NEW YORK APPELLATE DIGEST, INC.

Weekly Reversal Report
December 1 – 5, 2025

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Released by Our New York State Appellate Courts December 1 – 5, 2025, and Posted on the New York Appellate Digest Website on Monday, December 8, 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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CRIMINAL LAW, ATTORNEYS, JUDGES, APPEALS.

THE TRIAL JUDGE DID NOT ENSURE THAT DEFENDANT'S WAIVER OF HIS RIGHT TO COUNSEL WAS KNOWING AND INTELLIGENT, CRITERIA EXPLAINED; NEW TRIAL ORDERED (SECOND DEPT).

The Second Department, reversing defendant's conviction and ordering a new trial, determined the trial judge did not ensure the pro se defendant was aware of the risks of representing himself or the benefits of having an attorney:

… [T]he court failed to conduct the requisite inquiry before allowing the defendant to proceed pro se and the record does not reveal that the defendant was aware of the disadvantages of representing himself or the benefits of having an attorney … . A court must determine that the defendant's waiver of the right to counsel is made competently, intelligently, and voluntarily before allowing that defendant to represent himself or herself … . To make that evaluation, the court "must undertake a 'searching inquiry' designed to 'insur[e] that a defendant [is] aware of the dangers and disadvantages of proceeding without counsel'" … . The court's inquiry "must accomplish the goals of adequately warning a defendant of the risks inherent in proceeding pro se, and apprising a defendant of the singular importance of the lawyer in the adversarial system of adjudication" … .

Here, the record does not demonstrate that the Supreme Court inquired about the defendant's pedigree information, aside from the fact that he did not have a law license, or that the court ascertained whether the defendant was aware of the risks inherent in proceeding without a trial attorney and the benefits of having counsel represent him at trial … . The court failed to ensure that the defendant understood the potential sentence that could be imposed or the dangers and disadvantages of self-representation … . The court neither "tested defendant's understanding of choosing self-representation nor provided a reliable basis for appellate review" … . In addition, the defendant continually engaged in disruptive or obstreperous conduct … . Under these circumstances, the defendant's purported waiver of his right to counsel was ineffective and the defendant is entitled to a new trial … . People v Hall, 2025 NY Slip Op 06727, Second Dept 12-3-25

Practice Point: Consult this decision for insight into how a judge, faced with a defendant who wishes to represent himself, should handle the "searching Inquiry" to ensure the defendant is aware of the risks.

December 3, 2025

CRIMINAL LAW, EVIDENCE, JUDGES, CIVIL RIGHTS LAW.

ALTHOUGH THE DEFENSE IN THIS MURDER CASE WAS BASED ON THE LACK OF EVIDENCE THAT DEFENDANT WAS THE ASSAILANT, THE DEFENDANT WAS STILL ENTITLTED TO A JUSTIFICATION-DEFENSE JURY-INSTRUCTION; THE DENIAL OF THE REQUEST FOR THE JUSTIFICATION-DEFENSE JURY CHARGE WAS REVERSIBLE ERROR; IN ADDITION, THE TRIAL COURT VIOLATED CVIL RIGHTS LAW 52 BY ALLOWING THE MEDIA TO RECORD TESTIMONIAL PORTIONS OF THE TRIAL (THIRD DEPT).

The Third Department, reversing defendant's murder conviction and ordering a new trial, determined the defense request for a justification-defense jury-instruction should have been granted. The defendant and the victim got into a bar fight after defendant called the victim names. The victim, who was larger than the defendant, initially knocked defendant down. After the defendant got up, the victim was stabbed. The knife which stabbed the victim was not found It was not clear who was the initial aggressor in the fight. And there was evidence the victim may have had a knife. The Third Department noted that the court erred when it allowed audiovisual coverage of the testimonial portion of the trial (Civil Rights Law 52):

"A justification charge must be given if there is any reasonable view of the evidence, when it is considered in the light most favorable to the defendant, that would allow the jury to conclude that the defendant's actions were justified" … . In order "for a defendant to be entitled to a justification charge with respect to the use of deadly physical force, the record must contain evidence that the defendant reasonably believed that the victim was using or was about to use deadly physical force and that the defendant could not safely retreat" … . A charge on the defense of justification remains appropriate where a defendant pursued other defense strategies at trial, including that he or she did not intend to cause the victim's death … ,was not present or was not the assailant … .The failure to provide a justification charge under such circumstances constitutes reversible error warranting a new trial … .

