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ACTUAL INNOCENCE, MOTION TO VACATE CONVICTION, EVIDENCE, JUDGES.

DEFENDANT'S MOTION TO VACATE THE 1994 ATTEMPTED MURDER CONVICTION ON "ACTUAL INNOCENCE" GROUNDS SHOULD NOT HAVE BEEN SUMMARILY DENIED; DEFENDANT SUBMITTED SUFFICIENT EVIDENCE TO WARRANT A HEARING, I.E., EVIDENCE A DECEASED COOPERATING WITNESS HAD CONFESSED TO BEING THE SHOOTER (FIRST DEPT).

The First Department determined the evidence of "actual innocence" submitted in defendant's motion to vacate the 1994 attempted murder conviction warranted a hearing:

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The court … should have ordered a hearing on defendant's actual innocence claim … . Defendant presented evidence, supported by the statements of the Assistant United States Attorneys who handled the cooperator, that, in 1998, after defendant's trial, the cooperator credibly exonerated defendant by admitting to the shooting. Although the cooperator has died, his confession would be admissible as a statement against penal interest … . Accordingly, the court lacked grounds for a summary denial under CPL 440.30(4)(b). People v Davila, 2025 NY Slip Op 01300, First Dept 3-6-25

Practice Point: If a motion to vacate a conviction is supported by credible evidence of "actual innocence," a hearing is necessary before ruling on the motion.

March 6, 2025

APPEALS, RECONSTRUCTION HEARING TO COMPLETE RECORD FOR APPEAL.

HERE THE FOURTH DEPARTMENT HAD ORDERED A RECONSTRUCTION HEARING BECAUSE THE ORIGINAL RECORD WAS WOEFULLY INCOMPLETE; THE MAJORITY CONCLUDED THE RECONSTRUCTION HEARING WAS PROPERLY DONE AND AFFIRMED DEFENDANT'S CONVICTION; THE DISSENT TOOK ISSUE WITH NATURE OF THE RECONSTRUCTION HEARING (FOURTH DEPT).

The Fourth Department, affirming defendant's conviction over a dissent, determined the reconstruction hearing compelled by the incomplete original record was properly done. The dissent disagreed:

We … reserved decision … and remitted the matter to County Court "to conduct a reconstruction hearing with respect to the missing and irregular transcripts" … .

Upon remittal, the court conducted a reconstruction hearing during which it heard the testimony of the trial judge and his confidential law clerk, the trial prosecutor, defendant's former attorneys, a court clerk, and a county clerk. The court also admitted in evidence the trial judge's notes; the court's voir dire challenge sheet;

the trial prosecutor's notes on the jury charge and his copy of the verdict sheet; the court clerk's minutes, exhibit list, and witness list; the county clerk's case summary; and various court exhibits from the trial. Based on the record of the reconstruction hearing and the original record, we now affirm.

From the dissent:

Upon remittal, the court convened a reconstruction hearing without expressly delineating the missing and irregular transcripts to be reconstructed. Instead, the court heard the testimony of witnesses offered by the People and closed the hearing without determining whether the evidence submitted was sufficient to reconstruct a record that would permit defendant to review "whether genuine appealable and reviewable [trial] issues do or do not exist" … . That was error. Although the reconstruction required by the substantial irregularities in this trial transcript was considerably broader than the discrete issues for which reconstruction is more frequently directed … , the intent of our prior decision was for the court to make a determination whether the missing and irregular transcripts were sufficiently reconstructed, not merely to assist in the marshaling of evidence from which this Court could reconstruct the trial record behind closed doors … . People v Meyers, 2025 NY Slip Op 01762, Fourth Dept 3-21-25

Practice Point: Consult this decision for the issues raised, and the procedures to be followed, when the original record is too incomplete to allow an appellate review.

March 21, 2025

ASSAULT, INCLUSORY CONCURRENT COUNT, APPEALS.

ASSAULT THIRD IS AN INCLUSORY CONCURRENT COUNT OF ASSAULT SECOND; THE ASSAULT THIRD CONVICTION REVERSED AND THE COUNT DISMISSED; THE ISSUE NEED NOT BE PRESERVED FOR APPEAL (FOURTH DEPT).

The Fourth Department determined the assault third conviction must be reverses as an inclusory concurrent count of the assault second degree conviction. The issue need not be preserved for appeal:

… [A]ssault in the third degree is an inclusory concurrent count of assault in the second degree … . Thus, that part of the judgment convicting defendant of assault in the third degree must be reversed and count 2 of the indictment dismissed … , and we therefore modify the judgment accordingly. Contrary to the People's contention, preservation of this issue is not required … . People v Niles, 2025 NY Slip Op 01502, Fourth Dept 3-14-25

Practice Point: Assault third is an inclusory concurrent count of assault second. A defendant cannot stand convicted of both. The issue can be raised for the first time on appeal.

March 14, 2025

ATTORNEYS, INEFFECTIVE ASSISTANCE.

DEFENSE COUNSEL'S LACK OF PREPARATION AND FAILURE TO LIMIT MOLINEUX EVIDENCE DEPRIVED DEFENDANT OF EFFECTIVE ASSISTANCE; NEW TRIAL ORDERED (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction, determined defendant was not provided with effective assistance of counsel:

… [T]he record reveals that on several occasions as the case neared trial, including during the Mapp and Molineux hearings, and subsequently at the trial defense counsel was unfamiliar with and had not reviewed relevant and critical discovery obtained from defendant's cell phones following the execution of a search warrant. For example, defense counsel initially failed to object to the admission of a flash drive containing the entire contents of defendant's cell phones, but, when the People later isolated a portion of the cell phone contents as a separate exhibit for the jury, defense counsel objected—although the contents had already been admitted—and acknowledged that he had not had a chance to review "the exact exhibit." Defense counsel also failed to object to the portion of those contents containing voice notes, which constituted improper hearsay … . Additionally, defense counsel's failure to review the contents of defendant's cell phones had the result that he could not appreciate how important certain text messages and other communications were to the People's case. Defense counsel belatedly sought to

admit certain physical evidence of financial transactions that had not previously been disclosed during discovery to counter the communications presented by the People. County Court, however, precluded that physical evidence. Furthermore, defense counsel never sought a limiting instruction on the Molineux evidence that the People were permitted to introduce … . We conclude that "[t]here is simply no legitimate explanation for" defense counsel's failure to properly investigate the law, facts, and issues relevant to the case and that "[t]his failure seriously compromised defendant's right to a fair trial" … . People v Cousins, 2025 NY Slip Op 01535, Fourth Dept 3-14-25

Practice Point: Here defense counsel did not review evidence provided in discovery and failed to seek a limiting instruction on the Molineux evidence the People were allowed to introduce. A new trial was ordered.

March 14, 2025

COMPETENCY HEARING REQUIRED, MATTER REMITTED FOR A RECONSTRUCTION HEARING, JUDGES, APPEALS.

THE JUDGE DID NOT HOLD A COMPETENCY HEARING IN VIOLATION OF THE MANDATED PROCEDURES IN CRIMINAL PROCEDURE LAW ARTICLE 730; MATTER REMITTED FOR A RECONSTRUCTION HEARING (SECOND DEPT).

