Indigent Legal Services

Decisions of Interest

NOVEMBER 20, 2024

CRIMINAL

APPELLATE DIVISION, FIRST DEPARTMENT

People v Stewart | November 12, 2024

PERSISTENT VIOLENT FELONY ADJUDICATION IMPROPER | PRIOR PLEA UNKNOWING | VACATED

Appellant appealed from a New York County Court judgment convicting him of second-degree burglary and sentencing him, as a persistent violent felony offender, to 12 years-to-life in prison. The First Department vacated the persistent violent felony adjudication, finding a prior 2013 burglary conviction unconstitutionally obtained. During the 2013 plea, appellant stated that his intent to steal property arose only *after* he had entered the dwelling, contrary to the statutory requirement that the intent exist contemporaneously with the unlawful entry. Appellant's statements negated an essential element of the crime, triggering the court's duty to ensure that the plea was entered intelligently. Its failure to do so rendered the 2013 plea unknowing and unconstitutionally obtained. The First Department vacated and remanded for resentencing as a second violent felony offender because the prosecution had established that appellant was previously convicted of a 2005 violent felony. Office of the Appellate Defender (Ronald Zapata, of counsel) represented Stewart.
People v Stewart (2024 NY Slip Op 05546)
Oral Argument (starts at 01:36:38)

People v Davis | November 14, 2024

CONSECUTIVE SENTENCES ILLEGAL | FIRST-DEGREE MURDER | VACATED AND REMANDED

Appellant appealed from a New York County Court order denying his CPL § 440.20 motion to set aside his consecutive 20-year-to-life sentences following his conviction of two counts each of first-degree murder and attempted murder. Relying on *People v Rosas*, 8 NY3d 493 [2007], the First Department reversed, finding that the imposition of consecutive sentences on the first-degree murder counts was illegal. The Court of Appeals in *Rojas* held that the first-degree murder statute, PL § 125.27[1][a][viii], establishes that separate acts involved in killing multiple victims constitute a single offense. The sentencing court had attempted to prospectively run the attempted murder count consecutively to the first-degree murder counts in the event consecutive sentences on the completed murder counts were later found improper, but that order was "a nullity in that no statutory authority exists for imposing sentence in that manner." The First

Department remanded for plenary resentencing on all counts. The Legal Aid Society of NYC (Lorraine Maddalo, of counsel) represented Davis.
People v Davis (2024 NY Slip Op 05648)
Oral Argument (starts at 02:51:12)

APPELLATE DIVISION, SECOND DEPARTMENT

People v Williams | November 13, 2024

INVALID WAIVER OF APPEAL | SENTENCE NOT EXCESSIVE | AFFIRMED

Appellant appealed from a Kings County Supreme Court judgment sentencing him following a guilty plea. The Second Department found the appeal waiver invalid because appellant did not learn of the prosecution's demand for an appeal waiver until after he had agreed to enter a guilty plea. However, appellant's sentence was not excessive. Appellate Advocates (Russ Altman-Merino, of counsel) represented Williams.
People v Williams (2024 NY Slip Op 05595)

APPELLATE DIVISION, THIRD DEPARTMENT

People v Nolasco-Gutierrez | November 14, 2024

RESTITUTION AS ENHANCED SENTENCE | PLEA WITHDRAWAL | REVERSED AND REMITTED

Appellant appealed from a Tioga County Court judgment convicting him of first-degree burglary and sentencing him to 15 years' imprisonment followed by 5 years of PRS, as well as restitution in the amount of $5,880. The Third Department reversed and remitted. County Court erred by failing to give appellant the opportunity to withdraw his plea after imposing restitution, which was not part of the bargained-for sentence. The case was remitted for County Court to impose the original sentence or give appellant the option to withdraw his plea. Lisa A. Burgess represented Nolasco-Gutierrez.
People v Nolasco-Gutierrez (2024 NY Slip Op 05606)

