Indigent Legal Services

Decisions of Interest

OCTOBER 2, 2024

CRIMINAL

APPELLATE DIVISION, FIRST DEPARTMENT

People v D.S. | September 24, 2024

SURCHARGE AND FEES | YOUTHFUL OFFENDER | STRICKEN

Appellant appealed from a New York County Court judgment convicting him of third-degree grand larceny and adjudicating her a youthful offender. The First Department struck the mandatory surcharge and crime victim assistance fees. "The statutory provisions authorizing the imposition of mandatory surcharges and crime victim assistance fees upon youthful offenders were repealed effective August 24, 2020." The sentencing court had no authority to impose the fees. The Legal Aid Society of NYC (Megan Taeschler, of counsel) represented D.S.

People v. D.S., 2024 NY Slip Op 04524

People v Kuchma | September 26, 2024

ORDER OF PROTECTION | FAILURE TO TAKE INTO ACCOUNT JAIL TIME | OOP VACATED

Appellant appealed from a New York County judgment convicting him of first-degree criminal contempt, second-degree stalking, and second-degree aggravated harassment and sentencing him to an aggregate term of 1-to-3 years' imprisonment. The First Department vacated the orders of protection, in the interest of justice, and remanded for a new determination that calculated the jail time credit appellant had earned. Until the time of the recalculation the original protective orders would remain in place. The Legal Aid Society of NYC (Laura Boyd, of counsel) represented Kuchma.

People v. Kuchma, 2024 NY Slip Op 04622

People v Maldonado | September 26, 2024

WAIVER OF APPEAL | ORAL AND WRITTEN WAIVER INADEQUATE | SURCHARGES AND FEES STRICKEN

Appellant appealed from a Bronx County Court judgment convicting him of fourth-degree CPW and sentencing him to 9 months' imprisonment. The purported waiver of appeal was invalid because the court did not explain that the right to appeal was distinct from trial rights automatically forfeited by a guilty plea, and the First Department had previously recognized the form written waiver as inadequate. The mandatory surcharge and fees were stricken, with the prosecution's consent, but the judgment otherwise affirmed.

People v Maldonado, 2024 NY Slip Op 04615

People v Orenstein | September 26, 2024

WAIVER OF APPEAL | ORAL AND WRITTEN WAIVER INADEQUATE |-AFFIRMED

Appellant appealed from a New York County Court judgment convicting him of two counts of third-degree grand larceny and sentencing him, as a second felony offender, to consecutive terms of 2-to-4 years' imprisonment. The purported waiver of appeal was invalid because neither the oral nor written waiver adequately explained the rights being forfeited. The First Department refused to reduce the sentence.
People v Orenstein, 2024 NY Slip Op 04614

People v Paulino | September 26, 2024

SENTENCE NOT EXCESSIVE | HISTORY OF TRAUMA AND MENTAL ILLNESS | DISSENT

Appellant appealed from a Bronx County judgment convicting him of attempted second-degree murder and sentencing him to 8 years' imprisonment. The First Department held that appellant's mental illness, past trauma and minimal criminal history did not warrant reducing his sentence considering the violent nature of the attack on a vulnerable person. While recognizing its authority to reduce a sentence even in the absence of an abuse of discretion or extraordinary circumstances, the majority nonetheless refused to reduce appellant's sentence because "there are no extraordinary circumstances here to justify" reduction. The dissent would have reduced the sentence due to appellant's "unrelenting, severe mental illness that often went inadequately addressed." Appellant's attempts at self-medication though alcohol and substance abuse were also mitigating factors, as was his severe history of trauma, including witnessing his father's suicide. The Legal Aid Society of NYC (Graham Ball, of counsel) represented Paulino.
People v Paulino, NY Slip Op 04625

People v Carey
People v. Harris
People v. Lucas | September 26, 2024

INTEREST OF JUSTICE | SURCHARGES AND FEES STRICKEN

Exercising its interest-of-justice review power, the First Department vacated appellants' mandatory surcharges and fees, noting that the prosecution did not oppose the relief.
People v Carey, NY Slip Op 04613
People v Harris, NY Slip Op 04623
People v Lucas, NY Slip Op 04619