The Second Department, ordering a reconstruction hearing on the defendant's competence to stand trial, determined that the judge had not followed the procedures mandated by Criminal Procedure Law article 730:

"Article 730 of the Criminal Procedure Law sets out the procedures courts of this State must follow in order to prevent the criminal trial of [an incompetent] defendant" … . The CPL expressly provides that "[w]hen the examination reports submitted to the court show that the psychiatric examiners are not unanimous in their opinion as to whether the defendant is or is not an incapacitated person . . . the court must conduct a hearing to determine the issue of capacity" (CPL 730.30[4] …).. "That section is mandatory and not discretionary" … .

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Here, once the Supreme Court made a threshold determination that the defendant's conduct warranted an examination, it should have followed the procedures mandated by CPL article 730. The failure to comply with the statute deprived the defendant of the right to a full and fair determination of his mental capacity to stand trial … . We find, however, that the requirements of CPL article 730 can be satisfied by a reconstruction hearing … . People v Petty, 2025 NY Slip Op 01824, Second Dept 3-26-25

Practice Point: If the court orders a psychiatric examination to determine whether defendant is an incapacitated person and the psychiatric examiners are not unanimous, the court must conduct a hearing on the issue of capacity.

March 26, 2025

DEPRAVED INDIFFERENCE, RECKLESS DRIVING, EVIDENCE.

THE MAJORITY AFFIRMED DEFENDANT'S DRIVING-RELATED RECKLESS-ENDANGERMENT-FIRST-DEGREE CONVICTION STEMMING FROM HIS STRIKING SEVERAL CARS, CAUSING ONE TO FLIP, AND CRASHING INTO A HOUSE; TWO DISSENTERS ARGUED THE PROOF DID NOT SUPPORT THE "DEPRAVED INDIFFERENCE" ELEMENT OF THE OFFENSE (THIRD DEPT).

The Third Department affirmed defendant's reckless endangerment first degree conviction over a two-justice dissent which argued the evidence did not support the "depraved indifference" element of the offense:

From the dissent:

As the majority details, on the morning of June 27, 2018, defendant was driving his vehicle in the Town of Colonie, Albany County when he collided with several vehicles — causing one to flip over — before hitting a curb and crashing into the foundation of a house. We acknowledge that the People were able to rely on the circumstantial evidence surrounding defendant's conduct to establish that he acted with the requisite mens rea of depraved indifference to human life … .

Nevertheless, in reviewing these particular circumstances, we believe there is insufficient evidence to show that he was aware of, appreciated and disregarded the risks caused by his behavior (see id.). It is uncontroverted that defendant was driving recklessly and that, in doing so, he caused significant property damage as well as various degrees of injury to the victims. However, throughout this ordeal, which lasted less than five minutes and spanned less than half a mile, defendant was not driving well in excess of the posted speed limit, and there is no evidence that he ever drove against oncoming traffic or failed to obey traffic lights … . Even viewing the particular circumstances here in the light most favorable to the People, we do not believe that this case presents one of the rare circumstances where "the mens rea of depraved indifference . . . [is] established by risky behavior alone" … . People v Bender, 2025 NY Slip Op 01678, Third Dept 3-20-25

Practice Point: Consult this decision for some insight into the proof necessary for the "depraved indifference" element of reckless endangerment first degree in context of reckless driving.

March 20, 2025

DNA ON WEAPON ALONE NOT ENOUGH, MURDER COVICTION REVERSED, EVIDENCE, APPEALS.

THE ONLY EVIDENCE OF DEFENDANT'S PARTICIPATION IN THE SHOOTING WAS DNA ON A HANDGUN; THE EVIDENCE OF MURDER AND POSSESSION OF A WEAPON WAS LEGALLY INSUFFICIENT; THE VERDICT WAS AGAINST THE WEIGHT OF THE EVIDENCE; INDICTMENT DISMISSED (FIRST DEPT).

The First Department, vacating defendant's murder conviction and dismissing the indictment, determined the circumstantial evidence was legally insufficient and the verdict was against the weight of the evidence. The only evidence against the defendant was DNA on a handgun. No evidence placed defendant at the scene of the shooting or in the vehicle apparently used by persons (Jenkins and Brown) involved in the shooting:

… [T]here no evidence from which to infer that defendant had the intent to commit, or aid Jenkins or Brown in furtherance of, the shooting. The People's case depends almost entirely upon the DNA evidence, from which the People infer that defendant racked the Glock used to kill Ms. Jacobs. The DNA evidence, however, is highly equivocal and does not reasonably permit such an inference. … Critically, the OCME [Office of the Chief Medical Examiner] criminalist Hardy testified that it was impossible to determine when each contributor left DNA on the gun; how defendant's DNA was transferred to the gun; or, more importantly, whether defendant even touched the gun. Without additional evidence that defendant possessed the gun during or took any actions to aid Jenkins or Brown in the shooting, any conclusion that defendant possessed the gun or committed or aided in the shooting is based entirely on conjecture.

There is no such corroborating evidence. This case contains no physical, video, or testimonial proof regarding any act defendant took in furtherance of possessing the gun or shooting Ms. Jacobs. Even assuming arguendo defendant's presence with Jenkins and Brown nearly two hours before the shooting, such does not lead to a permissible inference that he shot Ms. Jacobs or possessed the gun in furtherance of the crime that evening. * * *

Further, there is no legally sufficient evidence proving that defendant was present at the crime scene. Again, assuming that defendant was with Jenkins and Brown hours prior to the shooting does not permit any reasonable inference that he was with them at the crime scene. There is no evidence that defendant ever entered the Nissan. Nor was there evidence that he was present in the Nissan at the time of the chase. While police recovered from the Nissan fingerprints of Jenkins, Brown, and that of a third unidentified back seat passenger, they did not recover defendant's prints. Additionally, the liquor bottles with which the People attempt to tie defendant to the car do not match those defendant purchased at the liquor store, and the bottles were never tested for defendant's fingerprints or DNA. People v Coke, 2025 NY Slip Op 01297, First Dept 3-6-25

Practice Point: Consult this opinion for discussions of convictions based entirely on circumstantial evidence. the criteria for finding evidence legally insufficient. and the criteria for finding a verdict is against the weight of the evidence.

March 6, 2025

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FOR CAUSE CHALLENGE TO JUROR, JUDGES.

DEFENDANT'S FOR-CAUSE CHALLENGE TO A JUROR SHOULD HAVE BEEN GRANTED; NEW TRIAL ORDERED (SECOND DEPT).

The Second Department, reversing defendant's conviction and ordering a new trial, determined defendant's for-cause challenge to a prospective juror should have been granted:

… Supreme Court should have granted the defendant's for-cause challenge to a prospective juror who evinced a state of mind that was likely to preclude the prospective juror from rendering an impartial verdict based on the evidence … . "[A] prospective juror whose statements raise a serious doubt regarding the ability to be impartial must be excused unless the juror states unequivocally on the record that he or she can be fair and impartial" … . Here, during voir dire, the prospective juror stated that his mother-in-law was a victim of sexual assault and raised his hand when defense counsel asked if any potential jurors felt that this was not the "right case" for them since the sexual assault allegations in this case might make them "too emotional" and might be something they "c[ould not] handle." Under the circumstances, the prospective juror's statements raised a serious doubt regarding his ability to be impartial, and the court failed to elicit an unequivocal assurance on the record that the prospective juror could render a fair and impartial verdict based on the evidence … . Since the defendant exhausted his peremptory challenges, the denial of his for-cause challenge constitutes reversible error … . People v Faustin, 2025 NY Slip Op 01231, Second Dept 3-5-25

Practice Point: The prospective juror's statements raised serious doubts about his ability to be impartial in this sexual-offense case. Defendant's for-cause challenge to the prospective juror should have been granted.