Here, the evidence in the record fails to indicate who was the initial aggressor with respect to the use of physical force, but rather suggests both individuals started fighting immediately after someone — presumably defendant — yelled derogatory remarks at the victim. It was unrefuted that the victim was larger than defendant and had gained the upper hand during the fight, knocking defendant down with several blows. The further question is whether or not defendant was the initial aggressor with respect to deadly physical force … . … [T]he police recovered an open folding knife on the patio adjacent the picnic tables where the altercation began, near a pool of blood. … [A] reasoned view of the evidence is that the victim had unfolded the knife prior to being stabbed by defendant. * * * [W]e believe that there was a reasonable view of the evidence which would permit the jury to conclude that defendant's conduct was justified … . People v Mack, 2025 NY Slip Op 06757, Third Dept 12-4-25

Practice Point: No matter what the defense strategy is, a defendant is entitled to a justification-defense jury instruction if a reasonable view of the evidence would support finding defendant's conduct justified.

Practice Point: Civil Rights Law 52 prohibits audiovisual coverage of the testimonial portion of a criminal trial.

December 4, 2025

CRIMINAL LAW, EVIDENCE.

THE POLICE STARTED FOLLOWING DEFENDANT BECAUSE THEY THOUGHT HE CROSSED THE STREET TO AVOID THEM; THE POLICE DID NOT HAVE GROUNDS FOR A COMMON-LAW INQUIRY AND NOTHING DEFENDANT DID AFTER THE STREET STOP JUSTIFIED THE LEVEL THREE SEIZURE OF THE DEFENDANT; THE WEAPON FOUND IN DEFENDANT'S POCKET SHOULD HAVE BEEN SUPPRESSED (FIRST DEPT).

The First Department, reversing Supreme Court, determined what the police saw did not warrant a common-law inquiry on the street and the subsequent level three

seizure of the defendant was not justified. Apparently the police felt defendant crossed the street to avoid them, the police followed him and saw him pass something to a woman, after defendant was stopped he was told to take his hand out of his jacket pocket and did so, the officer testified a heavy object was in the jacket pocket, the defendant was then handcuffed and a handgun was found in the pocket:

Defendant's suppression motion should have been granted. Although we decline to disturb the court's credibility determinations … , notwithstanding our concerns about discrepancies between the officers' testimony and what is shown in the body-worn camera footage, the initial inquiry and subsequent seizure were still unjustified. Even crediting the officers' testimony that their suspicion was aroused when defendant and the woman crossed the street to avoid their patrol car, and then they later observed him pass a small object to the woman, the totality of the circumstances did not give rise to the level of suspicion required for a common-law inquiry … . Neither officer could identify what object was passed from defendant to the woman — one testified that "it could have been anything" — nor otherwise articulate why, from this innocuous behavior, they had a "founded suspicion that criminality was afoot" to warrant a level two encounter … . The police were not responding to a call, there was ambiguous testimony as to whether the encounter took place in a high crime area, and the woman did not give defendant money in exchange or immediately leave "without any kind social interaction" … .

Similarly, this Court's review of the record, including the body-worn camera video recording of the encounter, indicates that the police were not justified in their escalation to the level three seizure in restraining defendant's wrists simply because, after he was detained, and defendant complied with the officers' request that he show his hands, he turned his body away from one officer, who observed a "shift in weight" in defendant's jacket pocket … . Even if there had been a bulge in defendant's pocket, that observation alone does not imply a reasonable conclusion that defendant was armed … . Defendant's hands were in clear view when the officers seized him, and nothing in the record indicates that defendant was armed or posed a threat to safety to justify him being frisked … . People v Small, 2025 NY Slip Op 06665, First Dept 12-2-25

Practice Point: This decision illustrates the level of suspicion required to justify a common-law inquiry on the street. Here the police thought the defendant crossed the street to avoid them and they saw defendant pass something to a woman, but could not say what it was. That was not enough.