People v Boyd P. | November 14, 2024

DVSJA | RESENTENCING DENIED

Appellant appealed from a Columbia County Court judgment denying his DVSJA resentencing motion under CPL § 440.47. The Third Department affirmed. Although the evidence demonstrated appellant suffered severe abuse throughout his childhood, the court found that there was insufficient evidence proving it was a significant contributing factor to his crime. Specifically, the court noted the absence of any expert testimony or other similar evidence and cited cases holding that the statute requires a temporal nexus between the abuse suffered by the person seeking resentencing and the offense. The court also opined that "contrary to his claim that he was being subjected to abuse," the evidence showed that appellant had committed acts of domestic violence close in time to the crime. The Third Department also held that the sentence was not unduly harsh due to the nature of the offense: here, the homicide of his four-month-old son.
People v Boyd P. (2024 NY Slip Op 5608)
Oral Argument

APPELLATE DIVISION, FOURTH DEPARTMENT

People v Grzegorzewski | November 20, 2024

SORA | FOREIGN DESIGNATION CLAUSE | REMITTED | CONCURRENCES

Appellant appealed from a Chautauqua County Court order designating him a sexually violent offender. The Fourth Department reserved decision and remitted. County Court designated appellant a sexually violent offender based solely on a prior out-of-state conviction for a sex offense. Citing *People v Malloy*, 228 AD3d 1284 [4th Dep't 2024], the appellate court determined that the SORA determination must include a finding of whether the underlying out-of-state offense was violent in nature in order to determine whether the statute, CL § 168-a[3][b], was constitutional as applied and remitted for that determination. Two justices wrote separately in concurrence and would have held the statute unconstitutional. Justice Curran's concurrence opined that appellant had met his burden for an as-applied challenge of showing that there was no rational basis to designate him a sexually violent offender. Justice Ogden's concurrence reiterated her concurrence in *Malloy*, concluding that the second disjunctive clause in CL § 168-a[3][b] is unconstitutional on its face. The Chautauqua County Public Defender (Heather Burley, of counsel) represented Grzegorzewski.
People v Grzegorzewski (2024 NY Slip Op 05657)

People v Park | November 20, 2024

ILLEGAL SENTENCE | REVERSED AND REMITTED

Appellant appealed from a Chautauqua County Court judgment convicting him of first-degree rape and first-degree criminal sexual act. The Fourth Department reversed and remitted. Although appellant did not challenge the legality of the sentencing range before the trial court, the Fourth Department remitted because the range was illegally low. County Court must give appellant the opportunity to either withdraw his plea or be resentenced. The Legal Aid Bureau of Buffalo (Braedan M. Gillman, of counsel) represented Park.
People v Park (2024 NY Slip Op 05717)
Oral Argument (starts at 00:58:00)

People v Morris | November 20, 2024

CPW | LEGALLY INSUFFICIENT| REVERSED

Appellant appealed from an Erie County Court judgment convicting him of first-degree assault and second-degree CPW. The Fourth Department reversed in part and vacated the CPW conviction, even though the challenge to legal sufficiency was unpreserved. Appellant demonstrated at trial that he had a license for the firearm at issue, and the prosecution failed to disprove beyond a reasonable doubt that appellant was exempt from prosecution. The People did not oppose vacatur of the conviction. Paul G. Dell represented Morris.
People v Morris (2024 NY Slip Op 05676)
Oral Argument (starts at 00:58:51)

People v Walker | November 20, 2024

PROSECUTION APPEAL | CPL 245.20/30.30 DISMISSAL| REVERSED | CONCURRENCE

The prosecution appealed from an Erie County Court judgment dismissing the indictment after a CPL 30.30 speedy trial motion. The Fourth Department reversed. The case arose after Walker's alleged assault of his parole officer, and the prosecution failed to produce the parole officer's disciplinary records in discovery. The defense then filed a motion to dismiss, which the trial court granted, because this failure invalidated the CPL § 245.20 certificate of compliance and thereby rendered any statement of trial readiness illusory. The Fourth Department held that the records at issue were possessed by DOCCS and thus outside the purview of discovery the prosecution was required to provide under CPL § 245.20. Because the prosecution properly complied with their discovery obligation, there was no speedy trial violation. Justice Curran concurred to express the view that the remedy of dismissal under CPL § 30.30 is only available when the prosecution fails to comply with their initial discovery obligations under CPL § 245.20[1], agreeing that the records at issue do not fall within that sub-section's possessory prong.