March 5, 2025

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GUILTY PLEAS, MISINFORMATION ABOUT POSSIBLE SENTENCE, JUDGES, APPEALS.

THE DEFENDANT'S MAXIMUM SENTENCE WAS 20 YEARS BUT THE JUDGE REPEATEDLY TOLD DEFENDANT HE WAS FACING 45 YEARS; THE MAJORITY DETERMINED THE GUILTY PLEA WAS NOT VOLUNTARILY ENTERED; THE DISSENT ARGUED THE ISSUE WAS NOT PRESERVED (CT APP).

The Court of Appeals, reversing the Appellate Division, in a full-fledged opinion by Judge Rivera, over a two-justice dissent, determined defendant's guilty plea was not entered voluntarily, knowingly and intelligently because the judge repeatedly told the defendant he was facing 45 years in prison when his sentence was capped at 20. The dissent argued the error was not preserved:

The issue on appeal is whether defendant Marquese Scott's guilty plea was knowing, voluntary, and intelligent. Supreme Court made an egregious error during the plea proceedings, repeatedly asserting that defendant faced up to 45 years' incarceration if found guilty after trial, when his maximum exposure was statutorily capped at 20 years. As we have long recognized, inaccurate information regarding a sentence is a significant factor in determining whether a plea was voluntary. Given defendant's young age, his inexperience facing serious charges with the risk of consecutive sentencing, and the vast disparity between the plea offer of 6 to 8 years and the court's erroneous assertion that he faced 25 years more than the law allowed, we hold that defendant's guilty plea was not the result of a free and informed choice. Accordingly, defendant's plea cannot stand. * * *

From the dissent:

With only narrow exceptions, we have unequivocally required a defendant to preserve a challenge to the voluntariness of their plea by making "a motion to withdraw the plea under CPL 220.60 (3) or a motion to vacate the judgment of conviction under CPL 440.10" … . People v Scott, 2025 NY Slip Op 01562, CtApp 3-18-25

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Practice Point: A guilty plea entered after the defendant is erroneously told he is facing 45 years in prison when the sentence is statutorily capped at 20 is not voluntary.

Practice Point: Here the dissent argued the majority should not have carved out a new exception to the preservation requirement to consider the merits of this case.

March 18, 2025

GUILTY PLEAS, FAILURE TO INFORM DEFENDANT OF MANDATORY FINES, APPEALS, JUDGES, VEHICLE AND TRAFFIC LAW.

DEFENDANT'S GUILTY PLEA WAS NOT VOLUNTARY BECAUSE HE WAS NOT INFORMED OF THE MANDATORY FINES FOR THE VEHICLE AND TRAFFIC LAW OFFENSES; AN EXCEPTION TO THE PRESERVATION REQUIREMENT APPLIED; AN APPEAL WAIVER DOES NOT PRECLUDE ARGUING THE PLEA WAS INVOLUNTARY (CT APP).

The Court of Appeals, reversing the Appellate Division, determined defendant's guilty plea was not voluntary because he was not informed of the mandatory fines for the Vehicle and Traffic Law offenses. Although the error was not preserved, the "no actual or practical ability to object" preservation exception was invoked: An appeal waiver does not preclude the defendant from arguing the plea was involuntary:

An exception to the preservation requirement exists where, as here, a defendant had "no actual or practical ability to object" prior to the imposition of the fines by the sentencing court … . Further, a valid appeal waiver does not preclude a defendant from challenging a plea as involuntary, where the court fails to advise a defendant of a component of their sentence before it is imposed … .

Supreme Court erred in failing to inform defendant at the time of his plea that the sentences for two of the offenses to which he was pleading guilty included mandatory fines (see Vehicle and Traffic Law § 511 [3] [b]; Vehicle and Traffic Law § 1193 [1] [a]) The failure to "ensure that . . . defendant, before pleading guilty, ha[d] a full understanding of what the plea connotes and its consequences"

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… , requires vacatur of the plea. People v Padilla-Zuniga, 2025 NY Slip Op 01563, CtApp 3-18-25

Practice Point: The failure to inform the defendant of mandatory fines renders the guilty plea involuntary.

Practice Point: Here the "no actual or practical ability to object" exception to the preservation requirement applied.

Practice Point: An appeal waiver does not preclude the argument that the plea was involuntarily entered.

March 18, 2025

INEFFECTIVE ASSISTANCE, MISINFORMATION ABOUT PAROLE ELIGIBILITY, SUCCESSIVE MOTIONS TO VACATE CONVICTION, ATTORNEYS, JUDGES.

THIS CASE PRESENTS THE RARE CIRCUMSTANCE WHERE DEFENDANT'S SECOND MOTION TO VACATE HIS CONVICTION SHOULD BE CONSIDERED, DESPITE THE DENIAL OF DEFENDANT'S PRIOR MOTION WHICH WAS BASED ON THE SAME GROUND, I.E., DEFENSE COUNSEL'S MISINFORMATION ABOUT WHEN DEFENDANT WOULD BE ELIGIBLE FOR PAROLE (THIRD DEPT).

The Third Department, reversing County Court, determined the defendant's second motion to vacate his murder conviction (by guilty plea) based on his attorney's erroneously informing him he would be eligible for parole haff-way through the 15-year sentence required a hearing. Defendant had made a prior motion on the same ground which was denied by another judge. The Third Department noted that ordinarily the prior motion would preclude the instant motion, but irregularities in the prior order denying the motion and the facts asserted in support of the instant motion justified giving the defendant a second chance:

… [T]he Legislature anticipated there would be times when it would be appropriate to reconsider issues previously decided on the merits (see CPL 440.10 [3] …). Doubtless those times should be rare; but, in our view, this is one of them.

Critically, the instant motion includes witness affidavits affirming that counsel assured defendant that he would be eligible for parole review as early as halfway through his minimum 15-year term of imprisonment (see CPL 440.30 [1] [a]; compare CPL 440.30 [4] [d]). Also attached is correspondence between defendant and counsel from December 2020. In one letter, defendant asks why counsel advised him that he would be eligible for early parole; counsel's response does not address defendant's question. Given defendant's submissions, plus his relatively young age and inexperience with the criminal justice system at the time of his guilty plea, along with the irregularities in the June 2020 order, summary denial of defendant's motion was an improvident exercise of discretion. Accordingly, in the exercise of our broad authority to substitute our discretion for that of County Court … , we set aside the procedural bars to relief on the issue of counsel's alleged erroneous parole advice and remit the matter for a hearing … . People v Phelps, 2025 NY Slip Op 01680, Third Dept 3-20-25

Practice Point: Here irregularities in the order denying defendant's first motion to vacate his conviction and the facts presented in support of defendant's second motion on the same ground justified consideration of the second motion.

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JUDGES, JUDGE REVERSED THE BURDEN OF PROOF IN RENDERING VERDICT.

THE JUDGE, IN RENDERING THE VERDICT, STATED THE DEFENDANT HAD NOT PROVEN HE WAS FRAMED AND THEREFORE WAS GUILTY; THAT SHIFTED THE BURDEN OF PROOF TO THE DEFENDANT, REQUIRING A NEW TRIAL (SECOND DEPT).