Practice Point: This decision also illustrates the level of suspicion required to justify a level three seizure on the street. Here defendant was told to remove his hand from his pocket and did so. The police testified there was a bulge in the pocket, but defendant's hands were visible. The police were not justified in handcuffing the defendant and searching his pocket.

December 2, 2025

CRIMINAL LAW, JUDGES, APPEALS.

THE PROBATION CONDITION REQUIRING DEFENDANT TO CONSENT TO SEARCHES FOR DRUGS AND WEAPONS WAS NOT REASONABLY RELATED TO HIS REHABILITATION FOR DISORDERLY CONDUCT; THE APPEAL WAIVER WAS INVALID (SECOND DEPT).

The Second Department determined defendant's waiver of appeal was not valid and went on to find that the probation condition requiring defendant to consent to "search of his person, vehicle, and place of abode, and the seizure of any illegal drugs, drug paraphernalia, gun/firearm, or other weapon or contraband" was not reasonably related to his rehabilitation for disorderly conduct:

… [The record does not demonstrate that the defendant knowingly, voluntarily, and intelligently waived his right to appeal … . The Supreme Court's oral explanation of the appeal waiver and its consequences was unclear and incomplete, and the written waiver cannot be relied upon to cure the deficiency because "the court did not ascertain on the record whether the defendant had read the written waiver, discussed it with his attorney, or was aware of its contents" … .

… [T]he conditions of probation "shall be such as the court, in its discretion, deems reasonably necessary to insure that the defendant will lead a law-abiding life or to assist him [or her] to do so" (Penal Law § 65.10[1]). In addition to

specific conditions enumerated in the statute, the court may, in its discretion, impose "any other conditions reasonably related to [the defendant's] rehabilitation" … and "any other reasonable condition as the court shall determine to be necessary or appropriate to ameliorate the conduct which gave rise to the offense or to prevent the incarceration of the defendant" … . Therefore, sentencing courts may require a defendant to consent to searches by his or her probation officer for weapons, illegal drugs, or other contraband so long as the condition is "individually tailored in relation to the offense" and "the defendant's particular circumstances, including his or her background, history, and proclivities" … .

Here, the defendant's only prior conviction was for disorderly conduct, a violation … , the offense at issue did not involve the use of a weapon or alcohol or other substances, and the defendant was not under the influence of any substances at the time of the offense. … [T]he Supreme Court improvidently exercised its discretion in imposing Condition No. 28, as that condition "was not individually tailored in relation to the offense, and was not, therefore, reasonably related to the defendant's rehabilitation, or necessary to ensure that the defendant will lead a law-abiding life" … . People v Gibson, 2025 NY Slip Op 06724, Second Dept 12-3-25

Practice Point: Here the defendant was convicted of disorderly conduct which did not involve a weapon or drugs. The probation condition requiring defendant to submit to searches for drugs or weapons was struck.

December 3, 2025

CRIMINAL LAW, JUDGES.

THE PROBATION CONDITION REQUIRING DEFENDANT TO SUPPORT DEPENDENTS AND MEET FAMILY RESPONSIBILITIES WAS NOT REASONABLY RELATED TO DEFENDANT'S REHABILITATION; DEFENDANT WAS CONVICTED OF ASSAULT (SECOND DEPT).

