Indigent Legal Services

Decisions of Interest

JANUARY 22, 2025

CRIMINAL

COURT OF APPEALS

People v Howard | January 14, 2025 (Memorandum)

IAC | AFFIRMED | DISSENT

Appellant appealed from a Fourth Department order affirming his conviction of first-degree burglary, second-degree assault, aggravated criminal contempt, and resisting arrest, upon a jury verdict. The Court of Appeals affirmed. Appellant failed to demonstrate that he was denied the effective assistance of counsel. Judge Rivera, in a dissent joined by Chief Judge Wilson, would have reversed and ordered a new trial because counsel's performance fell below the constitutional guarantee of effective assistance, which "ensures the integrity of the process and a fair trial—including for those defendants who appear guilty." Appellant's counsel filed boilerplate motions containing erroneous and irrelevant assertions, evincing counsel's failure to properly investigate; failed to show appellant video crucial to the prosecution's case until the eve of trial; elicited "devastating propensity evidence" testimony about appellant's prior criminal history through cross-examination of the complainant; and failed to object to the ambiguous jury instruction that might have resulted in the conviction on the top count. Clea Weiss represented Howard.
People v Howard (2025 NY Slip Op 00184)

APPELLATE DIVISION, SECOND DEPARTMENT

People v Kerr | January 15, 2025

TRIAL WITHOUT THE ACCUSED | IMPROPER JURY INSTRUCTIONS | REVERSED & NEW TRIAL ORDERED

Appellant appealed from an Orange County Court judgment convicting him of second-degree CPW and second-degree criminal possession of a forged instrument, upon a jury verdict. The Second Department reversed and ordered a new trial. The trial court improperly conducted the trial in appellant's absence without making an inquiry or reciting on the record the specific facts and reasons relied upon to determine that appellant's absence from trial was deliberate. Further, although unpreserved for appellate review, the trial court failed to instruct the jury on the home or place of business exception regarding the count of second-degree CPW. Rosenberg Law Firm (Jonathan Rosenberg, of counsel) represented Kerr.
People v Kerr (2025 NY Slip Op 00236)
Oral Argument (starts at 00:22:56)

People v Duhaney | January 15, 2025

People v Gumbs | January 15, 2025
People v Norberto | January 15, 2025
DEFICIENT *ANDERS* BRIEFS | NEW COUNSEL ASSIGNED

Appellants' assigned counsel each filed *Anders* briefs to withdraw. In all three cases, the Second Department found counsels' *Anders* briefs deficient, granted their motions to withdraw, and assigned new counsel. In *Duhaney* and *Norberto,* the briefs failed "to analyze potential appellate issues with reference to the facts of the case and relevant legal authority" and offered little more than conclusory statements that there were no nonfrivolous issues to be raised. In *Gumbs*, the brief's statement of facts did not include the proceedings pertaining to appellant's promised alternative sentence, and it did not adequately analyze potential appellate issues. These included whether appellant waived his right to be present at sentencing, whether he violated the terms of interim probation pursuant to the plea agreement, and whether his sentence was excessive.

People v Duhaney (2025 NY Slip Op 00233)
People v Gumbs (2025 NY Slip Op 00234)
People v Norberto (2025 NY Slip Op 00237)

APPELLATE DIVISION, THIRD DEPARTMENT

People v Gray | January 16, 2025
SUPPRESSION | VEHICLE IMPOUNDMENT AND SEARCH | REVERSED

Appellant appealed from a Schenectady County Court judgment convicting him of attempted second-degree CPW and sentencing him, as a second felony offender, to 4 years' incarceration followed by 5 years' PRS. The Third Department reversed. The impoundment of the car and ensuing search were unconstitutional, and the suppression motion should have been granted. The prosecution failed to establish that the car, which was parked legally, had been towed in accordance with standardized police department policy. That policy directed that a secured and lawfully parked vehicle may be left at a scene. Appellant had also requested that his father, who owned the vehicle, pick up the car later, which would have prevented the car from being towed under the policy. The purported inventory search was a pretext to search for incriminating items—which were the only items listed on the inventory sheet. Justice Egan dissented and would have upheld the validity of the impoundment and search. Hug Law PLLC (Matthew Hug, of counsel) represented Gray.