People v Walker (2024 NY Slip Op 05662)

Oral Argument (starts at 01:05:27)

People v Howard | November 20, 2024

SUPPRESSION | PLAIN VIEW EXCEPTION NOT APPLICABLE | REVERSED

Appellant appealed from a Monroe County Court judgment convicting him of second-degree criminal possession of a forged instrument. The Fourth Department reversed and dismissed the indictment. The trial court erred in refusing to suppress evidence obtained via a warrantless search of appellant's home, including checks, a printer, and a computer. Although the prosecution claimed those items were admissible under the plain view exception to the warrant requirement, the Fourth Department reasoned that the incriminating nature of those items was not immediately apparent. Because those items constituted the sole evidence against appellant, the court reversed and dismissed. The Monroe County Public Defender's Office (James Hobbs, of counsel) represented Howard.

People v Howard (2024 NY Slip Op 05733)

Oral Argument (starts at 01:10:08)

People v Cheese | November 15, 2024

BIASED PROSPECTIVE JUROR | FOR-CAUSE CHALLENGE | REVERSED

Appellant appealed from an Onondaga County Court judgment convicting him of second-degree murder and two counts of second-degree CPW. The Fourth Department reversed and ordered a new trial. County Court erred in denying appellant's for-cause challenge to a prospective juror. The prospective juror gave "some indication of bias" by stating that he "absolutely" might hold it against the accused for choosing not to testify. The prospective juror's subsequent conduct of nodding affirmatively in response to the court's instruction and question posed to the entire jury panel was not an unequivocal assurance of impartiality. Appellant used a peremptory challenge on this prospective juror and then

exhausted his peremptory challenges. Hiscock Legal Aid Society (J. Scott Porter, of counsel) represented Cheese.
People v Cheese (2024 NY Slip Op 05712)
Oral Argument (starts at 01:16:47)

People v Cohen | November 15, 2024

SORA | UPWARD DEPARTURE NOT WARRANTED | BIPOLAR DISORDER DIAGNOSIS | MODIFIED | DISSENT

Appellant appealed from an Onondaga County Court order designating him a level three sex offender under SORA. The Fourth Department modified the order and designated appellant a level two. The lower court erred in granting an upward departure where appellant was not more likely to reoffend based on his post-arrest diagnosis of Bipolar Disorder, which had been previously undiagnosed and untreated, and where there was no evidence indicating that appellant was reluctant or unable to comply with treatment and prescribed medications. Additionally, appellant's post-offense statement to one of the victims that it was their word against his did not warrant an upward departure, as failure to accept responsibility is already considered under risk factor 12. Justices Bannister and Keane dissented and would have affirmed. Cambareri & Brenneck (Melissa K. Swartz, of counsel) represented Cohen.
People v Cohen (2024 NY Slip Op 05658)

People v Yates | November 15, 2024

SENTENCE NOT IMPOSED FOR EACH COUNT | AFFIRMED BUT REMITTED FOR RESENTENCING

Appellant appealed from an Oneida County Court judgment convicting him of second-degree rape, two counts of third-degree rape, and three counts of EWC after a bench trial. The Fourth Department affirmed but vacated the sentence and remitted for resentencing where County Court failed to impose a sentence for each count of which appellant was convicted by not pronouncing the sentence on the final count of EWC during sentencing. Public Defender, Utica (David A. Cooke, of counsel) represented Yates.
People v Yates (2024 NY Slip Op 05738)