The Second Department, striking the probation condition requiring defendant to "support dependents and meet other family responsibilities', determined the condition was not reasonably related to the defendant's rehabilitation. Defendant was convicted of assault:

Pursuant to Penal Law § 65.10(1), the conditions of probation "shall be such as the court, in its discretion, deems reasonably necessary to insure that the defendant will lead a law-abiding life or assist him [or her] to do so" … . "In Penal Law § 65.10(2), the Legislature set forth a list of conditions intended to be rehabilitative" … , including the condition that a defendant "[s]upport his [or her] dependents and meet other family responsibilities" (Penal Law § 65.10[2][f]). "The statute 'quite clearly restricts probation conditions to those reasonably related to a defendant's rehabilitation'" … . All enumerated probation conditions under Penal Law 65.10 must be "tailored to the particular defendant's case" … .

Under the circumstances of this case, the Supreme Court improperly imposed Condition No. 14. This condition 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 Aldea, 2025 NY Slip Op 06716, Second Dept 12-3-25

Practice Point: Courts are striking the probation condition requiring defendant to support dependents when it is not related to the underlying offense, assault in this case.

December 3, 2025

CRIMINAL LAW.

ON APPEAL, CONVICTIONS FOR "INCLUSORY, CONCURRENT COUNTS" WERE VACATED, AND SEPARATE CONVICTIONS FOR A "CONTINUING OFFENSE" WERE VACATED (SECOND DEPT).

The Second Department determined several inclusory concurrent counts and certain convictions for a "continuing offense" must be vacated:

CPL 300.30(4) provides that "[c]oncurrent counts are 'inclusory' when the offense charged in one is greater than any of those charged in the others and when the latter are all lesser offenses included within the greater" … . CPL 300.40(3)(b) provides, in relevant part, that with respect to inclusory concurrent counts, "[a] verdict of guilty upon the greatest count submitted is deemed a dismissal of every lesser

count submitted" … . Here, the defendant was convicted of five counts of criminal possession of a weapon in the second degree … and three counts of criminal possession of a firearm … . Because the counts charging criminal possession of a weapon in the second degree and criminal possession of a firearm are inclusory concurrent counts, the convictions of criminal possession of a firearm … must be vacated … .

… The defendant's convictions of criminal possession of a weapon in the second degree under counts 4 and 10 of the indictment subjected the defendant to double jeopardy. "An indictment cannot charge a defendant with more than one count of a crime that can be characterized as a continuing offense unless there has been an interruption in the course of conduct" … . Here, the indictment charged the defendant with three separate counts of criminal possession of a weapon in the second degree under Penal Law § 265.03(3) for the uninterrupted possession of single weapon. Such possession was continuous and "'constituted a single offense for which he could be prosecuted only once'" … . As such, we vacate the defendant's convictions of criminal possession of a weapon in the second degree under counts 4 and 10 of the indictment, vacate the sentences imposed thereon, and dismiss those counts of the indictment. People v Stewart, 2025 NY Slip Op 06737, Second Dept 12-3-25

Practice Point: Here criminal possession of firearm convictions were vacated as "inclusory, concurrent counts" of criminal possession of a weapon second degree.

Practice Point: Here three criminal possession of a weapon convictions related to a single "continuing offense" of criminal possession of a weapon. Two of the convictions were therefore vacated.

December 3, 2025

LABOR LAW-CONSTRUCTION LAW, NEGLIGENCE, EVIDENCE.

PLAINTIFF TRIPPED OVER A FLOOR TO CEILING WOODEN BRACE IN A HOME WHICH WAS UNDER CONSTRUCTION; THE THIRD DEPARTMENT HELD THAT THE OPEN AND OBVIOUS NATURE OF THE BRACE DID NOT WARRANT THE AWARD OF SUMMARY JUDGMENT TO THE DEFENDANTS ON THE LABOR LAW 200 CAUSE OF ACTION (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the open and obvious nature of condition (a wooden brace over which plaintiff tripped) did not warrant summary judgment in defendants' favor on the Labor Law 200 cause of action. The home was under construction and the brace ran at a 45 degree angle from the floor to the ceiling in the middle of the kitchen:

… [D]efendants failed to meet their prima facie burden as questions of fact remain as to whether defendants maintained the worksite in a reasonably safe condition, precluding summary judgment. … [D]efendants presented an affidavit of David Rubin, a former CEO of a general contracting firm with 45 years of experience in the field of general construction. Rubin reviewed, among other things, photographs of the worksite and observed there were two-by-four wooden braces set up throughout the home that were "necessary and fundamental to the construction process." He explained that the brace plaintiff tripped over was "conspicuous and not hidden from sight, and indeed, plaintiff had already seen that particular brace prior to his incident." Ultimately, he opined that neither the use nor the placement of the brace was negligent as it was necessary to support the structure at that stage of construction.

