Indigent Legal Services

Decisions of Interest

OCTOBER 30, 2024

CRIMINAL

COURT OF APPEALS

People v Blue | October 22, 2024

RIGHT TO COUNSEL WAIVER | MAX. SENTENCING EXPOSURE | CO-D 30.30 TIME | AFFIRMED | DISSENT

Appellant appealed from a First Department order affirming his conviction for five counts of second-degree burglary. The Court of Appeals affirmed and held that the trial court's searching inquiry in assessing whether the accused's waiver of counsel was "knowing, voluntary, and intelligent" was constitutional. The Court declined to impose a bright-line rule requiring the court to recite the maximum sentencing exposure as part of a valid waiver colloquy. The Court also held that CPL 30.30(4)(d) applies to pre-arraignment time when a co-defendant is joined for trial. The dissent disagreed with the majority's conclusion as to waiver of the right to counsel and would have held that the constitution requires trial courts to explore whether the accused is aware of their maximum sentencing exposure before proceeding pro se. Providing the accused with the numerical range of their sentencing exposure is not a significant burden and influences the accused's decisions to plead guilty, testify on their own behalf, and represent themselves.

People v Blue, 2024 NY Slip Op 05175

Oral Argument

People v Dixon | October 22, 2024

RIGHT TO PRESENT A DEFENSE | MONITORED PRO SE JAIL CALLS TO WITNESSES | AFFIRMED

Appellant appealed from a Second Department order affirming his conviction for two counts of first-degree course of sexual conduct against a child, two counts of third-degree rape, and numerous counts of child pornography. The Court of Appeals affirmed and held that despite being incarcerated and proceeding pro se, appellant's constitutional right to present a defense was not impaired by the prosecution monitoring his jail phone calls with witnesses. Appellant had ample time to prepare his witnesses during the two years he was out on bail, and he had other means to prepare his witnesses, including his daughter who had visited him in jail. Any chilling effect on his trial preparation was negligible, as appellant did not become aware that the People were listening to his phone conversations until after his daughter and an expert had testified. The Court also held that appellant's request to proceed pro se was unequivocal.

People v Dixon, 2024 NY Slip Op 05176

Oral Argument

People ex rel Neville v Toulon | October 22, 2024

SOMTA | PROCEDURAL DUE PROCESS CHALLENGE REJECTED | AFFIRMED | DISSENT

Appellant appealed from a Second Department order denying his declaratory judgment action against OMH and DOCCS. Appellant had been civilly committed pursuant to SOMTA following a jury trial where he was found to have a "mental abnormality." He was subsequently released and placed on Strict Intensive Supervision and Treatment (SIST). When he was alleged to have violated SIST, a court determined, pursuant to Mental Hygiene Law 10.11(d)(4), that there was probable cause to detain him for a final determination hearing concerning whether he was a dangerous sex offender requiring continued confinement. Appellant filed a state habeas petition alleging that the provisions of the law governing the probable cause hearing violated procedural due process because he was not afforded notice and an opportunity to be heard. The majority held that an adversarial probable cause hearing was not necessary to protect appellant's procedural due process rights. As he possessed only a diminished liberty interest, the level of protection added by an adversarial hearing was slight, in contrast to the State's strong interest in confining dangerous sex offenders. The dissent considered the law to be unconstitutional on its face, finding that all the relevant factors weighed in appellant's favor: he had a liberty interest in remaining in his community, a non-adversarial probable cause determinations heightened the risk of erroneous confinement, and such hearings undermined public safety by disrupting his rehabilitation.

People ex rel. Neville v Toulon, 2024 NY Slip Op 05178

Oral Argument

People v McGovern | October 24, 2024

SENTENCE | CONSECUTIVE | NOT A SINGULAR ACT | AFFIRMED

Appellant appealed from a Fourth Department order affirming his conviction after a jury trial of third-degree grand larceny and second-degree forgery, among other counts, based on a scheme to sell tires by false representation. The Court of Appeals affirmed, holding that sentencing appellant to consecutive sentences on the grand larceny and forgery counts did not violate Penal Law § 70.25(2). Making false statements to induce a driver to relinquish their tires and then signing someone else's name on an invoice were separate acts, not a single act or omission. Nor did either act constitute one of the offenses *and* a material element of the other.