Brown v Annucci | November 15, 2024

ARTICLE 78 | CONCURRENT SENTENCES REQUIRED | REVERSED AND PETITION GRANTED

Appellant appealed from a Wyoming County Supreme Court judgment dismissing his Article 78 petition. Appellant had sought to compel DOCCS to recalculate his aggregate sentence in accordance with the Fourth Department's directive, which effectively obligated DOCCS to run the sentences on all four counts of the indictment concurrently with one another. However, DOCCS had recalculated appellant's sentence to reflect that some counts would run consecutively. The Fourth Department reversed the dismissal and granted the Article 78 petition. The Fourth Department's previous order contained no

express language limiting its directive to only a partial modification. Moreover, DOCCS lacks authority to resolve an ambiguity in a judicial order, since sentencing is a judicial function. David J. Pajak represented Brown.
Brown v Annucci (2024 NY Slip Op 05675)

TRIAL COURTS

People v. Essic, 2024 WL 4778776

SEARCH AND SEIZURE | IMPOUNDMENT UNLAWFUL | SUPPRESSION GRANTED

Essic sought suppression of the gun underlying his conviction for second-degree CPW and related charges. Kings County Supreme Court held that while the police lawfully stopped the vehicle after observing Essic drive through a stop sign and lawfully arrested him after he failed to produce identification, there was no lawful basis to impound the car to conduct an inventory search. The car was legally parked, was not impeding traffic, and there was no demonstrated need for its "safekeeping." Nor was there testimony that the police impounded the vehicle pursuant to any police regulations. The evidence recovered during the search was suppressed. The Legal Aid Society of NYC (Nahal Batmanghelidj and Julie Schaul, of counsel) represented Essic.
People v Essic (2024 NY Slip Op 51517(U))

People v. Hernandez, 2024 WL 4778810

SEARCH AND SEIZURE | IMPOUNDMENT UNLAWFUL | SUPPRESSION GRANTED

Hernandez sought suppression of the gun underlying his Kings County indictment for second-degree CPW and related charges. While the police had reasonable suspicion to believe Hernandez had committed a crime after being flagged down by a bloodied woman who directed the police to the car in which he was seated, and although the arrest was proper based on the woman's statements, the police lacked a proper basis to impound the car to conduct an inventory search. Although the vehicle was partly in the road near a fire hydrant and possibly impeding traffic, there was body camera footage suggesting someone could have moved the car. There was no testimony that the car was impounded pursuant to established police procedures, rendering the impoundment unlawful and requiring suppression of the evidence recovered during the inventory search. The Legal Aid Society of NYC (Alexandra Kaufman, of counsel) represented Hernandez.
People v Hernandez (2024 NY Slip Op 51518(U))

FAMILY

APPELLATE DIVISION, FIRST DEPARTMENT

Matter of Jahir I. v Sharon E.W. | November 14, 2024

LAW OF THE CASE DOCTRINE | REVERSED AND REMANDED

The father appealed from a New York County Family Court order denying his motions to vacate an order of custody and to compel compliance with a judicial subpoena for witness testimony. The First Department reversed and remanded for an evidentiary hearing regarding the custody order, reinstating the subpoena and motion to compel. Although Family Court had initially granted the father's motions, after the matter was transferred to a new judge, that judge denied both. The failure to adhere to the prior orders directing a hearing on the father's motion and so-ordering the subpoena violated the law of the case doctrine. Melanie M. Marmer represented the father.

Matter of Jahir I. v Sharon E.W. (2024 NY Slip Op 05635)

Matter of E. Y. A.-G. v S.B. | November 14, 2024

ORDER OF PROTECTION | REINSTATED

Appellant appealed from a New York County Family Court order dismissing petitions relating to an order of protection and vacating a prior order of protection. The First Department modified in part by reinstating the prior order of protection. Family Court should not have *sua sponte* vacated the prior order of protection—entered on consent—especially given the failure of the respondent to appear. Larry Bachner represented appellant.