People v Gray (2025 NY Slip Op 00249)
Oral Argument

People v Dorvil | January 16, 2025
CONSECUTIVE SENTENCES | INVOCATION OF RIGHT TO REMAIN SILENT| MODIFIED

Appellant appealed from a Schenectady County Supreme Court judgment convicting him of second-degree murder, second-degree CPW, and first-degree reckless endangerment. He was sentenced to 25 years to life on the murder conviction and 10 years' imprisonment plus 5 years' PRS on the others, to run consecutively to the murder conviction. The Third Department modified by directing that all sentences run concurrently and otherwise affirmed. Appellant's possession of the weapon was not a distinct act from the incident in which he fired it. While he may have acted as though he had a gun at a

different point earlier in the evening, the proof fell short of establishing that. The Third Department also agreed that he invoked his right to remain silent during a police interview. When asked, post-*Miranda*, about what he remembered, appellant replied, "'get the f**k out of here b***h, you trying to play me." The Third Department found that under the circumstances, it was clear that the investigators understood this as an unequivocal request for them to leave the room and for the interview to end but nonetheless continued the interview. However, the error was harmless where multiple cameras captured appellant discharging a firearm into a crowd, corroborated by witness testimony. Paul J. Connolly represented Dorvil.
People v Dorvil (2024 NY Slip Op 00246)
Oral Argument

People v Schultz | January 16, 2025
SORA| FOREIGN REGISTRATION CLAUSE| MODIFIED
Appellant appealed from a Warren County Court order classifying him as a level two sex offender and a sexually violent offender under SORA. The Third Department modified by vacating his designation as a sexually violent offender, remitted for further proceedings, and otherwise affirmed. That designation was based on a prior Florida conviction through an application of SORA's Foreign Registration Clause. Failure to give appellant notice and the right to be heard regarding that designation violated his procedural due process rights. Although appellant argued on appeal that the designation also violated his rights to substantive due process and equal protection, he was not given the opportunity to develop a record below with respect to those arguments, requiring remittal. Gregory V. Canale, Warren County Public Defender (Erin K. Komon, of counsel) represented Schultz.
People v Schultz (2025 NY Slip Op 00251)
Oral Argument

TRIAL COURTS

People v Morciglio| 2024 WL 5321256
DISCOVERY | PROSECUTION'S FAILURE TO COMPLY | DISMISSED
Morciglio was charged in Kings County Criminal Court with second-degree OGA, operating a motor vehicle while intoxicated, and related charges. She moved to dismiss the accusatory instrument based on the prosecution's failure to timely comply with their initial mandatory discovery obligations. The prosecution also failed to move to extend the time to comply. The court granted the defense motion to dismiss, and the prosecution moved to reargue. Granting the motion to reargue, the court adhered to its original ruling. The prosecution had 35 days to comply with their initial discovery obligations. "Having considered all permissible sanctions," the court deemed dismissal "the only sanction that is proportionate" for the "flagrant disregard of the 35-day mandatory discovery deadline and the [prosecution's] attempt to bypass the deadline by seeking an extension" in an untimely manner. The Legal Aid Society of NYC (Jennifer Kovacs, of counsel) represented Morciglio.
People v Morciglio (2024 NY Slip Op 51788)(U))