People v McGovern, 2024 NY Slip Op 05242

Oral Argument

People v Hayward | October 24, 2024

IAC | NY SINGLE-ERROR STANDARD | AFFIRMED | CONCURRENCE

Appellant appealed from a Third Department order affirming his conviction for third-degree CPCS and seventh-degree CPCS. The Court of Appeals affirmed and rejected the ineffective assistance of counsel claim. Trial counsel's failure to move to suppress physical evidence based on a violation of the knock-and-announce rule was a novel issue

and not “so clear-cut and dispositive that no reasonable defense attorney would have failed to assert it.” Judge Rivera’s concurrence, joined by Chief Judge Wilson and Judge Halligan, would have affirmed based on the inadequacy of the record, but expressed concern about the tension between New York’s IAC standard and the *Strickland* test in cases involving a single alleged error. “As identified by [federal] jurists, the central problem is that our standard may be misread to deny any constitutional defect where defense counsel makes but one error, even a serious one, in an otherwise-competent representation.” The concurring Judges also criticized the majority’s suggestion that IAC cannot be based on failure to raise a novel legal issue, stating that “[e]ffective advocacy under the New York Constitution might well require lawyers to advance some less-than-clear-cut claims,” particularly where failure to raise the claim has no strategic basis.
People v Hayward, 2024 NY Slip Op 05243
Oral Argument

People v Baque | October 24, 2024

WEIGHT OF THE EVIDENCE | CIRCUMSTANTIAL EVIDENCE | AFFIRMED | CONCURRENCES | DISSENT

Appellant appealed from a Second Department order affirming his conviction of criminally negligent homicide and EWC following the death of his infant daughter, based entirely upon circumstantial evidence. It was unclear from the record whether the Second Department, in conducting its weight-of-the-evidence (WOTE) review, had applied the same standard charged to the jury. The jury instructions had explained that to convict, the inference of guilt was the only one that could fairly and reasonably be drawn and that circumstantial evidence must exclude beyond a reasonable doubt every reasonable hypothesis but guilt. The Court of Appeals affirmed. The majority found no error in the Second Department’s WOTE analysis, observing that the Second Department relied on the proper legal standards and grappled “with the circumstantial evidence presented to the jury.” The majority recognized that the same tenets the jury applies to circumstantial evidence cases must also be applied to WOTE review on appeal. But failure to specifically recite the circumstantial evidence standard did not warrant reversal. In dissent, Chief Judge Wilson agreed with the majority that the Appellate Division must apply the same circumstantial evidence rule as the jury in performing WOTE review but concluded that the Second Department’s decision and the oral argument below suggested it may have applied the legal sufficiency standard or the “moral certainty standard,” and therefore would reverse. Judge Garcia concurred with the result, finding that the Second Department properly applied the WOTE standard, but disagreed with the majority that the Appellate Division’s WOTE review power was synonymous with jury instructions on circumstantial evidence, observing that appellate judges do not need such guardrails to focus their attention on the careful reasoning appropriate in circumstantial evidence cases. Judge Singas concurred separately, concluding that without a manifest misapplication of the WOTE standard, the Appellate Division was presumed to have properly exercised its authority.
People v Baque, 2024 NY Slip Op 05244
Oral Argument

APPELLATE DIVISION, FIRST DEPARTMENT

People v Wallace| 10/22/2024

SORA | ACCEPTANCE OF RESPONSIBILITY | REVERSED

Appellant appealed from a New York County Court judgment adjudicating him a level three sex offender under SORA. The First Department reversed, finding that the SORA court should not have assessed 10 points for failure to accept responsibility. Appellant's denials of guilt were made when his appeal was still pending, and his admissions could have potentially been used at a retrial, violating his Fifth Amendment right against self-incrimination. Accordingly, appellant should have been assessed points rendering him a presumptive level two offender. The Legal Aid Society, NYC (Robin Richardson, of counsel) represented Wallace.