APPELLATE DIVISION, SECOND DEPARTMENT

People v Sargeant | September 25, 2024

11-PERSON JURY TRIAL | FORFEITURE | AFFIRMED | DISSENT

Appellant appealed from a Queens County Supreme Court judgment convicting him of second-, third-, and fourth-degree CPW, third-degree criminal possession of forgery devices, and unlawful possession of pistol ammunition after an 11-person jury trial. The Second Department affirmed and held that appellant had forfeited his right to a 12-person jury through his own misconduct (jury tampering). The dissent would have

reversed the judgment and ordered a new trial, positing that the right to a 12-person jury is analogous to the right to counsel. Appellant's misconduct was not so severe as to warrant forfeiture of his right to a 12-person jury. The dissent concluded that the majority's forfeiture finding violated appellant's state constitutional right to substantive and procedural due process and the state constitutional separation of powers doctrine by creating a new penalty for jury tampering. Appellate Advocates (Sarah B. Cohen, of counsel) represented Sargeant.
Oral Argument (starts at 30:05)
People v Sargeant, 2024 NY Slip Op 04580

People v Hudson | September 25, 2024
DVSJA | PLEA AGREEMENT | WAIVER OF 60.12 | AFFIRMED
Appellant appealed from a Kings County Supreme Court judgment convicting her of first-degree assault following a plea agreement, under which the prosecution insisted that she waive an already-requested DVSJA sentencing hearing under PL § 60.12. The Second Department affirmed, holding that a DVSJA hearing at initial sentencing is waivable as part of an otherwise valid negotiated plea. The Court distinguished youthful offender determinations, which the COA held to be unwaivable in *Rudolph*, since (unlike the YO statute) the plain language of PL § 60.12 does not require the sentencing court to hold a DVJSA hearing for every eligible person and puts an affirmative obligation on the defense to request the hearing.
People v Hudson, 2024 NY Slip Op 04571

APPELLATE DIVISION, THIRD DEPARTMENT

People v Graham | September 26, 2024
INVALID WAIVER OF APPEAL | SENTENCE NOT HARSH OR SEVERE | AFFIRMED
Appellant appealed from a Schenectady County Court judgment convicting him of third-degree CPCS after a plea. The Third Department found the waiver of appeal to be invalid, but nevertheless affirmed. The sentence of 3.5 years' imprisonment, plus 1.5 years of PRS as a second felony offender, was not unduly harsh or severe. Theresa M. Suozzi represented Graham.
People v Graham (2024 NY Slip Op 04639)

People v Awny | September 20, 2024
INVALID WAIVER OF APPEAL | ARGUMENT FORFEITED | AFFIRMED
Appellant appealed from a Sullivan County Court judgment convicting him of second-degree burglary, second-degree CPW, third-degree CPCS and fourth-degree CPSP after a plea. The Third Department affirmed but found the waiver of appeal to be invalid, as the prosecution conceded. Because appellant entered a plea after his suppression hearing had commenced but before the court rendered a decision, he forfeited any appellate suppression claims and had raised no additional issues.
People v Awny (2024 NY Slip Op 04634)

People v Johns| September 26, 2024

SORA MODIFICATION DENIAL | DUE PROCESS VIOLATION | REVERSED AND REMITTED

Appellant appealed from a Cortland County Court order denying his application for reclassification of his level-two sex offender risk level status under CL § 168-o(2). The Third Department reversed and remitted for a new modification hearing. In denying the application, County Court relied heavily on Family Court proceedings, including statements in petitions that were withdrawn. Lack of notice to appellant that this information would be used in the proceeding and a lack of an opportunity to be heard deprived him of due process. The Third Department also reminded the trial court that the purpose of a reclassification hearing is to assess whether circumstances have changed since the initial classification, not to relitigate the initial classification. Rural Law Center of New York (Lora J. Tryon, of counsel) represented Johns.

People v Johns (2024 NY Slip Op 04640)

People v Furgeson | September 26, 2024

SORA | NO NOTICE OF ADDITIONAL UPWARD DEPARTURE FACTORS | REVERSED AND REMITTED

Appellant appealed from a Tompkins County Court order classifying him as a level-three sex offender. The Third Department reversed and remanded for a new hearing. In granting the prosecution's request for an upward departure, County Court *sua sponte* relied upon additional factors—purported underscoring on factors 4 and7 of the RAI and appellant's psychiatric history—none of which were the basis for the upward departure recommendation from the Board or the prosecution. Lack of fair notice deprived appellant of the opportunity to consider and respond. Angela Kelley represented Furgeson.