People v Martinez| 2025 WL 85975

SUPPRESSION | FAILURE TO INTRODUCE TRANSLATION TO PROVE CONSENT | SUPPRESSION GRANTED

Martinez was charged in Bronx County Criminal Court with DWI, aggravated DWI, and driving while impaired. The court granted a motion to suppress Martinez's statement to police, finding it involuntary, but denied suppression of the results of the Intoxicated Driver Testing Unit video and the chemical test. Martinez moved to reargue, and the court granted suppression based on the prosecution's failure to introduce a translation of what information was imparted to Martinez, a non-English speaker, prior to his consenting to the test. The prosecution then moved to reargue, contending that the court improperly assigned a burden to demonstrate that Martinez voluntarily consented to the breathalyzer test. The court granted re-argument to the prosecution but adhered to its suppression rulings. The prosecution failed to present a full translation of the video recording of the testing, particularly the conversation in Spanish with the Intoxicated Driver Testing Unit officer. Martinez's consent to testing could not be deemed voluntary "where the record is void of any English translation of what information was imparted to him before his breathalyzer test was performed." Although motorists in New York are deemed to have given consent to chemical testing, "the manner in which the blood sample is obtained must still pass constitutional muster." Lack of an English language translation raised a "fundamental due process issue" because the voluntariness of Martinez's consent could not be determined. The Bronx Defenders (Matthew S. Bruno, of counsel) represented Martinez.

People v Martinez (2025 NY Slip Op 50015)(U))

People v Lowe| 2025 WL 209852

SUPPRESSION | NO PROBABLE CAUSE | SUPPRESSION GRANTED

Lowe was charged in Queens County Criminal Court with fourth-degree criminal mischief, making graffiti, aggravated unlicensed driving, seventh-degree CPCS, and related offenses. Criminal Court granted a motion to suppress evidence and statements that were the fruits of his illegal arrest. While the police had probable cause to approach Lowe based on his standing near a motor scooter without a license plate, their actions following this approach were unlawful. There was no probable cause to arrest Lowe for unlicensed driving based on the officer's prior experience arresting Lowe for driving with a suspended license. Information about months-old prior criminal behavior cannot support probable cause for a new arrest. The police observation of a spray paint can in the scooter's cupholder did not give rise to probable cause for possession of a graffiti instrument since there was no evidence of Lowe's intent to damage property inferable merely from its possession. As the police were not permitted to search Lowe incident to a traffic arrest, and the prosecution's claim that the drugs were in plain sight was rebutted by the BWC footage, the court suppressed them. The BWC footage also did not support the prosecution's claim that Lowe consented to the search of his bag. The contents of the compartment under the scooter's seat were also suppressed as the prosecution offered no evidence justifying that search. Lopez's statements following his arrest at the scene, during transport, and at the precinct were suppressed as the fruits of his illegal arrest, although the court declined to suppress pre-arrest statements that resulted from investigatory questioning. Queens Defenders (Jordan Coyne and Gustavo Gutierrez, of counsel) represented Lowe.

People v Lowe (2025 NY Slip Op 50030)(U))

CIVIL

APPELLATE DIVISION, SECOND DEPARTMENT

Matter of Lane v County of Nassau | January 15, 2025

ARTICLE 78 | FOIL | POLICE DATABASE | REVERSED & REMITTED

Petitioner appealed from a judgment of Nassau County Supreme Court denying and dismissing an Article 78 petition to compel disclosure of Nassau County Police Department records pertaining to the creation or maintenance of its current databases and issue an award of attorney's fees and litigation costs. The Second Department reversed, reinstated the relevant branches of the petition, and remitted for further proceedings. Supreme Court erred by determining, as a matter of law, that petitioner failed to "reasonably describe" the records sought, which were not vague or unlimited and were circumscribed as to subject matter and the relevant time period. Further, contrary to FOIL regulations, there is no evidence that the Department made any effort to assist petitioner with more precisely defining the records sought. Cory H. Morris (Victor Yannacone, Jr., of counsel) represented Lane.