Although Rubin placed great emphasis on the fact that the brace was open and obvious and that plaintiff saw it prior to his fall, this Court has repeatedly held that "the open and obvious nature of an allegedly dangerous condition does not, standing alone, necessarily obviate a [general contractor's] duty to maintain [the worksite] in a reasonably safe condition" … . Rather, the readily observable nature of the wooden brace "merely negated any duty that defendant[s] owed plaintiff to warn of [the] potentially dangerous condition[ ]" … . Nor does plaintiff's

testimony at his deposition that he saw the wooden brace prior to his fall defeat his claim as his "previous knowledge of a defective condition, if any, may be considered by a jury in assessing comparative negligence" … . Accordingly, "[v]iewing the evidence in the light most favorable to plaintiff as the nonmoving party, a question of fact remains as to whether defendants' [worksite was] maintained in a reasonably safe condition. That question is for the trier of fact to resolve" … . Sullivan v Flynn, 2025 NY Slip Op 06773, Third Dept 12-4-25

Practice Point: Here the Third Department noted that a condition which is open and obvious and of which the plaintiff was aware before he was injured is not a sufficient ground for the award of summary judgment on a Labor Law 200 cause of action. Here a wooden floor to ceiling brace in the middle of the kitchen in a house under construction, over which plaintiff tripped, was deemed to raise a question of fact.

December 4, 2025

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF WAS INJURED WHEN AN UNPROTECTED TRENCH CAVED IN AND COLLAPSED; THE ABSENCE OF ANY SAFETY DEVICES, LIKE A SAFETY RAILING, VIOLATED LABOR LAW 240(1) AND 241(6) (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment on the Labor Law 240(1) and 241(6) causes of action. Plaintiff was directed to retrieve lumber which was near an unprotected trench. He was injured when the trench caved in and collapsed. The facts that the trench was 10 feet deep, unshored, and without planking, barricades or guardrails demonstrated plaintiff was not provided with an adequate safety device in violation of Labor Law 240(1). The same omissions violated 12 NYCRR 23-1.7(b)(1):

… [T]he plaintiff demonstrated, prima facie, that the defendants violated Labor Law § 240(1) by failing to provide the plaintiff with an adequate safety device and that this violation was a proximate cause of his injuries ….* * *

"To establish liability under Labor Law § 241(6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the case" … . Here, the Labor Law § 241(6) cause of action was predicated, inter alia, on a violation of 12 NYCRR 23-1.7(b)(1), "which mandates that holes or hazardous openings at construction sites into which a person may step or fall be guarded by a substantial cover fastened in place or by the installation of a safety railing" … . O'Donnell v Rocklyn Ecclesiastical Corp., 2025 NY Slip Op 06714, Second Dept 12-3-25

Practice Point: If a worker is injured when an unprotected trench caves in, both Labor Law 240(1) and 241(6) have been violated.

December 3, 2025

MEDICAL MALPRACTICE, NEGLIGENCE, EVIDENCE, JUDGES.

SUPREME COURT SHOULD NOT HAVE RELIED ON THE "LOCALITY RULE" TO DISMISS THE OPINION OF PLAINTIFF'S EXPERT BECAUSE THE EXPERT PRACTICED MEDICINE IN ANOTHER STATE: WHEN AN EXPERT TESTIFIES ABOUT STANDARDS APPLICABLE THROUGHOUT THE UNITED STATES, THE LOCALITY RULE SHOULD NOT BE INVOKED (THIRD DEPT).

