within the vehicle that are not memorialized within the inventory form" and because the form "was not filled out until some many hours — if not days — after the search was conducted." * * *

The foregoing were "minor deviation[s] from procedure" under the circumstances of this case "and did not undermine the reasonableness of the limited search," particularly because "there was no indication that the police were using the procedure as a pretext to search for incriminating evidence" to begin with … . It is not the role of either County Court or this Court to "micromanage the procedures used to search properly impounded" vehicles and, as the record leaves no question both that the towing]and inventory search of the Kia were justified and that the ensuing list of the vehicle's contents sufficiently complied with State Police policy to meet the constitutional minimum, defendant's motion to suppress should have been denied in its entirety … . People v Craddock, 2025 NY Slip Op 01016, Third Dept 2-20-25

Practice Point: Here the Third Department held that any deviations from the State Police inventory-search procedure were minor and did not warrant suppression. Two justices dissented.

February 20, 2025

SEARCH AND SEIZURE, TRAFFIC STOP.

AT THE SUPPRESSION HEARING THE OFFICER TESTIFIED THE SEARCH OF DEFENDANT'S PERSON AFTER A TRAFFIC STOP WAS BASED UPON THE ODOR OF MARIJUANA; THE OFFICER DID NOT TESTIFY HE WAS QUALIFIED BY TRAINING AND EXPERIENCE TO RECOGNIZE THE ODOR OF MARIJUANA; THE SUPPRESSION MOTION SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the traffic stop was proper (inoperable brake light) but the search of defendant's person, based on the odor of marijuana, was not:

… [T]he officer's testimony was insufficient to establish that there was probable cause for the search of the defendant's person. As the law existed in 2020, "the odor of marihuana emanating from a vehicle, when detected by an officer qualified by training and experience to recognize it, [was alone] sufficient to constitute probable cause to search the vehicle and its occupants" … . Here, however, the officer did not testify that he had any training or experience in detecting the odor of marihuana … .

Accordingly, the Supreme Court should have granted that branch of the defendant's omnibus motion which was to suppress physical evidence. People v McLeod, 2025 NY Slip Op 01108, Second Dept 2-26-25

Practice Point: Under the law as it was in 2020, the search of a person could be justified by the odor of marijuana, but only if the officer was qualified by training and experience to recognize the odor of marijuana. Here the officer did not testify he was qualified to recognize the odor of marihuana. Therefore, defendant's motion to suppress should have been granted.

February 26, 2025

SENTENCING, INVALID PREDICATE OFFENSE.

THE FEDERAL OFFENSE WHICH SERVED AS A PREDICATE FOR DEFENDANT'S SECOND-FELONY-OFFENDER DESIGNATION DOES NOT REQUIRE THAT THE FIREARM INVOLVED BE OPERABLE; THE RELEVANT NEW YORK FELONY OFFENSE INCLUDES OPERABILITY AS AN ELEMENT; THEREFORE THE FEDERAL OFFENSE IS NOT A VALID PREDICATE OFFENSE (SECOND DEPT).

The Second Department, vacating defendant's second-felony-offender designation, determined the federal crime constituting the predicate offense was not a felony in New York One of the elements of the relevant New York felony was that the firearm involved in the offense be operable. That element was missing from the federal offense:

"Penal Law § 70.06 requires the imposition of enhanced sentences for those found to be predicate felons" … . Among other criteria, for the purpose of determining whether a prior conviction is a predicate felony conviction, the conviction must have been in New York of a felony, "or in any other jurisdiction of an offense for which a sentence to a term of imprisonment in excess of one year or a sentence of death was authorized and is authorized in this state irrespective of whether such sentence was imposed" (Penal Law § 70.06[1][b][i]). "Since New York authorizes sentences exceeding one year only for felonies, the second prong of this statutory test requires an inquiry to determine whether the foreign conviction has an equivalent among New York's felony-level crimes" … . "As a general rule, this inquiry is limited to a comparison of the crimes' elements as they are respectively defined in the foreign and New York penal statutes" … . Here, the defendant's predicate crime does not require as one of its elements that the firearm be operable … and, thus, does not constitute a felony in New York for the purpose of enhanced sentencing … . People v Davis, 2025 NY Slip Op 00977, Second Dept 2-19-25

Practice Point: Here defendant's prior federal offense did not require that the firearm involve be operable. The corresponding New York felony requires operability. Therefore the federal offense could not serve as a predicate offense for a second-felony-offender designation.

February 19, 2025

SENTENCING, PERSISTENT FELONLY OFFENDER, TOLL OF TEN-YEAR LOOKBACK.

