Indigent Legal Services

Decisions of Interest

NOVEMBER 6, 2024

CRIMINAL

APPELLATE DIVISION, FIRST DEPARTMENT

People v Johnson | October 29, 2024

ADVERSE INFERENCE FOR DESTRUCTION OF EVIDENCE| HARMLESS ERROR| AFFIRMED

Appellant appealed from a New York County Court judgment convicting him of first-degree sexual abuse and second-degree assault. The First Department found that the trial court erred in refusing to give an adverse inference charge based on the prosecution's failure to disclose a voucher relating to appellant's cell phone. Because the cellphone was sold at auction and the evidence destroyed, the adverse inference charge was mandatory, although the error was harmless.

People v Johnson (2024 NY Slip Op 05313)

APPELLATE DIVISION, SECOND DEPARTMENT

People v Blackwood | October 31, 2024

PROSECUTION'S APPEAL | SUFFICIENCY OF THE EVIDENCE | GRAND JURY | INDICTMENT REINSTATED

The prosecution appealed from an order of the Westchester County Supreme Court granting respondent's motion and dismissing the indictment on the ground that proof submitted to the grand jury was legally insufficient and the proceeding was defective, pursuant to CPL 210.20 and 210.30. The Second Department vacated the order, denied the motion, reinstated the indictment, and remitted. The prosecution's presentation of evidence to the grand jury was proper, and there was prima facie proof that respondent was personally served with the order of protection, advised of the contents therein, had signed the order, and nevertheless violated it by not staying away from the protected party. Although the "stay away" box was not checked, the protected party's name was included, and all six subcategories of that section were checked.

People v Blackwood (2024 NY Slip Op 05353)

People v Campbell | October 31, 2024

ORDER OF PROTECTION | OOP VACATED IN INTEREST OF JUSTICE

Appellant appealed from a Richmond County Supreme Court judgment convicting him of second-degree attempted burglary following a guilty plea. The Second Department affirmed the conviction but vacated the portion of the order of protection naming two

protected parties that were neither the victims of, nor witnesses to, the crime to which appellant entered a plea of guilty, as conceded by the prosecution. Appellate Advocates (Alexa Askari, of counsel) represented Campbell.
People v Campbell (2024 NY Slip Op 05355)

People v Mendoza | October 31, 2024

INVALID WAIVER OF APPEAL | SENTENCE NEITHER EXCESSIVE NOR ILLEGAL | AFFIRMED

Appellant appealed from a Nassau County Supreme Court judgment sentencing her following a guilty plea to aggravated DWI with a child passenger, aggravated DWI per se, and EWC. The Second Department affirmed but found the appeal waiver invalid because the record did not demonstrate that appellant understood the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty. However, appellant's sentence was not excessive. Nor was the sentence illegal based on the probation condition that she submit to warrantless searches of her person, property, residence, or vehicle. Whether appellant's plea of guilty was made knowingly, voluntarily, and intelligently was not preserved for appellate review because no motion for plea withdrawal was made. Joseph Z. Amsel represented Mendoza.
People v Mendoza (2024 NY Slip Op 05357)

APPELLATE DIVISION, THIRD DEPARTMENT

Matter of Chesebro | October 31, 2024

ATTORNEY DISCIPLINE | ELECTION INTERFERENCE | OUT-OF-STATE CONVICTION

Chesebro was criminally indicted, along with former President Donald Trump, Rudolph Giuliani, and 16 other defendants in Fulton County, Georgia, for their efforts to overturn the 2020 presidential election. He ultimately pleaded guilty to conspiracy to commit filing false documents, a felony in Georgia. The Attorney Grievance Committee of the Third Department moved to disbar Chesebro in New York based on that conviction. The Third Department denied the motion to disbar but granted it insofar as suspending Chesebro from the practice of law in New York. The court held that automatic disbarment based on a felony conviction is not appropriate, since the Georgia conspiracy conviction is not the equivalent of a felony in New York: it lacks the element of an intent to defraud and is therefore more similar to New York's misdemeanor version of the same crime. However, the Third Department held that Chesebro nevertheless stands convicted of a "serious crime" requiring suspension from the practice of law. The finality of the judgment was unaffected by the conditional nature of the plea agreement providing for vacatur of the conviction upon successful completion of probation, since the definition of "judgment" in New York includes a conviction and sentence, both of which were imposed here.
Matter of Chesebro (2024 NY Slip Op 05394)

People v Reynolds | October 31, 2024

WAIVER OF APPEAL | ORAL AND WRITTEN WAIVER INADEQUATE | SENTENCE NOT EXCESSIVE

Appellant appealed from an Albany County Supreme Court judgment convicting him of second-degree attempted robbery and sentencing him to 6 years' imprisonment followed by 5 years of PRS. As the prosecution conceded, the purported waiver of appeal was invalid because neither the oral nor written waiver adequately explained the rights being forfeited. The Third Department declined to reduce the sentence, however. Tina K. Sodhi, Alternate Public Defender, Albany (Steven M. Sharp of counsel) represented Reynolds.
People v Reynolds (2024 NY Slip Op 05373)