People v Furgeson (2024 NY Slip Op 04644)

APPELLATE DIVISION, FOURTH DEPARTMENT

People v Santos | September 27, 2024

INVALID WAIVER OF APPEAL | SENTENCE NOT HARSH OR SEVERE | AFFIRMED

Appellant appealed from two Jefferson County Court judgments convicting him, after a plea, of third-degree sexual abuse, forcible touching, first-degree disseminating indecent material to a minor, and promoting a sexual performance by a child. The Fourth Department affirmed but found the "global waiver" of appeal to be invalid. The colloquy and written waiver both used overbroad language that mischaracterized the waiver as a complete bar to taking an appeal. However, the sentence was not unduly harsh or severe.

People v Santos (2024 NY Slip Op 04694)

People v White| September 27, 2024

INVALID WAIVER OF APPEAL | SENTENCE NOT HARSH OR SEVERE | AFFIRMED

Appellant appealed from a Jefferson County Court judgment convicting her of third-degree CPCS after a plea. The Fourth Department affirmed but found the waiver of appeal to be invalid, because the written waiver used overbroad language not cured by the oral colloquy. However, the sentence was not unduly harsh or severe.

People v White (2024 NY Slip Op 04655)

People v Johnson | September 27, 2024

INVALID WAIVER OF APPEAL | SENTENCE NOT HARSH OR SEVERE | AFFIRMED

Appellant appealed from a Monroe County Court judgment convicting him of first-degree manslaughter and first-degree robbery after a plea. The Fourth Department affirmed but found the waiver of appeal to be invalid, since both the written waiver and oral colloquy used overbroad language mischaracterizing the waiver as a total bar to an appeal. However, the sentence was not unduly harsh or severe.

People v Johnson (2024 NY Slip Op 04685)

People v Milord | September 27, 2024

INVALID WAIVER OF APPEAL | SUPPRESSION | AFFIRMED

Appellant appealed from a Monroe County Court judgment convicting him of second-degree burglary after a plea. The Fourth Department affirmed but found the waiver of appeal to be invalid. Both the written waiver and oral colloquy contained inaccurate language about the scope of the waiver. The Fourth Department held that police observations, in an area known for marijuana sales, of "large puffs of smoke" emanating from a parked vehicle, a strong odor of burnt marijuana, plus Milford's flight from the vehicle after the officer approached, gave rise to reasonable suspicion, justifying the police pursuit. The lower court's denial of the suppression motion was affirmed.

People v Milord (2024 NY Slip Op 04682)

People v Brightman | September 27, 2024

SORA | FOREIGN DESIGNATION CLAUSE | UNCONSTITUTIONAL AS APPLIED

Appellant appealed from a Chautauqua County Court order designating him a sexually violent offender. The Fourth Department reversed, holding that SORA's foreign designation clause was unconstitutional as applied to appellant. County Court designated him a sexually violent offender based solely on his prior, out-of-state conviction for the nonviolent sex offense of "importuning" (soliciting via a telecommunications device a complainant between 13 and 16 to engage in sexual conduct when Brightman was 23), which County Court compared to New York's PL § 235.22(2) (first-degree disseminating indecent material to minors). Absent any evidence of violent conduct, mislabeling appellant a sexually violent offender was not rationally related to any legitimate governmental interest. County Court rejected appellant's facial challenge to the foreign designation clause under substantive due process, applying rational basis review. The Chautauqua County Public Defender (Heather Burley, of counsel) represented Brightman.