The Second Department, reversing defendant's conviction and ordering a new trial, determined the court, in rendering its verdict, shifted the burden of proof to the defendant:

… Supreme Court, in rendering its verdict, impermissibly shifted the burden of proof to the defendant. The defendant asserted at trial that he had been framed by the police. In delivering its verdict, the court ruled that "the credible testimony before me does not persuade this Court beyond a reasonable doubt that [the] defendant was in fact framed. And that being so . . . I find [the] defendant guilty." The court's finding "reverses the constitutionally required principles that the defense bears no burden and that it is the prosecution that must introduce evidence sufficient to persuade the fact finder, beyond a reasonable doubt, of the defendant's guilt" … . People v Steward, 2025 NY Slip Op 01825, Second Dept 3-26-25

Practice Point: Here the judge, in rendering the verdict, stated the defendant was found guilty because the defendant had not proven he was framed. Shifting the burden of proof to the defendant required reversal and a new trial.

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JUROR MISCONDUCT, MOTION TO SET ASIDE VERDICT, ATTORNEYS, JUDGES.

A JUROR, AN ATTORNEY, ALLEGEDLY TOLD THE OTHER JURORS THAT THE "BEYOND A REASONABLE DOUBT" STANDARD COULD BE DISREGARDED; DEFENDANT WAS ENTITLED TO A "JUROR MISCONDUCT" HEARING IN CONNECTION WITH HIS MOTION TO SET ASIDE THE VERDICT (FIIRST DEPT).

The First Department, holding the matter in abeyance, determined the allegations that a juror, A.H., an attorney, told the other jurors the "beyond a reasonable doubt" standard did not apply to everything in the case necessitated an evidentiary hearing on defendant's motion to set aside the verdict:

Some of the alleged conduct of juror A.H., an attorney, described in the supporting affidavits of two jurors, was an emphatic expression of the juror's thoughts, his strong belief in defendant's guilt, his understanding of the court's instructions, his personal antipathy to the defendant, and, to the extent it was incorrect, his understanding of the law, none of which constitutes juror misconduct under CPL 330.30(2) … . However, the affidavit of one juror (E.A.) affirmed that A.H. "told us that we did not have to apply the beyond a reasonable doubt standard for everything in the case." The other juror (S.D.) affirmed that A.H. averred, without any stated exception, "that the proof did not have to be beyond a reasonable doubt."

Considering these attestations regarding A.H.'s alleged direction to the jury members to disregard the court's instruction concerning the burden of proof, defendant was entitled to an evidentiary hearing on his motion to set aside the verdict. We hold the appeal in abeyance for that purpose. People v Hernandez, 2025 NY Slip Op 01589, Ct App 3-18-25

Practice Point: Consult this decision for some insight into what is, and what is not, juror-misconduct, here in the context of a juror, an attorney, telling the other jurors the "beyond a reasonable doubt" standard may be disregarded.

March 18, 2025

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KIDNAPPING CHARGE NOT SUPPORTED, FAMILY LAW.

RESTRAINING A PERSON FOR A FEW SECONDS WHILE ATTEMPTING TO PULL THAT PERSON INTO A VEHICLE DOES NOT SATISFY THE CRITERIA FOR KIDNAPPING (SECOND DEPT).

The Second Department, reversing (modifying) Family Court in this juvenile delinquency proceeding, determined the evidence did not support the kidnapping charge:

… Family Court's determination that the appellant committed acts which, if committed by an adult, would have constituted the crime of kidnapping in the second degree was against the weight of the evidence. "A person is guilty of kidnapping in the second degree when he [or she] abducts another person" (Penal Law § 135.20 …). As relevant here, abduction "means to restrain a person with intent to prevent his [or her] liberation by either secreting or holding him [or her] in a place where he [or she] is not likely to be found" … . "Restrain means to restrict a person's movements intentionally and unlawfully in such manner as to interfere substantially with his [or her] liberty by moving him [or her] from one place to another, or by confining him [or her] . . . without consent and with knowledge that the restriction is unlawful" … . Here, the presentment agency's evidence demonstrated that the appellant restrained the complainant for a very short time while the two were in the midst of a physical altercation. Although the complainant testified that the appellant pulled her partway into a vehicle, at least one door of the vehicle remained open and the vehicle traveled only a very short distance before stopping again within a matter of mere seconds. The evidence established only that the appellant restrained the complainant, without the requisite "secreting or holding [her] in a place where [she] is not likely to be found" (Penal Law § 135.00[2][a]). Matter of Marco F., 2025 NY Slip Op 01365, Second Dept 3-12-25

Practice Point: Consult this decision for a clear explanation of the elements of "kidnapping." Briefly restraining a person while unsuccessfully trying to pull that person into a vehicle is not enough.

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POSSESSION OF A WEAPON, INSUFFICIENT EVIDENCE THE WEAPON WAS LOADED WHEN POSSESSED.

PROOF THAT THE WEAPON WAS LOADED WHEN IT WAS FOUND THE DAY AFTER DEFENDANT POSSESSED IT WAS NOT SUFFICIENT TO SUPPORT THE CRIMINAL-POSSESSION-OF-A-WEAPON-SECOND-DEGREE COUNT (SECOND DEPT).

The Second Department, reversing defendant's conviction on a count charging criminal possession of a weapon second degree, determined the People did not prove the firearm was loaded at the time defendant possessed it:

… [W]e find that [the evidence] was legally insufficient to establish, beyond a reasonable doubt, the defendant's guilt of criminal possession of a weapon in the second degree as charged under count 9 of the indictment, which pertained to the Intratec firearm. A person is guilty of criminal possession of a weapon in the second degree when, inter alia, with intent to use the same unlawfully against another, such person possesses a loaded firearm (see Penal Law § 265.03[1][b]). Here, the evidence presented by the People …. was legally sufficient to establish that the defendant possessed the Intratec firearm in Queens on July 8, 2007. However, the People did not present any evidence that the Intratec firearm was loaded at the time that it was in the defendant's possession in Queens on July 8, 2007, as charged under count 9 of the indictment … . Rather, the People merely presented evidence that the Intratec firearm was loaded at the time that it was found by the police in a garage in Brooklyn approximately one day later on July 9, 2007. Under these circumstances, the evidence was legally insufficient to establish, beyond a reasonable doubt, the defendant's guilt of criminal possession of a weapon in the second degree as charged under count 9 of the indictment … . People v Bostic, 2025 NY Slip Op 01816, Second Dept 3-26-25

Practice Point: Proof that a firearm was loaded on July 9 does not prove the firearm was loaded when defendant possessed it on July 8.

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PRIOR BAD ACTS IMPROPERLY REFERENCED, NEW TRIAL REQUIRED.

IN THIS STRANGULATION CASE, A POLICE OFFICER'S TESTIMONY ABOUT UNRELATED ALLEGED STRANGULATIONS INVOLVING OTHER COMPLAINANT'S DEPRIVED DEFENDANT OF A FAIR TRIAL (FOURTH DEPT).

The Fourth Department, reversing defendant's strangulation conviction and ordering a new trial, determined the admission of the testimony of a police officer describing unrelated allegations of strangulation by other complainants deprived defendant of a fair trial:

… County Court erred in admitting in evidence testimony from a police officer who responded to the scene regarding his observations of other, unnamed complainants in prior, unspecified cases. The officer was permitted to testify that he had taken photographs "once or twice" of complainants who had "alleged strangulations," and that he could not recall having observed bruises on those other complainants. The officer's testimony was used by the People in order to explain that the lack of marks on the neck of the victim in the present case did not mean that defendant did not strangle her. Indeed, during closing argument the People invited the jury to "recall the testimony of [the officer], that he did not observe any signs of bruising on [the victim's] neck. You'll also recall that he has been to other strangulations and investigated those, and he didn't find any injuries there either." We conclude that the officer's testimony regarding prior, unrelated cases is entirely irrelevant to the instant case, and that it was error to admit that "irrelevant and highly prejudicial testimony" … . People v Iqbal, 2025 NY Slip Op 01746, Fourth Dept 3-21-25

Practice Point: Here a police officer's vague testimony about unrelated allegations of strangulation involving complainants other than the victim in this strangulation case deprived defendant of a fair trial.