People v Wallace, 2024 NY Slip Op 05189

Oral Argument (starts at 01:02:42)

APPELLATE DIVISION, SECOND DEPARTMENT

People v Wildman | October 23, 2024

SORA | DOWNWARD DEPARTURE | REVERSED

Appellant appealed from a Kings County Supreme Court judgment adjudicating him a level three sex offender under SORA. The Second Department reversed and designated appellant a level one sex offender. Appellant had been at liberty for over 11 years without committing an additional sex offense or violent felony and was already on the cusp of the range applicable to a presumptive risk level two designation. Further, the trial court had not adequately accounted for the mitigating factor that the age difference between appellant and the victim was four years and two months. Appellate Advocates (Zachory Nowosadzki, of counsel) represented Wildman.

People v Wildman, 2024 NY Slip Op 05229

People v Webb Burris | October 23, 2024

INVALID WAIVER OF APPEAL | SENTENCES NOT EXCESSIVE | AFFIRMED

Appellant appealed from two Queens County Supreme Court judgments sentencing him following guilty pleas. The Second Department found the appeal waivers invalid because the court had erroneously mischaracterized the appellate rights relinquished as encompassing the loss of the right to counsel and poor person's relief, and the court failed to discuss the waivers until after appellant had admitted his guilt as part of the plea agreements. Here, the execution of written waivers did not cure the deficient oral colloquy. However, appellant's sentences were not excessive. Appellate Advocates (Anna Jouravleva, of counsel) represented Burris.

People v Burris, 2024 NY Slip Op 05226

People v Martinez | October 23, 2024

DEFICIENT *ANDERS* BRIEF | NONFRIVOLOUS APPELLATE ISSUES | NEW APPELLATE COUNSEL ASSIGNED

Appellant appealed from a Suffolk County Court judgment convicting him after a guilty plea of first-degree course of sexual conduct against a child. Appellate counsel filed an *Anders* brief seeking to be relieved on the ground that there were no nonfrivolous issues to be raised. The Second Department granted counsel's motion to withdraw and assigned new counsel to prosecute the appeal after finding that the *Anders* brief failed to adequately analyze potential appellate issues or highlight the facts in the record that might arguably support the appeal. Counsel merely recited the underlying facts and stated a bare conclusion that there were no nonfrivolous issues to be raised.

People v Martinez, 2024 NY Slip Op 05224

People v Brown | October 23, 2024

PROSECUTION APPEAL | CPL 30.30 | COVID-19 EXEC. ORDER | INDICTMENT REINSTATED

The New City District Attorney appealed from an order of the Rockland County Court dismissing the indictment on the ground that respondent was deprived of his right to a speedy trial, pursuant to CPL § 30.30. The Second Department vacated the order, denied the motion, reinstated the indictment, and remitted. The period of time at issue was not chargeable to the prosecution, because Executive Order No. 202.87, issued in response to the COVID-19 pandemic, tolled the speedy trial statute from the date the felony complaint was filed through the date of arraignment on the indictment.

People v Brown, 2024 NY Slip Op 05221

People v Drayton | October 23, 2024

PROSECUTION APPEAL | CPL 30.30 | COC AND GRAND JURY MINUTES | INDICTMENT REINSTATED

The Queens County District Attorney appealed from an order of the Queens County Supreme Court invalidating the COC and dismissing the indictment on the ground that respondent was deprived of his right to a speedy trial, pursuant to CPL 30.30. The Second Department vacated the order, denied the motion, reinstated the indictment, and remitted. The COC filed prior to the disclosure of the grand jury minutes was not illusory. The prosecution met their burden of establishing that they had "exercised due diligence and made reasonable inquiries" to obtain the discovery at issue where the COC expressly acknowledged their obligation to provide grand jury minutes once they obtained the completed transcript, and where they then provided the transcript "within a reasonable time after obtaining it from the court reporter."