THE TEN-YEAR LOOKBACK FOR A PERSISTENT VIOLENT FELONY OFFENDER DESIGNATION FOR SENTENCING PURPOSES IS TOLLED BY PRESENTENCE, AS WELL AS POST-SENTENCE, INCARCERATION (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over an extensive two-judge dissenting opinion, determined the ten-year lookback for a persistent violent felony offender designation is tolled by any presentence period of incarceration:

A person convicted of a violent felony offense is a "persistent violent felony offender" for sentencing purposes if that person has "two or more predicate violent felony convictions" (Penal Law § 70.08 [1] [a], [b]). Those potentially qualifying felony convictions must satisfy the timing requirement set forth in Penal Law § 70.04, namely that the sentence on the prior crime must have been imposed not more than ten years before the commission of the current felony (Penal Law § 70.04 [1] [b] [iv]). This ten-year lookback period is extended by any period of incarceration between commission of the prior felony and commission of the current felony (Penal Law § 70.04 [1] [b] [v]). Defendant challenges any extension of the ten-year lookback period using time he spent in presentence incarceration on his earliest qualifying felony conviction. We now hold that pursuant to Penal Law § 70.04, defendant's presentence incarceration time did extend the ten-year period and therefore defendant was properly sentenced as a persistent violent felony offender. People v Hernandez, 2025 NY Slip Op 00904, CtApp 2-18-25

Practice Point: The ten-year lookback for a persistent violent felony offender designation is tolled by both presentence and post-sentence incarceration.

February 18, 2025

SENTENCING, IRRELEVANT PROBATION CONDITION.

THE PROBATION CONDITION THAT DEFENDANT "SUPPORT DEPENDENTS AND MEET OTHER FAMILY RESPONSIBILITIES" WAS NOT TAILORED TO THE OFFENSE (CRIMINAL POSSESSION OF A WEAPON) AND WAS THEREFORE DELETED (SECOND DEPT).

The Second Department, deleting a condition of probation, determined that the condition that defendant "support dependents and meet other family responsibilities" was not tailored to the offense (criminal possession of a weapon):

"Pursuant to Penal Law § 65.10(1), conditions of probation 'shall be such as the court, in its discretion, deems reasonably necessary to insure that [a] defendant will lead a law-abiding life or to assist [the defendant] to do so'" … . "The statute 'quite clearly restricts probation conditions to those reasonably related to a defendant's rehabilitation'" … .

Here, under the circumstances of this case, Condition No. 14, requiring that the defendant "[s]upport dependents and meet other family responsibilities," was improperly imposed because it was not individually tailored in relation to the offense and therefore, was not reasonably related to the defendant's rehabilitation or necessary to insure that he will lead a law-abiding life … . People v Sobers, 2025 NY Slip Op 00992, Second Dept 2-19-25

Practice Point: Probation conditions must be tailored to the offense to which defendant pled guilty. Here the condition that defendant support dependents and meet family responsibilities was not relevant to the offense (criminal possession of a weapon).

February 19, 2025

SENTENCING, SECOND FELONY OFFENDER, RECORD INADEQUATE.

WHETHER DEFENDANT WAS PROPERLY SENTENCED AS A SECOND FELONY OFFENDER DEPENDS ON THE UNDERLYING FACTS FOR THE PREDICATE FEDERAL OFFENSE WHICH ARE NOT ON THE RECORD; MATTER REMITTED FOR THAT DETERMINATION (THIRD DEPT).

The Third Department, reversing Supreme Court and remitting the matter, determined that whether the federal offense used as a predicate for defendant's second felony offender designation is the equivalent of a New York felony depends on the underlying facts of the federal offense:

… [T]he federal statute under which defendant was previously convicted provides, in relevant part, that "it shall be unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance" (21 USC § 841 [a] [1]). As defendant points out, the federal statute contains elements not found in certain New York statutes, e.g., manufacturing, and encompasses a mix of felony and misdemeanor offenses … . Hence, resort to the facts underlying defendant's federal conviction is warranted in order to ascertain whether defendant's convictions are equivalent to a felony in this state … . However, because defendant did not controvert his status as a second felony offender, the People have not sought to admit an "accusatory instrument that describe[s] the particular act or acts underlying the charge [for purposes of] isolat[ing] and identify[ing] the statutory crime[s] of which . . . defendant was accused" for purposes of "determining whether Penal Law § 70.06 [1] [b] [i] has been satisfied" … . Accordingly, we remit this matter for a hearing on defendant's CPL 440.20 motion to give the People the opportunity to establish, and defendant the opportunity to protest, the issue of equivalency, which is a determination we cannot make on the current record. People v Darby, 2025 NY Slip Op 01134, Third Dept 2-27-25

Practice Point: When a federal conviction is used as a predicate offense for a second felony offender designation, the federal offense must be equivalent to a New York felony. Here the federal offense included elements not included in the relevant New York felony. In that situation, it is necessary to look at the underlying facts for the federal conviction to determine equivalency.