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SEALED RECORDS OF A TRIAL ENDING IN ACQUITTAL NOT AVAILABLE TO CIVILIAN COMPLAINT REVIEW BOARD, ADMINISTRATIVE LAW, MUNICIPAL LAW.

THE NEW YORK CITY CIVILIAN COMPLAINT REVIEW BOARD (CCRB) IS NOT ENTITLED TO UNSEAL THE RECORD OF THE CRIMINAL PROSECUTION AND TRIAL OF AN OFF-DUTY POLICE OFFICER WHO SHOT A MAN IN A ROAD RAGE INCIDENT (SECOND DEPT).

The Second Department, reversing Supreme Court, in a full-fledged opinion by Justice McCormick, determined the NYC Civilian Complaint Review Board (CCRB) was not entitled to unseal the record of a criminal action which had resulted in the acquittal of an off-duty police officer (the defendant) who shot and killed a man during a road rage incident:

At his criminal trial, the defendant presented a justification defense … [and] the jury acquitted him of all charges. As a result, the records pertaining to the defendant's arrest and criminal prosecution were sealed (see CPL 160.50). * * *

The CCRB charged the defendant with three counts of intentionally using force without police necessity, rising to the level of assault in the second degree, in violation of the NYPD's Patrol Guide. * * *

… [T]he CCRB moved herein to unseal the record of this criminal action … in order to conduct its disciplinary trial … . * * *

Although the New York City Charter authorizes the CCRB to compel the attendance of witnesses and to require the production of such records and other materials as are necessary for its investigations of police misconduct, and further requires the NYPD, inter alia, to provide records and other materials that are necessary for the CCRB's investigations, the Charter specifically exempts from such disclosure "such records or materials that cannot be disclosed by law" (NY City Charter § 440[d][1]). As such, it cannot be said that the CCRB has been given a specific grant of power that would allow it to access the sealed records … . People v Isaacs, 2025 NY Slip Op 01818, Second Dept 3-26-25

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Practice Point: The NYC Civilian Complaint Review Board cannon unseal the record of the criminal prosecution of a police officer which resulted in an acquittal.

March 26, 2025

SEARCH WARRANTS, HEARSAY PROVIDED PROBABLE CAUSE, EVIDENCE.

THE MAJORITY CONCLUDED THE HEARSAY ALLEGATIONS IN THE SEARCH WARRANT APPLICATION PROVIDED PROBABLE CAUSE TO SEARCH TWO DIFFERENT RESIDENCES; THE TWO-JUSTICE DISSENT ARGUED THE APPLICATION DID NOT PROVIDE PROBABLE CAUSE TO SEARCH ONE OF THE TWO RESIDENCES, I.E., THERE WERE NO DETAILS DESCRIBING THE NARCOTICS THE INFORMANT OBSERVED IN THE RESIDENCE AND NO INDICATION WHEN THE OBSERVATON WAS MADE (FOURTH DEPT).

The Fourth Department, over a two-justice dissent, determined the hearsay allegations in the search warrant application were sufficient to provide probable cause to search two different residences. The two dissenting justices agued that the search warrant application focused on one residence and barely mentioned the other:

From the dissent:

Here, the warrant application in question concerned two addresses, i.e., 205 Curtis Street and 215 Curtis Street, but contained a mere two statements based on the confidential informant's claimed knowledge regarding 205 Curtis Street. Specifically, it stated that "[t]he [confidential informant] has been inside 205 Curtis St[reet] on multiple occasions and is aware that narcotics are kept inside the location," and that "[t]he [confidential informant] . . . has been to 205 and 215 Curtis Street multiple times for narcotics transactions." The remaining contents of the six-page, single-spaced warrant application focused on 215 Curtis Street.

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… [W]e agree with defendant that the hearsay information regarding 205 Curtis Street does not provide the requisite basis of knowledge justifying the issuance of the search warrant for that address … . First, we note that the application neither details any transaction that occurred at 205 Curtis Street, nor specifies the type of narcotic exchanged during such transaction. Second, no time frame is provided for the hearsay statements concerning 205 Curtis Street, and it is therefore entirely possible that the unspecified drug transaction occurred years or decades ago. In fact, the warrant application entirely fails to set forth what was actually observed by the informant at 205 Curtis Street or when it was observed … . On this record, we conclude that there is no basis provided to support the informant's claimed awareness of narcotics at 205 Curtis Street. People v Berry, 2025 NY Slip Op 01523, Fourth Dept 3-14-25

Practice Point: According to the dissent, the bare allegation the informant observed narcotics in a residence, without any detail and without any time frame, did not provide probable cause for the search of that residence.

March 14, 2025

SELF-REPRESENTATION, FAILURE TO EXPLAIN RISKS, ATTORNEYS, JUDGES.

ALTHOUGH THE JUDGE APPOINTED STANDBY COUNSEL AS DEFENDANT REQUESTED, THE JUDGE DID NOT CONDUCT AN ADEQUATE INQUIRY TO ENSURE DEFENDANT UNDERSTOOD THE RISKS OF REPRESENTING HIMSELF; GUILTY PLEA VACATED (THIRD DEPT).

The Third Department, vacating defendant guilty plea, determined the judge did not conduct an adequate inquiry before granting defendant's request to represent himself. The appointment of standby counsel is not a substitute for an inquiry to make sure a defendant understands the risks:

… [D]efendant repeatedly conditioned his request on proceeding pro se "with standby [counsel]." In response to defendant's request, County Court inquired as to

whether defendant knew the rule regarding standby counsel. Although defendant replied in the negative, the court provided no further explanation and, instead, proceeded to question defendant about his knowledge of the law. Following a week-long adjournment for defendant to confer with counsel regarding his request to proceed pro se, at the next court appearance, defendant reaffirmed his desire to proceed pro se with standby counsel. Although the court informed defendant that he did not qualify for standby counsel because he seemed to be familiar with some legal terms, defendant responded that he was requesting standby counsel because he does not know everything in the law. The record does not otherwise reflect that defendant was informed of or understood that, despite being permitted to proceed with standby counsel, there were risks inherent in proceeding pro se. Upon this record, we conclude that County Court's inquiry was insufficient to establish that defendant's waiver of the right to counsel was knowing and voluntary and, accordingly, the plea must be vacated … . People v Gray, 2025 NY Slip Op 01259, Third Dept 3-6-25

Practice Point: The appointment of standby counsel is not a substitute for a judge's responsibility to make an inquiry to ensure the defendant is aware of the risks of representing himself.

March 6, 2025

SENTENCING, DEFENDANT'S RIGHT TO BE PRESENT, JUDGES.

A DEFENDANT'S RIGHT TO BE PERSONALLY PRESENT FOR SENTENCING EXTENDS TO RESENTENCING AND TO THE AMENDMENT OF A SENTENCE (SECOND DEPT).