People v Drayton, 2024 NY Slip Op 05222

Oral Argument (starts at 26:50)

APPELLATE DIVISION, THIRD DEPARTMENT

People v Niquasia MM. | September 24, 2024

DVSJA| RESENTENCING DENIED

Appellant appealed a Schenectady County Court judgment denying her DVSJA resentencing motion under CPL § 440.47. The Third Department affirmed. Citing *People v Williams*, County Court found that there was insufficient evidence to show that, at the time of the offense, appellant was the victim of substantial domestic violence, since appellant's testimony about when she resided with her alleged abusers was "vague and imprecise." The Court also held that that the record did not demonstrate that the abuse she previously experienced at the hands of her mother and the father of her child was a significant contributing factor to her crime. Although appellant testified that, because of the abuse, she frequently became angry and fought with others, the court noted the absence of any expert testimony or other evidence linking her prior abuse to the crime: here, a robbery where cleaning products and other toxic household chemicals were poured on the pregnant victim. The Third Department also held that, even if appellant had met her burden of proof on those two elements, it would not have found it appropriate to reduce her sentence in the interest of justice because of evidence showing the premeditated nature of the crime and appellant's lack of remorse.

People v Niquasia MM. (2024 NY Slip Op 04638)

People v Dillon | October 24, 2024

SERIOUS PHYSICAL INJURY | AGAINST WEIGHT OF EVIDENCE| MODIFIED

Appellant appealed a St. Lawrence County Court judgment convicting him of second-degree assault and sentencing him to seven years' imprisonment, followed by three years of PRS. The Third Department reduced the conviction to third-degree assault and remitted for resentencing. The complainant's broken jaw, which was wired shut for several weeks after the incident, was not enough to demonstrate the statutory element of serious physical injury. The court found that the record was sufficient to show physical injury, however, supporting a conviction for third-degree assault. Rural Law Center of New York (Kristin A. Bluvas, of counsel) represented Dillon.

People v Dillon (2024 NY Slip Op 05246)

People v Goodman | October 24, 2024

ACCESSORIAL LIABILITY| AGAINST WEIGHT OF EVIDENCE| REVERSED AND INDICTMENT DISMISSED

Appellant appealed a Broome County Court judgment convicting him of second-degree CPW and sentencing him, as a second felony offender, to 10 years' imprisonment followed by 5 years of PRS. The Third Department vacated the conviction and dismissed the indictment, finding the conviction to be against the weight of the evidence. The codefendant was the only one who possessed the gun, and he testified that he did not tell appellant he had it before the altercation. While some of appellant's conduct suggested he may have known about the gun, the proof did not demonstrate beyond a

reasonable doubt that he "solicited, requested, commanded, importuned, or intentionally aided" the codefendant in possessing it. Mitchell S. Kessler represented Goodman.
People v Goodman (2024 NY Slip Op 05249)
Oral Argument

People v Anderson | October 24, 2024

440.20 | RESENTENCING ON ILLEGALLY LENIENT SENTENCE | REDUCED IN INTERESTS OF JUSTICE

Appellant appealed an Albany County Court judgment denying a CPL § 440.20 motion to vacate his sentence, following convictions for numerous counts of possession and sale of controlled substances. The Third Department upheld the denial of the motion but reduced the sentence in the interests of justice. Appellant's 440.20 motion argued that the sentences on several counts were unlawfully lenient, and that he should therefore be resentenced on all counts. The Third Department agreed with County Court that only resentencing on the illegally low counts was permitted. But because the new sentence resulted in a higher sentence than the original (which the Third Department had reduced from 165 years-to-life to 55 years-to-life in an earlier appeal) the Third Department modified the sentence in the interests of justice to 46 years-to-life. Matthew C. Hug represented Anderson.
People v Anderson (2024 NY Slip Op 5250)