Matter of E. Y. A.-G. v S.B. (2024 NY Slip Op 05632)

APPELLATE DIVISION, SECOND DEPARTMENT

Matter of Ana D. Z. H. (Jennifer E. Z. H.--Werli P.) | November 13, 2024

SPECIAL IMMIGRANT JUVENILE STATUS | REVERSED AND REMITTED

The mother appealed from two Nassau County Family Court orders dismissing the petition to appoint the mother guardian of the child without a hearing and denying the mother's motion to dispense with service on the father. The Second Department reversed, reinstated the petition and motion, and remitted for an expedited hearing. Family Court erred in summarily dismissing the petition—related to findings needed to secure Special Immigrant Juvenile Status for the child—because the child had previously appeared before the court as a person in need of supervision and/or juvenile delinquency proceeding. Resolving the petition and motion required consideration of the child's best interests. Bruno J. Bembi represented the mother.

Matter of Ana D. Z. H. (Jennifer E. Z. H.--Werli P.) (2024 NY Slip Op 05582)

APPELLATE DIVISION, FOURTH DEPARTMENT

Matter of Betz v Betz | November 15, 2024

CUSTODY | NO DEFAULT | REVERSED AND REMITTED

The mother appealed from an Erie County Family Court order granting the father sole custody of the subject child. The Fourth Department reversed and remitted. The Family Court erred in disposing of the matter based on the mother's purported default. The mother, although not present at the start of the proceeding, did appear and participated in a discussion regarding settlement until she was ordered out of the courtroom when she contested the award of sole custody to the father. The order appealed from also does not state that it was made on default; rather, the mother appeared personally and by her attorney. Family Court also abused its discretion in denying the mother's counsel's request for an adjournment, because it was unclear whether a trial was proceeding that day. The notice to the parties stated the appearance was for a "motion" related to the Attorney for the Child's subpoena for documents concerning the child, as well as father's counsel's request for an adjournment, to which both mother's attorney and the AFC had consented. Caitlin M. Connelly represented the mother.
Matter of Betz v Betz (2024 NY Slip Op 05713)

Matter of Juliet W. (Amy W.) | November 15, 2024

TPR | SUMMARY JUDGMENT IMPROPER | REVERSED AND REMITTED

Mother appealed from a Cattaraugus County Family Court order terminating her parental rights, which brought up for review an order granting a summary judgment motion. The Fourth Department reversed, denied the motion, and remitted to Family Court. The summary judgment motion was premised on the ground that the mother was collaterally estopped from relitigating the issue of whether she was "presently and for the foreseeable future unable, by reason of mental illness or intellectual disability, to provide proper and adequate for [the subject] child," based solely on a 2018 dispositional order regarding the mother's other children. The petitioning agency failed to submit any additional evidence regarding the mother's purported mental illness or intellectual disability. The prior order, premised on evidence from at least three years prior, was thus insufficient to establish by clear and convincing evidence the mother's *present* mental condition or intellectual disability. Erickson Webb Scolton & Hajdu, Lakewood (Lyle T. Hajdu, of counsel) represented the mother.
Matter of Juliet W. (Amy W.) (2024 NY Slip Op 05690)
Oral Argument (starts at 01:28:35)

TRIAL COURTS

Matter of A.R. (C.M.) | 2024 WL 4779537

MOTION TO COMPEL DNA TESTING | GRANTED

The presentment agency, Administration for Children's Services ("ACS"), filed a motion to compel the father/person legally responsible, C.M., to submit to DNA paternity testing under Section 1038-a of the Family Court Act. New York County Family Court granted the motion. C.M. is the biological father of subject child, R.R. R.R. became pregnant at 13 years old and gave birth to J.R., who was born with abnormal facial features. Genetic testing revealed that J.R.'s biological father was within a first- or second-degree relation to J.R. The Court granted the motion to compel C.M. to submit DNA paternity testing,

finding there was probable cause that the evidence sought is reasonably related to establishing the allegations in the abuse petitions.
Matter of A.R. (C.M.) (2024 NY Slip Op 51520(U))

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New York State Office of Indigent Legal Services
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