February 27, 2025

SENTENCING, SHOCK INCARCERATION PROGRAM, VALIDITY OF WAIVER OF PARTICIPATION.

MAJORITY: THE DEFENDANT'S WAIVER OF PARTICIPATION IN THE SHOCK INCARCERATION PROGRAM WAS NOT A COMPONENT OF THE SENTENCE AND THEREFORE THE LEGALITY OF THE SENTENCE CANNOT BE CHALLENGED BASED ON THE WAIVER; DISSENT: THE SHOCK WAIVER VIOLATES PUBLIC POLICY AND RENDERS THE SENTENCE ILLEGAL (CT APP).

The Court of Appeals affirmed the First Department's rejection of defendant's argument that his waiver of shock incarceration program violated public policy, over an extensive two-judge dissenting opinion. The dissent argued the waiver was against public policy rendering defendant's sentence illegal. The majority avoided the issue entirely by holding the waiver was not part of the sentence:

Defendant's sole contention on appeal is that the shock waiver is an illegal component of the sentence. We reject that contention on the ground that the waiver is not a component of the sentence … . * * *

From the dissent:

Shock is a six-month discipline and treatment-oriented program selectively administered to qualifying incarcerated persons selected by DOCCS when they are approximately three years away from the end of their prison sentence (see Correction Law §§ 867, 865). It has proven wildly successful on both the crime prevention and cost reduction fronts. In this case, the plea offer made by the People to Mr. Silva Santos [defendant] required him to waive participation in Shock. He told the sentencing court that he wished to be able to participate in Shock, and the court refused, citing the terms of the waiver of Shock in the plea agreement. The sole question on appeal is whether including the Shock waiver as part of the plea agreement is contrary to statutory authority or public policy. People v Santos, 2025 NY Slip Op 01008, CtApp 2-20-25

Practice Point: A defendant's waiver of participation in the shock incarceration program is not a component of a sentence. Therefore a sentence cannot be challenged as illegal based on a defendant's shock-waiver.

February 20, 2025

SENTENCING, YOUTHFUL OFFENDER STATUS, APPEALS, JUDGES.

DEFENDANT WAS 16 AT THE TIME OF THE CRIME AND WAS CONVICTED OF MANSLAUGHTER IN 2012; THE CONVICTION WAS AFFIRMED IN 2014; PURSUANT TO A MOTION FOR A WRIT OF CORAM NOBIS BROUGHT IN 2022 IT HAS BEEN DETERMINED THAT SUPREME COURT ERRED IN FAILING TO CONSIDER WHETHER DEFENDANT SHOULD BE AFFORDED YOUTHFUL OFFENDER STATUS AND THE MATTER IS NOW REMITTED TO SUPREME COURT FOR THAT PURPOSE (THIRD DEPT).

The Third Department, vacating defendant's sentence, determined the matter should be remitted for a ruling on whether defendant defendant should be afforded youthful offender status. Defendant, who was 16 at the time of the crime was convicted of manslaughter in 2012. His conviction was affirmed in 2014. In 2022 defendant moved for a writ of coram nobis to permit him to argue that Supreme Court erred by failing to determine whether he should be afforded youthful offender status:

The decision to grant or deny youthful offender status rests within the sound exercise of the sentencing court's discretion to determine "if in the opinion of the court the interest of justice would be served by relieving the eligible youth from the onus of a criminal record" … . "Among the factors to be considered are the gravity of the crime and manner in which it was committed, mitigating circumstances, the defendant's prior criminal record, prior acts of violence, recommendations in the presentence reports, the defendant's reputation, the level of cooperation with authorities, the defendant's attitude toward society and respect for the law, and the prospects for rehabilitation and hope for a future constructive life" … . Defendant argues, the People concede, and we agree that defendant is an eligible youth; thus, Supreme Court erred in failing to determine defendant's eligibility for youthful offender status in the first instance … .

Although this Court has the authority to determine whether defendant is entitled to youthful offender status … , we decline the People's invitation to do so here in the

complete absence of any consideration by the sentencing court as to whether defendant should be adjudicated a youthful offender … . Accordingly, we remit the matter to Supreme Court for the explicit purpose of providing an opportunity to the parties to fully advocate for and against whether youthful offender status for defendant is warranted … . People v Vanderhorst, 2025 NY Slip Op 01012, Third Dept 2-20-25

Practice Point: Here Supreme Court's erroneous failure to consider whether defendant should be afforded youthful offender status was first raised in a motion for a writ of coram nobis after defendant's conviction had been affirmed on appeal.

