Indigent Legal Services

Decisions of Interest

OCTOBER 16, 2024

CRIMINAL

APPELLATE DIVISION, FIRST DEPARTMENT

People v Gerson | October 8, 2024

INVALID WAIVER OF APPEAL | AFFIRMED

Appellant appealed from a New York County judgment convicting him of first-degree burglary and contempt. The First Department found that the purported waiver of the right to appeal was invalid because the court misleadingly suggested that the waiver was an absolute bar to appeal and did not confirm on the record that appellant understood the written waiver. The First Department, upon reviewing the merits of appellant's claims, affirmed. Office of the Appellate Defender (Karen Brill, of counsel) represented Gerson. People v Gerson, NY Slip Op 04918.

APPELLATE DIVISION, SECOND DEPARTMENT

People v Guerra | October 9, 2024

IAC | ERRONEOUS STIPULATION | REVERSED & REMITTED

Appellant appealed from a Queens County Supreme Court judgment convicting him of numerous counts of promoting a sexual performance by a child and possessing a sexual performance by a child. The Second Department reversed and remitted for a new trial due to record-based ineffectiveness. Trial counsel erroneously signed and permitted the jury to consider a stipulation that improperly eliminated the requisite mens rea element of knowing possession from the charged crimes, even though the defense theory was that someone else could have used the involved laptop. Counsel's remarks reflected that this was not part of any legal strategy. Further, prejudice to appellant was compounded by the lower court's refusal to provide clarifying instructions to the jury that its earlier legal instructions that included the mens rea element were controlling. The dissent would have affirmed, positing that the stipulation was not an instruction on the law, and counsel employed a reasonable defense strategy. Appellate Advocates (Hannah Kon, of counsel) represented Guerra.

Oral Argument (starts at 07:02)

People v Guerra, 2024 NY Slip Op 04978

People v Augustine | October 9, 2024

ANDERS BRIEF | NONFRIVOLOUS APPELLATE ISSUES | NEW APPELLATE COUNSEL ASSIGNED

Appellant's counsel filed an *Anders* brief. The Second Department granted counsel's motion to withdraw but assigned new counsel to prosecute the appeal. Nonfrivolous issues existed, including whether appellant's waiver of appeal was valid and whether the sentence, which had already been served, was excessive, where there were possible immigration consequences.
People v Augustine, 2024 NY Slip Op 04976

People v Muhammad | October 9, 2024

INVALID WAIVER OF APPEAL | SENTENCE NOT EXCESSIVE | AFFIRMED

Appellant appealed from a Queens County Supreme Court judgment sentencing him following a guilty plea. The Second Department found the written appeal waiver invalid. Nor was the written waiver sufficient to overcome the deficiencies in the lower court's oral colloquy, which erroneously advised appellant that his waiver barred any appeal. However, appellant's sentence was not excessive and the suppression motion was properly denied. Appellate Advocates (Chelsea Lopez, of counsel) represented Muhammad.
Oral Argument (starts at 6:26)
People v Muhammad, 2024 NY Slip Op 04981

APPELLATE DIVISION, THIRD DEPARTMENT

People v Holland | October 10, 2024

SORA | DECISION NOT APPEALABLE | DISMISSED

Appellant appealed a Clinton County Court decision adjudicating him a Level Three sex offender under SORA. The Third Department dismissed the appeal. Although County Court issued a written decision, it did not contain "so ordered" language, and no order was ever entered and filed as required by Correction Law § 168-n [3]. The appeal was therefore not properly taken and must be dismissed.
People v Holland (2024 NY Slip Op 5001)

TRIAL COURTS

People v McKinley | 2024 WL 4455635

ERLINGER | JURY NOT REQUIRED WHERE NO TOLLING INVOLVED | 2FO SENTENCE APPROPRIATE

McKinley was convicted after a jury trial of first- and second-degree assault based on an offense that occurred in March 2022. The prosecution asked that he be sentenced as a second-felony offender based on a prior second-degree assault conviction, for which he was sentenced in April 2012 (9 years, 11 months before the instant offense). Kings County Supreme Court denied the defense's Sixth Amendment challenge-under *Erlinger*,

which requested that McKinley be sentenced as a first felony offender. The court determined that tolling was not an issue where the instant offense was committed less than 10 years after sentencing on the prior offense, invoking the exception under *Almendarez-Torres v United States*, 523 US 224 [1998].
People v McKinley (2024 NY Slip Op 24257