The Third Department, reversing Supreme Court in this medical malpractice action, determined plaintiffs' expert affidavit was not conclusory or speculative and raised triable questions of fact. The Third Department noted that Supreme Court should not have dismissed plaintiffs' expert's (Grant's) opinion on the ground Grant practiced medicine in a different state. Although the "locality rule" has not been set aside, it does not affect the validity of an opinion based on standards applicable throughout the United States:

… [W]e briefly address Supreme Court's reliance on the fact that Grant practiced medicine in another state to ostensibly dismiss his opinions. Over 125 years ago in Pike v Honsinger (155 NY 201 [1898]), the Court of Appeals promulgated what has become known as the locality rule … . Under this rule, "the prevailing standard

of care governing the conduct of medical professionals demands that a doctor exercise that reasonable degree of learning and skill that is ordinarily possessed by physicians and surgeons in the locality where the doctor practices" … . While this rule has not been set aside, this Court has indicated that "the development of vastly superior medical schools and postgraduate training, modern communications, the proliferation of medical journals, along with frequent seminars and conferences, have eroded the justification for th[is] rule" … . With the rise of the Internet and the attendant ease with which information is disseminated, this is even more true today. "Thus, where, as here, a medical expert proposes to testify about minimum standards applicable throughout the United States, the locality rule should not be invoked" … . Kosinski v Wladis, 2025 NY Slip Op 06772, Third Dept 12-4-25

Practice Point: In a med mal case, where an expert testifies about standards applicable throughout the United States, the "locality rule" requiring the application of local standards should no longer be invoked. Here plaintiffs' expert's opinion was erroneously dismissed because the expert practiced medicine in a different state.

December 4, 2025

MUNICIPAL LAW, LIEN LAW, CONTRACT LAW, EMPLOYMENT LAW.

PLAINTIFF HVAC CONTRACTOR WAS NOT LICENSED TO DO HOME IMPROVEMENT IN NASSAU COUNTY; THEREFORE THE CONTRACTOR COULD NOT SUE FOR BREACH OF CONTRACT AND COULD NOT ENFORCE A MECHANIC'S LIEN; THE FACT THAT THE HVAC INSTALLATION WAS DONE BY A LICENSED SUBCONTRACTOR MADE NO DIFFERENCE (SECOND DEPT).

The Second Department, reversing Supreme Court and dismissing the complaint, determined that plaintiff, a heating, ventilation and air-conditioning (HVAC) contractor, could not recover on his breach of contract claim and could not enforce a mechanic's lien because the company was not licensed to do home improvement in Nassau County. The fact that the installation was actually done by a licensed subcontractor made no difference:

Pursuant to Nassau County Administrative Code § 21-11.2, anyone operating a home improvement business must be licensed. "Licensing statutes are to be strictly construed and an unlicensed contractor forfeits the right to recover damages based either on breach of contract or quantum meruit" … . "Moreover, a home improvement contractor must plead possession of a valid license in order to commence an action to foreclose a mechanic's lien" … .

Here, the complaint, even as supplemented by an affidavit from the plaintiff's president, failed to allege that the plaintiff was licensed to perform home improvement work in the County. As the plaintiff was not licensed to perform home improvement work in the County, it may not recover damages for breach of contract against the defendant and has forfeited the right to foreclose the mechanic's lien … . The plaintiff's contention that recovery should not be denied because the installation of the HVAC system was performed by a duly licensed subcontractor is without merit, as such a relationship is insufficient to permit an unlicensed contractor to recover for work performed … . Nationwide HVAC Supply Corp. v Mosby, 2025 NY Slip Op 06712, Second Dept 12-3-25

Practice Point: Municipal home-improvement licensing requirements are strictly enforced. Here the HVAC contractor was not licensed in Nassau County but the subcontractor who did the work was licensed. The contractor could not sue for breach of contract and could not enforce the mechanic's lien. The contractor's complaint was dismissed.

December 3, 2025

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