Matter of Lane v County of Nassau (2025 NY Slip Op 00220)

Oral Argument (starts at 00:15:47)

FAMILY

APPELLATE DIVISION, FIRST DEPARTMENT

Matter of Destiny G. | January 14, 2025

NEGLECT | 1028 HEARING | REVERSED

A parent appealed from a Bronx County Family Court order denying his application for a return of his children to his care after a Family Court § 1028 hearing. The First Department reversed and granted the application. Any risks to the children could be mitigated with reasonable efforts, and Family Court failed to properly weigh the parent's actions to counteract the agency's concerns, such as finding overnight supervision for the children, improving the condition of the home, and using non-physical methods of punishment. Dora M. Lassinger represented the parent.

Matter of Destiny G. (2024 NY Slip Op 00191)

APPELLATE DIVISION, SECOND DEPARTMENT

Matter of Blackman v Barge | January 15, 2025

MODIFICATION OF CUSTODY & PARENTAL ACCESS | ERRONEOUS DISMISSAL WITH PREJUDICE | MODIFIED

Mother appealed from a Westchester County Family Court order dismissing, with prejudice and without a hearing, her petitions to modify her custody order to award her sole legal and physical custody of the parties' child or, in the alternative, for an extension of supervised therapeutic parental access with the child. The Second Department

modified the order by deleting the provision dismissing the mother's petition with prejudice, and otherwise affirmed. Although the mother did not make the requisite evidentiary showing of a change in circumstances warranting a hearing on her petitions, the Family Court erred by dismissing said petitions with prejudice, as doing so is confusing and suggests that the mother could not seek relief in the future based upon a change in circumstances. Further, child custody and parental access orders are not entitled to a *res judicata* effect. Karen M. Jansen represented the mother.
Matter of Blackman v Barge (2025 NY Slip Op 00214)

Matter of Freyer v Macruari | January 15, 2025

MODIFICATION OF CUSTODY & PARENTAL ACCESS | IMPROVIDENT EXERCISE OF DISCRETION | MODIFIED

Father appealed from a Suffolk County Family Court order awarding the mother sole legal custody of the child, with parental access to the father via OurFamilyWizard and FaceTime. The Second Department modified the order by deleting the provision prohibiting the father from filing any further modification petitions without permission of the Family Court, and otherwise affirmed. Family Court improvidently exercised its discretion as nothing in the record demonstrated that the father forfeited his right to free access to the courts by abusing the judicial process or filing meritless petitions out of ill will or spite. The Law Office of Robert H. Montefusco, P.C., represented the father.
Matter of Freyer v Macruari (2025 NY Slip Op 00217)
Oral Argument (starts at 00:08:28)

Matter of Nathaniel v Mauvais | January 15, 2025

CUSTODY MODIFICATION | IMPROPER CONDITIONS ON FUTURE PARENTAL ACCESS | MODIFIED

Mother appealed from a Kings County Family Court order granting the father's petition to (1) modify the parties' custody order to award him sole legal custody of the parties' child; (2) granting the father's application to relocate with the child to Georgia, and (3) limiting the mother's parental access to the child to only written letters and mailed packages once per week. The Second Department modified the order by deleting the provision conditioning any future modification of mother's parental access upon her enrollment in mental health treatment and her resulting improvement in mental health, and otherwise affirmed. A court may not direct that a parent undergoes counseling or treatment as a condition of future parental access or reapplication for parental access rights.
Matter of Nathaniel v Mauvais (2025 NY Slip Op 00223)
Oral Argument (starts at 00:24:40)

Matter of Ramos v West | January 15, 2025

FAMILY OFFENSE | INSUFFICIENT EVIDENCE OF DISORDERLY CONDUCT | MODIFIED

Father appealed from a Kings County Family Court order of fact-finding and disposition which found that father had committed the family offenses of second-degree aggravated harassment, second-degree harassment, and disorderly conduct, and directed him to comply with the terms of an order of protection. The Second Department modified the order by deleting the provision finding that he committed the family offense of disorderly conduct, and otherwise affirmed. There was insufficient evidence to establish that the father intended to cause, or recklessly posed a risk in causing, public inconvenience, annoyance, or alarm. Elliot Green represented the father.

Matter of Ramos v West (2025 NY Slip Op 00225)

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