People v Lorenzo
People v Pugh | 2024 WL 4455635

440.10 | NEWLY DISCOVERED EVIDENCE & BRADY VIOLATIONS | VACATED & REMITTED

Lorenzo and Pugh filed CPL § 440.10 motions based on actual innocence, newly discovered evidence, and *Brady* violations, seeking vacatur of 1994 murder and burglary convictions, for which they received sentences of 37.5 years-to-life and 25 years-to-life, respectively. The jury convicted them based largely on alleged post-offense admissions to associates and (as to Lorenzo) a rare coin recovered from a bag in his possession at the time of arrest, which allegedly belonged to the deceased. Erie County Supreme Court rejected the actual innocence claim, finding the third-party-culpability testimony of David Sweat to be "patently incredible" and the testimony of two assistant district attorneys—who had formerly recommended exoneration before being transferred from the Erie County District Attorney's Conviction Integrity Unit—to be based on uncorroborated speculation. Hearsay statements from one of the alternative suspects, an investigating detective in the original case, were not admitted as statements against penal interest due to lack of sufficient corroboration. Supreme Court granted the 440.10 motion, however, with respect to the newly discovered evidence and *Brady* claims. Results of DNA testing performed with technology not available in 1994, which excluded both Lorenzo and Pugh from myriad items at the crime scene, gave rise to a reasonable probability of a different outcome. This was true despite other DNA evidence introduced at trial excluding Lorenzo and Pugh. Moreover, the prosecution violated *Brady* by failing to turn over notes from the trial ADA documenting that a key prosecution witness's father, who was not called at trial, could not identify the rare coin recovered from Lorenzo upon arrest, although he had allegedly purchased the coin and given it to the victim shortly before the crime. Applying the higher "reasonable probability" standard under *People v Thibodeau*, 31 NY3d 1055 [2018], due to lack of a specific defense request for the notes, Supreme Court nonetheless found the error was not harmless, even as to Pugh, since he and Lorenzo were tried jointly as accomplices. The convictions were reversed, and the cases remitted for a new trial. Ilann M. Maazel and Emma Freeman represented Lorenzo. Zachary Margulis-Ohnuma and Tess Cohen represented Pugh.
People v Lorenzo (2024 NY Slip Op 51515 (U))

People v Mendell | 2024 WL 4430740

DWI | UNMIRANDIZED STATEMENTS & BLOOD DRAW RESULTS | SUPPRESSION GRANTED

Mendell was charged with driving while ability impaired by a drug and a number of traffic violations. Justice Court of the Town of Henrietta, Monroe County, granted suppression

of Mendell's statements prior to issuance of *Miranda* warnings and of the results of a blood draw taken two hours post-arrest. Mendell was effectively in custody when the officer who had pulled him over called for backup and ordered Mendell back in his vehicle. The officer's subjective opinion that Mendell was "not free to leave" gave rise to "[t]he implication…that [the officer] viewed the detention…to be for more than routine investigatory questioning," an implication that "would not have been lost on [Mendell]." Distinguishing *People v Atkins*, 85 NY2d 1007 [1995], the court held that the prosecution had not proved that Mendell voluntarily consented to the blood draw, since there was no proof that refusal warnings were given, that the purpose of the blood draw was not explained to him, or that he understood he could refuse. Monroe County Public Defender (Rachel Davis, of counsel) represented Mendell.
People v Mendell (2024 NY Slip Op 51375(U)