February 20, 2025

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

DESIGNATING DEFENDANT A SEXUALLY VIOLENT OFFENDER BASED SOLELY UPON THE FACT HE WAS REQUIRED TO REGISTER AS A SEX OFFENDER IN PENNSYLVANIA VIOLATED DUE PROCESS; HOWEVER THE MATTER WAS REMITTED TO DETERMINE WHETHER ANY OF THE PENNSYLVANIA FELONIES WOULD HAVE CONSTITUTED A SEXUALLY VIOLENT OFFENSE IN NEW YORK, A QUESTION NOT RAISED BEFORE COUNTY COURT (FOURTH DEPT).

The Fourth Department reversed defendant's SORA designation as a sexually violent offender based upon Pennsylvania convictions as a violation of due process, but remitted the matter to Count Court for consideration of the issue under another provision of the Correction Law:

… [W]e conclude, based on the reasoning set forth by the plurality in People v Malloy (228 AD3d 1284, 1287-1291 [4th Dept 2024]), that there is no rational basis for designating defendant a sexually violent offender solely on the ground of his conviction of the Pennsylvania felony sex offenses requiring him to register as a sex offender in that jurisdiction … . Defendant has therefore met his burden of showing that the imposition of the sexually violent offender designation under the second disjunctive clause of Correction Law § 168-a (3) (b), as applied to him,

violates his constitutional right to substantive due process. Consequently, we reverse the order insofar as appealed from and vacate that designation.

However, we note that the issue whether the essential elements of any of the Pennsylvania felonies were the statutory equivalent of a sexually violent offense in New York under the essential elements test set out in the first disjunctive clause of Correction Law § 168-a (3) (b) was never raised before County Court. We decline to consider that alternative basis for affirmance, sua sponte, for the first time on appeal … . We therefore remit to County Court to consider whether any of the Pennsylvania felonies includes all of the essential elements of a sexually violent offense set forth in Correction Law § 168-a (3) (a) … . People v Boldorff, 2025 NY Slip Op 00765, Fourth Dept 2-7-25

Practice Point: A sexually-violent-offender designation based solely upon the fact defendant was required to register as a sex offender in Pennsylvania was deemed unconstitutional here. But the matter was remitted for a determination whether any of the Pennsylvania felonies would have constituted a sexually violent offense in New York.

February 7, 2025

VEHICULAR MANSLAUGHTER, HEIGHTENED DEFINITION OF IMPAIRMENT, DEFENSE COUNSEL'S FAILURE TO REQUEST JURY INSTRUCTION.

DEFENSE COUNSEL'S FAILURE TO REQUEST THAT THE JURY BE INSTRUCTED ON THE HEIGHTENED DEFINITION OF IMPAIRMENT DID NOT CONSTITUTE INEFFECTIVE ASSISTANCE; AT THE TIME OF THE TRIAL THERE WAS NO APPELLATE AUTHORITY FOR THE APPLICATION OF THE HEIGHTENED DEFINITION OF IMPAIRMENT IN ANY CONTEXT OTHER THAN VEHICULAR MANSLAUGHTER (THIRD DEPT).

The Third Department, affirming defendant's conviction, over a dissent, determined that the heightened definition of "impaired" which has been applied to a vehicular manslaughter charge need not be applied to driving while ability impaired by drugs or a combination thereof, the charges against defendant here.

Therefore the failure to request that the jury be instructed to apply the heightened definition of impaired did not constitute ineffective assistance of counsel:

At the time of defendant's trial, there was no appellate authority which warranted a jury instruction concerning the heightened intoxication standard relative to the crimes that were pending against defendant. In Caden N. [189 AD3d 84], this Court, by its own express language, limited its holding to the crime of vehicular manslaughter, which of course is not present here. That is, this Court was careful to state that it was defining impairment "in the context of assessing whether a person has committed the crime of vehicular manslaughter in the second degree" (People v Caden N., 189 AD3d at 90). In the event that this Court had also wished to apply the new definition of impairment to the underlying crimes of driving while ability impaired by drugs or by a combination thereof, it surely would have explicitly stated as much. * * *

In the absence of any such authority, defense counsel properly acquiesced to the jury being charged in accordance with the definition of impairment that was provided in the Criminal Jury Instructions as of that time. Thus, under these circumstances, it cannot be said that any reasonable defense counsel would have requested the intoxication instruction in place of the impairment instruction, and counsel was not ineffective for failing to do so. People v Ambrosio, 2025 NY Slip Op 01133, Third Dept 2-27-25

Practice Point: The Third Department has applied a heightened definition of impairment for vehicular manslaughter cases. The Fourth Department refused to follow suit. The law in this area is in flux.

February 27, 2025