The Second Department, reversing Supreme Court and remitting the matter, determined defendant had a right to be present at his resentencing:

The defendant was not present at the resentencing proceeding in June 2023 because he was incarcerated in Florida. The Supreme Court nonetheless resentenced the defendant to the same sentence as had been previously imposed.

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"A defendant has a fundamental right to be personally present at the time sentence is pronounced" … , which "extends to resentencing or to the amendment of a sentence" … . Although the defendant had already completed serving the incarceration portion of his sentence as of resentencing, the defendant had not completed the postrelease supervision component of his sentence, for which the Supreme Court could have resentenced the defendant to a minimum period of 3 years and a maximum period of 10 years (see Penal Law § 70.45[2-a][a]). The defendant was not present at the resentencing proceeding, and the record is devoid of any indication that he waived his right to be present … . People v Allen, 2025 NY Slip Op 01381, Second Dept 3-12-25

Practice Point: Absent a waiver, a defendant has the right to be personally presented at a resentencing.

March 12, 2025

SENTENCING, RESTITUTION DEEMED "VINDICTIVE," JUDGES, APPEALS.

THE RESTITUTION ORDERED AS PART OF DEFENDANT'S SENTENCE AFTER THE SECOND TRIAL RAISED A PRESUMPTION OF VINDICTIVENESS; DEFENDANT ARGUED THE RESTITUTION WAS PUNISHMENT FOR WINNING THE APPEAL OF THE FIRST TRIAL; THE THIRD DEPARTMENT VACATED THE RESTITUTION; ALSO, THE MURDER SECOND DEGREE COUNTS WERE DISMISSED AS INCLUSORY CONCURRENT COUNTS OF MURDER FIRST DEGREE (THIRD DEPT).

The Third Department, vacating the restitution portion of the sentence, determined the presumption of vindictiveness had not been overcome. The defendant had won an appeal requiring a second trial. Defendant argued that the restitution in the amount of $139,231.87 ordered after the second trial was punishment for the successful appeal. The Third Department also dismissed the murder second degree counts a inclusory concurrent courts of murder first degree:

"[T]o insure that trial courts do not impose longer sentences to punish defendants for taking an appeal, a presumption of vindictiveness generally arises when defendants who have won appellate reversals are given greater sentences after their retrials than were imposed after their initial convictions" … . * * *

… [T]he imposition of restitution after retrial did result in an enhanced sentence following defendant's successful appeal, and, as a result, the presumption of vindictiveness arose … . However, the court failed to engage in any on-the-record examination of the objective reasons why an enhanced sentence must be imposed, other than finding that it was not vindictive to order defendant "to make financially whole the representatives of his victims," facts that indisputably existed at the time of the initial sentencing … . * * *

While we observe that County Court may have not actually been seeking to punish defendant for exercising his right to appeal when it imposed restitution, it was nevertheless the court's obligation to overcome the presumption of vindictiveness by placing the reasons for the enhanced sentence on the record, and, based upon its failure to do so, we are constrained to vacate this portion of defendant's sentence … . People v Powell, 2025 NY Slip Op 01839, Second Dept 3-27-25

Practice Point: Here ordering restitution as part of the sentence after the second trial raised a presumption that the restitution constituted "punishment" for defendant's winning the appeal of the first trial. The sentencing court put nothing on the record to rebut the presumption of vindictiveness, so the restitution was vacated.

Practice Point: Here the murder second degree counts were dismissed as concurrent inclusory counts of murder first.

March 27, 2025

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SEX OFFENDER REGISTRATION ACT (SORA), INSUFFICIENT EVIDENCE, RISK-LEVEL REDUCED.

THE EVIDENCE THAT DEFENDANT HAD USED ALCOHOL TO EXCESS AT THE TIME OF THE CRIME WAS CONFLICTING AND INSUFFICIENT; IN ADDITION, THE DEFENDANT WAS NOT IN CUSTODY OR UNDER SUPERVISION AT THE TIME OF ALLEGED MISCONDUCT; THEREFORE 25 POINTS WERE TAKEN OFF DEFENDANT'S RISK-LEVEL ASSESSMENT (FOURTH DEPT).

The Fourth Department determined the evidence did not support the finding that defendant was intoxicated at the time of the offense. In addition the SORA court wrongly found that defendant was in custody or under supervision at the time of alleged misconduct. Therefore a total of 25 points were wrongly applied to the risk-level assessment:

… [I]n order to demonstrate that [defendant] was abusing . . . alcohol at the time of the offense, the People [were required to] show by clear and convincing evidence that [defendant] used alcohol in excess . . . at the time of the crime" … . Here, the victim informed a caseworker that, on the night of that incident, defendant had been "outside by the fire drinking." Defendant's ex-wife also indicated in her victim impact statement that defendant was "drunk" on the night of that incident, but it is unclear whether the source of her information was the victim or hearsay from an unidentified third-party with whom the victim had spoken and whose reliability could not be tested … . In contrast, the victim denied that defendant had been drinking at the time of the second incident and indicated that defendant "normally doesn't drink." In his interview with probation, defendant denied "current alcohol or substance use and . . . any current or past treatment for such." We conclude that there is no indication in the record that defendant abused alcohol by drinking in excess, that defendant became intoxicated, or that alcohol affected his behavior during the incident … . Nor is it "clear from the record what time the drinking occurred, how much [defendant] had to drink, and how much time passed before he abused [the] victim" … . The People thus failed to establish that defendant abused alcohol at the time of the offensive conduct, and the court erred

in assessing 15 points under risk factor 11. People v Crane, 2025 NY Slip Op 01530,Fourth Dept 3-14-25

Practice Point: Here the evidence that defendant had used alcohol to excess at the time of the crime was weak and conflicting, rendering it insufficient to support the 15 points assessed on that ground.

March 14, 2025

SEX OFFENDER REGISTRATION ACT (SORA), PRIOR CONVICTIONS.

THE FACT THAT THE SENTENCING COURT IN 2016 DID NOT USE DEFENDANT'S 2006 CONVICTION TO ENHANCE HIS SENTENCE DID NOT REQUIRE THE SORA COURT TO IGNORE THE 2006 CONVICTION WHICH WAS NEVER DIRECTLY ATTACKED AS UNCONSTITUTIONAL AND WAS NEVER VACATED; THEREFORE THE 2006 CONVICTION WAS PROPERLY RELIED UPON BY THE SORA COURT TO ASSESS DEFENDANT A LEVEL THREE RISK (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Singas, determined the fact that the resentencing court in 2016 found defendant's 2006 conviction by guilty plea "constitutionally infirm" for purposes of sentencing did not require the SORA court to ignore the 2006 conviction. Defendant had never directly attacked the constitutionality of the 2006 conviction:

Defendant's reliance on the resentencing court's collateral determination that his 2006 conviction cannot be used as a predicate to impose an enhanced sentence is misplaced. As the resentencing court explained, it lacked authority to vacate the 2006 conviction and instead properly stressed that its determination governed only the question of whether the People could use the conviction to establish defendant's status as a second child sexual assault felony offender for purposes of sentencing. Furthermore, at the resentencing hearing, defendant bore the burden of offering substantial evidence that the 2006 conviction is constitutionally infirm … . If defendant directly challenged the conviction's constitutionality, however, he would face a higher burden of proof … . No court has determined that defendant's

2006 conviction is unconstitutional or otherwise invalid under that more demanding standard. Nor have the People had an opportunity to be heard in opposition to defendant's attempt to make such a showing. Against this backdrop, it is logical for the Guidelines to require an offender with a prior felony sex offense conviction to satisfy the higher evidentiary burden that they must meet to vacate or reverse that conviction, if they wish to avoid the override's application.