People v Pressley | 2024 WL 4402055

30.30 | MULTIPLE DISCOVERY VIOLATIONS | CHARGES DISMISSED

Pressley was charged with operating a motor vehicle under the influence of alcohol, third-degree unlawful fleeing a police officer in a motor vehicle, second-degree OGA, and other traffic violations. Justice Court of the Town of Clarkstown, Rockland County, granted the 30.30 motion and dismissed the charges, holding that the prosecution failed to timely disclose (1) an incident report and other arrest paperwork, (2) body-worn camera (BWC) footage, (3) the breath machine operator's permit and all calibration records for the breath machine, and (4) impeachment material for a non-testifying sergeant and historical impeachment material for two testifying officers. *Bay*'s due diligence standard was not met where the prosecution's SCOC failed to detail any efforts to obtain missing material *before* they filed the original COC. Regarding breath machine records, "the prosecution's reference to a publicly available website [was] legally insufficient compliance." The prosecution must affirmatively provide them to the defense. While the court took the position that *all* impeachment material—historical or otherwise—for testifying *and* non-testifying officers is automatically discoverable, the prosecution nonetheless acted with sufficient due diligence given the unsettled nature of the law in this area. Rockland County Public Defender (Jessica Fein, of counsel) represented Pressley.
People v Pressley (2024 NY Slip Op 51372 (U))

People v Guzman | 2024 WL 4447292

30.30 | 911 RECORDING | CHARGES DISMISSED

Guzman was charged with third-degree robbery for allegedly forcibly stealing a cell phone. City Court of Yonkers granted the 30.30 motion and dismissed the charges due to the prosecution's failure to demonstrate due diligence in trying to obtain the 911 recording, which was known to exist when the COC was filed. "[M]erely requesting the 911 recording, via emails to the Yonkers Police Department, without more, falls short of the People's discovery obligation…." Joanna I. Karlitz represented Guzman.
People v Guzman (2024 NY Slip Op 51385 (U))

People v Bresnan | 2024 WL 4471098

30.30 | BWC AUDIT LOGS | CHARGES DISMISSED

Bresnan was charged with criminal obstruction of breathing/blood circulation. Justice Court of the Town of Henrietta, Monroe County, granted the 30.30 motion and dismissed the charge. Agreeing with a majority of trial courts to have addressed the issue and collecting cases, Justice Court held that BWC audit logs are subject to automatic discovery. These audit trails "contain more than metadata and chain of custody information," including impeachment information, and are within the prosecution's control, despite being stored by a third-party contractor. The court found that, if the prosecution were "troubled by the conflicting, nonbinding authority" regarding discoverability of BWC audit logs, they could have sought a protective order under CPL § 245.70. The defense was not required to demonstrate prejudice to obtain dismissal, citing *Bay*. Brandy L. Shafer represented Bresnan.

People v Bresnan (2024 NY Slip Op 24259

MENTAL HYGIENE LAW

APPELLATE DIVISION, SECOND DEPARTMENT

Matter of State v H. | October 9, 2024

FRYE HEARING | ADMISSIBILITY OF EXPERT TESTIMONY | HYPERSEXUALITY | AFFIRMED

Appellant appealed from a Kings County Supreme Court order finding after a bench trial that appellant suffers from a mental abnormality, pursuant to Mental Hygiene Law § 10.03(i), and is a dangerous sex offender requiring civil confinement. The Second Department affirmed, concluding that the lower court, following a pre-trial *Frye* hearing, properly determined that the condition of hypersexuality has gained general acceptance in the psychiatric and psychological communities, and that expert testimony on the condition was admissible at trial.

Oral Argument (starts at 11:50)
Matter of State v H., 2024 NY Slip Op 04986

FAMILY

TRIAL COURTS

Matter of Cornielle v Rosado | October 9, 2024

PARENTAL ACCESS SCHEDULE| MODIFIED AND REMITTED

The father appealed from a Kings County Family Court order granting the mother sole legal and physical custody of the child and giving him parenting time on alternate weekends and "additional parental access as agreed upon by the parties." The Second Department modified by awarding the father four consecutive weeks with the child during the summer and remitted to Family Court in order to set a new parenting time schedule.

The Second Department determined that one night every two weeks was insufficient to maintain the bond between the child and father. Additionally, the order failed to provide the father parental access on holidays, school vacations, and special occasions unless the mother consented. This was reversible error because the record demonstrated ongoing animosity between the parties. Lauri Gennusa represented the father.
Matter of Cornielle v Rosado (2024 NY Slip Op 04960)

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