People v James | October 31, 2024

WAIVER OF APPEAL | ORAL AND WRITTEN WAIVER INADEQUATE | AFFIRMED

Appellant appealed from an Ulster County Court judgment convicting him, after a guilty plea, of second-degree CPW and third-degree CSCS, and sentencing him, as a second felony offender, to an aggregate term of 20 years' imprisonment followed by 5 years of PRS. As the prosecution conceded, the purported waiver of appeal was invalid because neither the oral nor written waiver adequately explained the rights being forfeited. Nevertheless, the court found unpreserved his arguments that his waiver of an *Outley* hearing was invalid and that the court erred in adjudicating him a second felony offender. The court also found thathe sentence was not excessive. Angela Kelley represented James.
People v James (2024 NY Slip Op 05375)

TRIAL COURTS

People v Rivera | 2024 WL 4596717

ERLINGER | TOLLING AND WAIVER OF JURY TRIAL | SENTENCED AS PVFO

Rivera was convicted, after a bench trial, of several violent felonies. The defense opposed sentencing as a persistent violent felony offender (PVFO) based on two prior convictions for violent felonies that occurred in 1992 and 1994, respectively, arguing under *Erlinger* that a jury must make findings of fact related to tolling. New York County Supreme Court held that *Erlinger* does not apply to New York's tolling provision, reading *Erlinger*'s as an "extremely narrow" holding merely applying the *Apprendi*/*Alleyne* rule to the "Occasions Clause" in the federal Armed Career Criminal Act (ACCA). The court distinguished the factual questions at issue: ACCA requires a fact finder to determine "what happened during those prior offenses," while tolling only involves doing arithmetic regarding "street time" versus incarceration. "There is simply no logical reason to delegate these clerical [tolling] functions to a jury, and *Erlinger* does not require it, even if it can be read to leave the question open." Supreme Court alternatively held that by waiving his right to a jury trial before *Erlinger* was decided, Rivera necessarily waived any alleged right to a jury determination regarding tolling, concluding that the sentencing enhancement was an element of the offense encompassed by the jury waiver, and there can be no claim of

surprise where *Erlinger* merely applied settled law to an ACCA provision. Supreme Court further held that Rivera's prior adjudication as a PVFO in 2009 is binding on the court, despite the Appellate Division's vacatur of that conviction, since the PVFO designation was not challenged in that appeal. Rivera was sentenced as a PVFO.
People v Rivera (2024 NY Slip Op 24278)

People v Martinez | 2024 WL 4645743

DWI | INSUFFICIENT EVIDENCE OF CONSENT TO BREATHALYZER BY SPANISH SPEAKER | SUPPRESSION GRANTED

Martinez was charged with DWI and aggravated DWI and moved to suppress the results of a breathalyzer test. New York City Criminal Court initially denied suppression after a hearing, then granted reargument and suppression. Acknowledging its earlier misapplication of *People v Medel-Dominguez*, the court held that the prosecution failed to meet its burden of showing that Martinez voluntarily consented to a breathalyzer test. The record lacked an English translation of a video recording in which Martinez communicated in Spanish with a police officer prior to taking the test. When the officer from the video was unavailable to testify, the court had precluded testimony from another Spanish-speaking officer as a sanction for untimely disclosure of *Giglio* material. Criminal Court also noted that while the prosecution had made reference to a certified translation of the video, they never sought to introduce it into evidence at the hearing. The court granted suppression of the IDTU video and results of the chemical breath test. The Bronx Defenders (Matthew S. Bruno, of counsel) represented Martinez.
People v Martinez (2024 NY Slip Op 51485 (U))

FAMILY

APPELLATE DIVISION, FIRST DEPARTMENT

Matter of Stephanie C. v Ricardo E. | October 31, 2024

CUSTODY | PARENTAL ACCESS SCHEDULE | MODIFIED AND REMITTED

The father appealed from a Bronx County Family Court order granting the mother sole legal and physical custody and awarding him access on alternating weekends, as well as "shared" holidays and school vacations. The First Department modified in part and remitted for determination of a precise schedule of the father's time with the child, as well as to set an electronic contact schedule for each parent when the child is with the other parent, as the parties had requested. Andrew J. Baer represented the father.
Matter of Stephanie C. v Ricardo E. (2024 NY Slip Op 05399)

TRIAL COURTS

Matter of M.A. (R.A.) | September 4, 2024

1028 HEARING | NO IMMINENT RISK | CHILD RETURNED

The mother filed a 1028 application for the release of the child to her care and custody. New York County Family Court granted her application, finding that the subject child, a 9-month-old baby, would not be at imminent risk to her life or health if returned to the mother with certain court orders in place. The court engaged in a detailed analysis pursuant to *Nicholson v Scoppetta* and found that the harm of removing the baby from the mother outweighed any potential risk to the child in her mother's care. The court found that the incident that led to the filing of the Article 10 petition and subsequent removal of the child was isolated, and since that time the mother had gained insight and engaged in mental health treatment, as well as consistently visited with the child without any safety concerns. Neighborhood Defender Service of Harlem (Krysten Hernandez, of counsel) represented the mother.

Matter of M.A. (R.A.) (2024 NY Slip Op 51450(U))

Faina P. v Alexander S. | October 21, 2004

MODIFICATION OF LEGAL CUSTODY | GRANTED

The mother requested a post-judgment modification of the parties' parenting agreement granting her sole legal custody after the relationship between the parents deteriorated. The Court granted the mother's application, finding that the acrimony demonstrated by the father towards the mother transcended any level that would make continuing joint custody in the best interest of the child. The father refused to abide by the parenting agreement and behaved in a vindictive and retaliatory manner towards the mother.

Faina P. v Alexander S. (2024 NY Slip Op 51469(U))

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