Given that defendant failed to pursue any procedural pathway to vacate the 2006 conviction, we see no reason to depart from the Guidelines' text stating that the override is triggered if "[t]he offender has a prior felony conviction for a sex crime" (Guidelines, override 1). We therefore apply the Guidelines and hold that the override was properly implemented … . People v Moss, 2025 NY Slip Op 01673, CtApp 3-20-25

Practice Point: The fact that a sentencing court found a prior conviction "constitutionally infirm" such that the conviction was not used to enhance defendant's sentence did not require that the SORA court ignore the prior conviction. The SORA court properly relied upon the prior conviction here.

March 20, 2025

STREET STOPS, CARRYING CAPPED BOTTLES OF ALCOHOL NOT ENOUGH, EVIDENCE.

OBSERVING THE DEFENDANT CARRYING CAPPED BOTTLES OF ALCOHOL AND HAVING A HEAVY OBJECT IN A JACKET POCKET WAS NOT SUFFICIENT TO JUSTIFY DETAINING DEFENDANT; DEFENDANT'S FLIGHT WHEN AN OFFICER SAID "COME OVER HERE" IS OF NO CONSEQUENCE; THE SEIZED HANDGUN SHOULD HAVE BEEN SUPPRESSED (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Mendez, reversing Supreme Court, determined defendant's motion to suppress the handgun seized in a street stop should have been suppressed. Two police officers in a vehicle observed the defendant crossing the street. The defendant was carrying haff-full bottles of

alcohol, but the bottles were not open. When one of the officers got out of the police vehicle and shone a flashlight on the defendant he noticed there appeared to be a heavy object in the defendant's jacket pocket. The officer told the defendant to "come over here." The defendant ran, was tackled, and the handgun was seized:

Transporting closed bottles is a legal activity which, without more, does not give rise to a presumption of intent to consume, or a founded suspicion of criminal activity under DeBour. Moreover, the fact that it was raining makes it less likely that the defendant intended to congregate outside and remain exposed to the elements while consuming alcohol. Critically, the officers never saw defendant drink from any of the bottles. Therefore, these facts did not give rise to a presumption that defendant intended to consume alcohol in public in violation of the statute, and Officer Delia, at most, acquired the right to approach defendant to request information.

The heavy-weighted object in defendant's right jacket pocket could not have justified defendant's stop and detention because, "absent other circumstances evoking suspicion, indicative of or referable to the possession of a handgun, the observation of a mere bulge or heavy object in a pocket does not imply a reasonable conclusion that the person is armed" … . "A police officer must show that the object or appearance thereof which is the focus of his attention resembled a gun" … . Thus, absent a showing of anything other than a mere bulge or heavy object in defendant's pocket, Officer Delia could not have acquired a level of suspicion sufficient to detain the defendant … . People v Walker, 2025 NY Slip Op 01194, First Dept 3-4-25

Practice Point: If what the police observe is not enough to justify a street stop, the defendant's flight when the police approach is irrelevant.

March 4, 2025

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STREET STOPS, FLIGHT JUSTIFIED PURSUIT, POLICE HAD AN ARREST WARRANT FOR A DIFFERENT PERSON, EVIDENCE.

ALTHOUGH THE DEFENDANT WAS NOT THE PAROLE ABSCONDER FOR WHOM THE POLICE HAD AN ARREST WARRANT, THE MAJORITY DETERMINED THE PEOPLE PROVED THE POLICE REASONABLY BELIEVED DEFENDANT WAS THE PAROLE ABSCONDER WHEN THEY APPROACHED HIM, WHICH JUSTIFIED THE PURSUIT OF THE DEFENDANT; TWO DISSENTERS ARGUED THE PROOF AT THE SUPPRESSION HEARING, WHICH DID NOT INCLUDE TESTIMONY BY THE OFFICERS WHO FIRST APPROACHED DEFENDANT, DID NOT DEMONSTRATE THE POLICE REASONABLY BELIEVED DEFENDANT WAS THE SUBJECT OF THE ARREST WARRANT (FOURTH DEPT).

The Fourth Department, over a two-justice dissent, determined the police reasonably (but erroneously) believed defendant was the parole absconder for whom they had an arrest warrant. The pursuit and arrest, based in part on observing the defendant discard a handgun, were deemed proper:

… [T]here is no dispute that the apprehension team had probable cause to arrest the parole absconder inasmuch as an arrest warrant had been issued. As for the second element, "[t]he reasonableness of the arresting officers' conduct must be determined by considering the totality of the circumstances surrounding the arrest"… , and "great deference should be given to the determination of the suppression court, which had the opportunity to observe the demeanor of the witnesses and to assess their credibility, and its factual findings should not be disturbed unless clearly erroneous" … . Even though "[f]light alone . . . is insufficient to justify [a] pursuit" … , we conclude that under the totality of the circumstances present here the arresting officer's testimony establishes that he reasonably believed that defendant was the absconder when he initiated his pursuit. Defendant closely matched the height and weight provided in the parole absconder's description, covered his face with a ski mask, was in the location provided by the absconder's girlfriend, and immediately fled upon being approached by one of the apprehension team's unmarked vehicles. Inasmuch as the

initial pursuit and subsequent arrest of defendant—which occurred after he was observed holding and then discarding a handgun—were lawful, the court did not err in refusing to suppress the physical evidence recovered during the post-arrest search of defendant and the surrounding area … .

From the dissent:

In our view, however, it does not appear that the pursuing officers had even a subjectively reasonable belief that defendant was the parolee for whom they had an arrest warrant. Indeed, the People, who are "put to the burden of going forward to show the legality of the police conduct in the first instance" … , failed to adduce anything other than that defendant matched the generic height and weight of the average male in the general population. Notably, the People failed to call the approaching officers, and thus adduced no testimony with respect to their actions, observations, or whether they believed—reasonably or not—that defendant was the parole absconder, particularly in the absence of any evidence that they chased defendant when he fled.

The officers who did testify at the suppression hearing—the pursuing officers—testified simply that defendant roughly matched the height and weight of the parolee and that he fled. As set forth above, the pursuing officers did not testify that the approaching officers gave chase when defendant fled. Coupled with the pursuing officer's testimony that at the point when defendant fled, he was "free to leave," the record at the suppression hearing undercuts any possible claim that the pursuing officers were not simply chasing a man who fled, but that they actually believed defendant to be the parolee for whom they had an arrest warrant. People v Jones, 2025 NY Slip Op 01524, Fourth Dept 3-14-25

Practice Point: Consult this decision for insight into the validity of an arrest of the "wrong person," i.e., the approach, pursuit and arrest of one person based upon an arrest warrant for issued for another.

March 14, 2025

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TERRORISTIC THREAT, EVIDENCE INSUFFICIENT, FAMILY LAW.