R.S. v State of New York | October 24, 2024

DOCCS FAILURE TO PROTECT | REASONABLY FORESEEABLE| REVERSED

Appellant appealed a Court of Claims judgment dismissing her suit against DOCCS for failing to protect her from a sexual assault at Clinton Correctional Facility. The Third Department reversed and reinstated the claim, finding in favor of appellant and remitting to the Court of Claims to assess damages. The assault was reasonably foreseeable and thus triggered the State's duty to protect appellant. Appellant, who is transgender, in response to "her general safety fears," had been assigned a sleeping cube in the open-plan dormitory closest to the CO's station, a so-called "PREA cube" reserved by DOCCS for inmates at higher risk of sexual assault. Because the CO assigned to watch the area was asleep at the time of the incident, he "breached his critical duty to protect" appellant's safety, rendering the State liable. Held & Hines, LLP (Philip M. Hines, of counsel) represented R.S.
R.S. v State of New York (2024 NY Slip Op 05253)
Oral Argument

TRIAL COURTS

People v Disdier | 2024 WL 4551348

CONFIRMATORY ID | INSUFFICIENT EVIDENCE OF FAMILIARITY | *WADE* HEARING GRANTED

Disdier was charged with first-degree attempted assault in connection with a shooting during an alleged road rage incident. The complainant's girlfriend, an eyewitness, told police she recognized the shooter as someone she knew "from the area," who was "her friend Kim's aunt's boyfriend." She said she had seen this individual "over ten times" in the past and remembered him from neighborhood parties. The eyewitness then sent a photograph of Disdier, downloaded from her friend's Facebook account, to the police, which the prosecution offered as a confirmatory identification. Kings County Supreme Court granted a *Wade* hearing, holding that, without evidence of when the parties last had contact or the nature of their "ten-plus contacts" in the past, there was insufficient evidence of the eyewitness' familiarity with Disdier. Brooklyn Defender Services (Paul Giovanniello, of counsel) represented Disdier.

People v Disdier (2024 NY Slip Op 51439(U))

People v Weaver | 2024 WL 4560148

DISCOVERY |COC ILLUSORY DUE TO *BRADY* VIOLATION |30.30 DENIED

Weaver was charged with second-degree CPW after he allegedly discarded an unknown item during a police chase, and a loaded gun was subsequently discovered in the yard of the house where Weaver was apprehended. Four days later, the homeowner at that address reported they had discovered another firearm in the yard. Police recovered the second gun the same day but did not inform prosecutors about it until many months later, during trial preparation and after the suppression hearing. After the prosecution disclosed this information and related discovery, the defense challenged the validity of the COC, alleging a *Brady* violation. Queens County Supreme Court invalidated the COC, holding that recovery of the second gun was *Brady* material and subject to automatic discovery, rendering the COC illusory. Despite an extensive investigation, the prosecution had not acted in good faith and with due diligence as to the second gun. Not only did the police officer who had testified at the suppression hearing deliberately withhold information, but the prosecution filed their SOR before speaking with the homeowner who had discovered both guns—an "essential witness." Supreme Court found the COC invalid but denied the speedy trial motion, finding only 177 days chargeable to the prosecution. The Legal Aid Society of NYC (Ronald Popo, of counsel) represented Weaver.

People v Weaver (2024 NY Slip Op 24275)

FAMILY

APPELLATE DIVISION, SECOND DEPARTMENT

Matter of McCloskey v Unger **|** October 23, 2024

INEFFECTIVE ASSISTANCE OF COUNSEL | REVERSED AND REMITTED

The father appealed from a Suffolk County Family Court order finding that he willfully violated a child support order and ordering a period of six months' incarceration. The Second Department reversed and remitted for a new hearing, holding that the failure of the father's counsel to obtain relevant medical and financial information deprived him of meaningful representation. Counsel failed to procure certified copies of the father's medical records or public assistance records to demonstrate his inability to work and need to rely on public benefits. Moreover, counsel failed to call any witnesses to testify regarding the father's neuropathy, such as the father's treating physician, or even to obtain an affidavit from that physician. Salvatore C. Adamo represented the father.
Matter of McCloskey v Unger (2024 NY Slip Op 05210)

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