People v Brightman (2024 NY Slip Op 04654)

People v Lorenzo | September 27, 2024

440.10 | NEWLY-DISCOVERED EVIDENCE & *BRADY* | PROSECUTION APPEAL| AFFIRMED

The prosecution appealed an Erie County order granting CPL 440.10 motions vacating murder and burglary convictions for jointly-tried co-defendants on newly-discovered evidence and *Brady* grounds. The Fourth Department affirmed. Post-conviction testing excluded both men as contributors to DNA found on items at the scene. The court rejected the prosecution's arguments that the DNA evidence was cumulative of the trial evidence and that the undisclosed *Brady* material—which undermined the probative value of a key

piece of physical evidence—would not have changed the result of the trial. Emery Celli Brinckerhoff Abady Ward & Maazel LLP (Ilann M. Maazel, of counsel) and ZMO Law PLLC represented Lorenzo and Pugh.
People v Lorenzo (2024 NY Slip Op 04681)

People v Taylor | September 27, 2024

SUPPRESSION | DISPOSITIVE EVIDENCE | INDICTMENT DISMISSED

Appellant previously appealed an Erie County Court judgment convicting him of second-degree CPW2, and the Fourth Department held that the trial court erroneously determined that the police engaged in a level-one intrusion by ordering appellant to step out of his car, held the appeal in abeyance, and remitted for further proceedings. On remittal, the trial court found that the police lacked reasonable suspicion and granted suppression. Because that ruling suppressed all evidence of the charged crime, the Fourth Department dismissed the indictment. The Legal Aid Bureau of Buffalo (Allison V. McMahon, of counsel) represented Taylor.
People v Taylor (2024 NY Slip Op 04678)

People v Figueroa | September 27, 2024

PREDATORY SEXUAL ASSAULT | RESTITUTION | MODIFIED

Appellant appealed a Genesee County judgment convicting him of predatory sexual assault against a child, first-degree sexual abuse, and EWOC after a plea based on the sexual abuse of his girlfriend's child. The sentence included an award of restitution for the unpaid rent and bills for their shared residence. The Fourth Department modified by vacating the portion of the sentence imposing restitution, and otherwise affirmed. Although the appeal waiver was valid, the restitution award was not encompassed within it because it was not part of the plea. Restitution awards are limited to costs directly caused by the crimes, and the rent and bills did not fit into that category. The Legal Aid Bureau of Buffalo (Allison V. McMahon, of counsel) represented Figueroa.
People v Figueroa (2024 NY Slip Op 04691)

People ex rel. Cordes v Shelley | September 27, 2024

HABEAS CORPUS | BAIL REVOCATION | REVERSED

Petitioner appealed from a judgment of Onondaga County Supreme Court dismissing his petition for a writ of habeas corpus. Carl Newton was released on bail pending trial, which ended in a mistrial after an individual describing himself as a supporter of Newton allegedly approached trial attorneys and expressed displeasure that certain jurors had been removed from the panel. The trial court held a bail revocation hearing and revoked Newton's bail based on that alleged conduct. The Fourth Department reversed. Although the trial court ostensibly based its decision on the fact that Newton "could have been charged with a felony" based on the incident, it did not specify which felony, and juror tampering is a misdemeanor. Because this offense would have been the only feasible basis to revoke Newton's bail under CPL § 530.60, the Fourth Department held that the bail court's determination was not supported by clear and convincing evidence and that Supreme Court erred in dismissing the petition for a writ of habeas corpus. Craig M. Cordes represented Newton.
People ex rel Cordes v Shelley (2024 NY Slip Op 04657)

People v Gause | September 27, 2024

SENTENCING | FAILURE TO PRONOUNCE ON EACH COUNT | DVSJA | REMITTED

Appellant appealed a judgment of Steuben County Court convicting her of first-degree robbery, first-degree assault, and fourth-degree conspiracy. The Fourth Department vacated the sentence and remitted to the trial court for resentencing, and otherwise affirmed. The trial court failed to impose a sentence for every count of the verdict as required by CPL 380.20. The Fourth Department affirmed the denial of sentencing pursuant to the DVSJA (PL § 60.12), finding that appellant failed to meet her burden at the DVSJA hearing to establish that her history of abuse was a significant contributing factor to her criminal conduct. Feldman and Feldman (Steven A. Feldman, of counsel) represented Gause.