PRIVATE MESSAGES SENT BY THE JUVENILE DID NOT MEET THE CRITERIA FOR A "TERRORISTIC THREAT" (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined the messages sent by the juvenile did not meet the criteria for a terroristic threat:

… [A] person is guilty of making a terroristic threat when "with intent to intimidate or coerce a civilian population . . . [they] threaten[ ] to commit or cause to be committed a specified offense and thereby cause[ ] a reasonable expectation or fear of the imminent commission of such offense" (Penal Law § 490.20 [1]). Here, petitioner presented testimony that respondent sent private messages to another student in a different school district that respondent was planning to commit a mass shooting to end bullying in his school. There was no evidence that those threats were made to anyone other than the student or that respondent requested that the student relay the threats to others. "A private conversation between immature teenage friends, without more, does not establish the element of intent to intimidate a civilian population" … . Matter of Jose M.F. (Seneca County Presentment Agency), 2025 NY Slip Op 01734, Fourth Dept 3-21-25

Practice Point: Threatening to commit a mass shooting to end school bullying in a private message to another student does not satisfy the criteria for a "terroristic threat."

March 21, 2025

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TRAFFIC STOPS, TINTED WINDOWS, VEHICLE AND TRAFFIC LAW, EVIDENCE.

THE OFFICER'S TESTIMONY HE COULD NOT SEE INSIDE THE CAR FROM A DISTANCE OF 10 TO 15 FEET PROVIDED PROBABLE CAUSE TO STOP THE CAR FOR A "TINTED WINDOWS" VIOLATION; THE DISSENT ARGUED IT WAS DARK AT THE TIME OF THE STOP AND THE OFFICER DID NOT LINK HIS INABILITY TO SEE INSIDE THE CAR TO THE TINTED WINDOWS AS OPPOSED TO THE AMBIENT DARKNESS (FOURTH DEPT).

The Fourth Department, affirming County Court, over a dissent, determined the officer's testimony he could not see the driver's face from a distance of 10 to 15 feet demonstrated probable cause of a "tinted window" violation which supported the vehicle stop. The dissent argued the officer's testimony was insufficient to demonstrate probable cause because it was dark at the time of the stop and the officer did not link his inability to see inside the car to the tinted windows, as opposed to the ambient darkness:

Here, the officer who initiated the stop testified at the suppression hearing that he looked directly at the driver's side window of the vehicle defendant was operating, that he did so from a distance of no more than 10 to 15 feet, and that he was "unable to see the driver of the vehicle" through the window. We conclude that the officer's testimony contained sufficient facts to establish that he reasonably believed that the windows were excessively tinted in violation of Vehicle and Traffic Law § 375 (12-a) (b) (2) … .

From the dissent:

The officer who attempted to initiate the stop of defendant's vehicle testified that he believed any level of tint on the front driver's side window or the front passenger window would be illegal and that the actual tint on the vehicle's windows was never tested with a tint meter. He further testified that he initially observed the vehicle when it was dark outside and that he was unable to see the driver inside the vehicle. At no point did the officer testify that it was the window

tint, as opposed to the ambient darkness, that prevented him from seeing the driver. The officer's failure to link the allegedly excessive tint with his inability to see into the vehicle distinguishes this case from those cited by the majority, in which the arresting officer "testified at the suppression hearing that he could tell the window tints were too dark because he could not see into the [vehicle]" … or "specifically testified that the driver's side windows were 'so dark that [he] was unable to actually see the operator of the vehicle as the vehicle was going by' " … . Because the officer's testimony here failed to link his conclusory belief that the windows were excessively tinted with an objective fact in support of that belief, I conclude that the People failed to meet their burden … . People v Hall, 2025 NY Slip Op 01457, Fourth Dept 3-14-25

Practice Point: Consult this decision for some insight into the proof required for a valid "tinted-windows-violation" traffic stop.

March 14, 2025

VEHICLE AND TRAFFIC LAW, SUSPENDED LICENSE, CRITERIA FOR MISDEMEANOR COMPLAINT VS MISDEMEANOR INFORMATION.

IN THE CONTEXT OF DRIVING WITH A SUSPENDED LICENSE, THE COURT OF APPEALS EXPLAINED THE CRITERIA FOR A VALID MISDEMEANOR COMPLAINT, VERSUS A MISDEMEANOR INFORMATION (CT APP).

The Court of Appeals, affirming the convictions by guilty pleas to misdemeanor complaints, in a full-fledged opinion by Judge Troutman, determined the factual allegations in the complaints were sufficient. The defendants were charged with driving with a suspended license and argued the complaints did not demonstrate reasonable cause to believe they knew they their licenses had been suspended:

The misdemeanor complaints here satisfy the reasonable cause standard. The complaints "state[d] the time, date and location of the[ ] events," and otherwise "provide[d] [defendants] with enough information" of how defendants committed the crime "to put [them] on notice of the crime" and "to prevent defendant[s] from

facing double jeopardy on the same charges" … . Defendants knew from the complaints what they were accused of doing and where, when, and how they allegedly did it. Based on the complaints' allegations, defendants could assess what defenses were available to them, such as contending that they never knew their licenses were suspended, that they were never served with a summons, or that the summonses didn't warn them that their licenses would be suspended if they failed to respond.

… [D]efendants contend that the complaints failed to provide reasonable cause because they did not specifically allege that defendants personally received the summonses. * * * … [T]he numerous summonses issued to each defendant are sufficient to convince a person of ordinary intelligence, judgment, and experience that it is reasonably likely defendants received at least one of them. …

… [D]efendants' consent to prosecution by misdemeanor complaint relieved the People of their obligation under a misdemeanor information to proffer "[n]on-hearsay allegations establishing every element of each charge" … . Although that obligation—known as "the prima facie case requirement"—applies to an information, "[a] misdemeanor complaint, in comparison, need only set forth facts that establish reasonable cause to believe that the defendant committed the charged offense" … .

Nor were the complaints deficient simply because they did not explain how the officers knew about suspension warnings appearing on traffic summonses or about those suspensions occurring automatically (by computer) within four weeks of a defendant's failure to answer those summonses. We do not require complaints to contain such "formulaic recitation" … . Moreover, at this stage, the officers' statements about summonses "appear[] reliable" … , inasmuch as the law tasks officers with delivering traffic summonses to alleged violators … . People v Willis, 2025 NY Slip Op 01405. CtApp 3-13-25

Practice Point: Consult this decision for an explanation of the criteria for a valid misdemeanor complaint, versus a misdemeanor information.

March 13, 2025

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YOUTHFUL OFFENDER STATUS MUST BE CONSIDERED, JUDGES.

WHERE A DEFENDANT IS AN "ELIGIBLE YOUTH," THE SENTENCING COURT MUST CONSIDER YOUTHFUL OFFENDER TREATMENT; IF THE RECORD IS SILENT ON THE ISSUE, THE SENTENCE WILL BE VACATED AND THE MATTER REMITTED (SECOND DEPT).

The Second Department, vacating defendant's sentence and remitting the matter, determined defendant was an "eligible youth" but the record was silent about whether the court considered youthful offender treatment:

"Criminal Procedure Law § 720.20(1) requires a court to make a youthful offender determination in every case where the defendant is eligible, even where the defendant fails to request it, or agrees to forego it as part of a plea bargain" … . "Where a defendant is an eligible youth, the determination of whether to afford him or her youthful offender treatment must be explicitly made on the record" … . Here, even though the defendant was an eligible youth, the record does not demonstrate that the Supreme Court made such a determination. Accordingly, the defendant's sentence must be vacated and the matter remitted to the Supreme Court, Queens County, for resentencing after a determination as to whether the defendant should be afforded youthful offender treatment … . People v Suckoo, 2025 NY Slip Op 01396, Second Dept 3-12-25

Practice Point: If the record does not reflect that the court considered youthful offender treatment for an "eligible youth," the sentence will be vacated.

March 12, 2025