People v Gause (2024 NY Slip Op 04686)

TRIAL COURTS

People v Moses | 2024 WL 4259750

COMMUNITY CARETAKING FUNCTION | COA *BROWN* TEST MET | SUPPRESSION DENIED

Moses was charged with DWI after police approached a vehicle pulled over on the side of the highway to conduct a "wellness check." Nassau County Court found the police conduct to be legal under the two-prong test for the community caretaking function in *People v Brown*, -- NY3d – (2024), 2024 NY Slip Op 02765. Under prong one, the car's position on the side of the highway, in the middle of the night, constituted "specific, objective, and articulable facts that would lead a reasonable officer to conclude that an occupant of the vehicle is in need of assistance." Under prong two, the initial police intrusion—asking level-one questions regarding destination and identification—was "narrowly tailored to address the perceived need for assistance." Police observations of Moses throwing a Solo cup, his bloodshot eyes, the odor of alcohol, and slurred speech in response to level-one questions, justified the transition from a wellness check to a level-two inquiry. Distinguishing *People v Serrano*, 229 AD3d 642 (2d Dep't 2024), County Court held that Moses was not seized when police pulled up behind him, since—unlike in *Serrano*—police illuminated only the rear-facing emergency lights on the police vehicles to alert oncoming traffic, not the forward-facing lights used to instruct drivers to pull over.

People v Moses (2024 NY Slip Op 51307(U))

People v Shilman | 2024 WL 4282676

BRUEN & *RAHIMI* | PL 265.03(3) CONSTITUTIONAL | CPL 440.10 SUMMARILY DENIED

Shilman was convicted of CPW2 under PL § 265.03(3) (possession outside home or place of business) and sentenced to 5 years' imprisonment and 5 years' PRS. He filed a post-judgment motion pursuant to CPL § 440.10(1)(h) seeking to vacate his conviction and sentence, raising a *Bruen* challenge to the constitutionality of his conviction under the Second and Fourteenth amendments. In the alternative, Shilman sought resentencing to a lesser offense pursuant to CPL § 440.20. Bronx County Supreme Court summarily denied the motion, finding the claims procedurally barred and substantively without merit. CPL § 440.20 is a vehicle to set aside an unconstitutional or otherwise unauthorized sentence, not for attacking both conviction and sentence. The CPL § 440.10 claim was

also procedurally barred because Shilman could have raised his claim before the plea, which was entered post-*Bruen* (*see* CPL § 440.10[2][b]), and that his extra-record affidavit explaining his reasons for gun possession were irrelevant to the legal issue. In any event, Supreme Court held that PL § 265.03(3) is constitutional even under the *Bruen* framework (also citing *Rahimi*), since SCOTUS did not prohibit states from regulating gun licensure and enforcing those laws. Supreme Court concluded that PL § 265.03(3) "operates as an enhanced sentencing law" that increases the CPW penalty for possession of an assault weapon or where the person has previously been convicted of a crime; it is "not a New York State counterpart to the federal felon in possession law" (18 USC § 922 [g][1]).
People v Shilman (2024 NY Slip Op 24250(U))

People v Clark | 2024 WL 4231658

DISCOVERY | 30.30 | DISCIPLINARY RECORDS FOR TESTIFYING POLICE OFFICERS | CHARGES DISMISSED

Clark was charged with multiple DWI's and moved to dismiss the accusatory instrument due to the prosecution's failure to disclose all disciplinary records of a testifying officer. District Court, Nassau County granted the 30.30 motion and dismissed the charges. After thoroughly reviewing the split of authority on the issue of whether prosecutors may withhold impeachment evidence from prior cases, District Court adhered to its prior decision in *People v Gelhaus*, 82 Misc3d 864 [Dist Ct, Nassau Cty 2024], holding that the prosecution is "obligated to disclose all disciplinary records[] for testifying police witnesses, without limitation." The court noted that CPL § 245 deals with "only disclosure, not admissibility," allowing the court—not the prosecution—to decide what "relate[s] to the subject matter of the case."
People v Clark (2024 NY Slip Op 51296(U))

FAMILY

APPELLATE DIVISION, FIRST DEPARTMENT

Matter of Aminata S. v. Ndongo D. | September 26, 2024

ORDERS ENTERED ON DEFAULT NOT APPEALABLE | DISMISSED

The father appealed from a Bronx County Family Court granting custody of the subject children to the aunt. The First Department dismissed the appeal. The order was made on the father's default and was thus not appealable, since he never moved to vacate his default.
Matter of Aminata S. v Ndongo D. (2024 NY Slip Op 04628)

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