Indigent Legal Services

Decisions of Interest

DECEMBER 11, 2024

CRIMINAL

APPELLATE DIVISION, SECOND DEPARTMENT

People v Etienne | December 4, 2024

EXCESSIVE SENTENCE | CONSECUTIVE TO CONCURRENT | MODIFIED

Appellant appealed from a Queens County Supreme Court judgment convicting him of third-degree CPSP and second-degree criminal possession of a forged instrument, after a jury trial, and sentencing him to consecutive indeterminate imprisonment terms of 3 to 6 years and 2 to 4 years. The Second Department affirmed the conviction but found that the sentences were excessive and modified by running the sentences concurrently. Appellate Advocates (Tina Peng and Joshua M. Levine, of counsel) represented Etienne.

People v Etienne (2024 NY Slip Op 06056)

Oral Argument (starts at 00:21:27)

People v Victor G. (Anonymous) | December 4, 2024

SURCHARGES & FEES | RETROACTIVITY | MODIFIED

Appellant appealed from a Kings County Supreme Court judgment adjudicating him a youthful offender upon a guilty plea to fourth-degree grand larceny. The Second Department, vacated, on consent of the prosecution, the imposition of the mandatory surcharge and fee in the interest of justice. CPL § 420.35 (2-a) permitted the waiver of surcharges and fees as appellant was under 21 years old at the time of the offense, and the statute applies retroactively to cases that were pending on direct appeal on the effective date of the legislation. Appellate Advocates (Tina Peng, of counsel) represented Victor G.

People v Victor G. (Anonymous) (2024 NY Slip Op 06057)

People v Jones | December 4, 2024

CORAM NOBIS | LATE NOTICE OF APPEAL | GRANTED

Appellant filed a writ of error coram nobis seeking leave to file a late notice of appeal from a judgment of Kings County Supreme Court rendered in 2022. The Second Department granted appellant's application. Appellate Advocates (Christian Seno, of counsel) represented Jones.

People v Jones (2024 NY Slip Op 06059)

People v Lebron | December 4, 2024

ORDER OF PROTECTION | VACATED IN INTEREST OF JUSTICE

Appellant appealed from a Richmond County Supreme Court judgment convicting him of second-degree attempted CPW, following a guilty plea. The Second Department affirmed the conviction but vacated the order of protection that had been granted in favor of individuals that were neither the victims of, nor witnesses to, the crime to which appellant pleaded guilty, as conceded by the prosecution. Further, the court did not state on the record the reasons for issuing the order of protection at the time of sentencing. Appellate Advocates (Sarah B. Cohen, of counsel) represented Lebron.
People v Lebron (2024 NY Slip Op 06060)

People v Whitman | December 4, 2024
INVALID WAIVER OF APPEAL | SENTENCE NOT EXCESSIVE | AFFIRMED
Appellant appealed from a Dutchess County Court judgment convicting her of second-degree grand larceny and second-degree attempted grand larceny, following a guilty plea. The Second Department affirmed but found the appeal waiver invalid. However, the sentences imposed were not excessive. Dutchess County Public Defender (Jennifer Burton, of counsel) represented Whitman.
People v Whitman (2024 NY Slip Op 06066)

APPELLATE DIVISION, THIRD DEPARTMENT

People v Mayette | December 5, 2024
INCLUSORY CONCURRENT COUNTS | SENTENCE REDUCED
Appellant appealed from a St. Lawrence County Court judgment convicting him of 13 counts related to his alleged sexual abuse of his stepdaughter and sentencing him to an aggregate term of 140 years to life in prison, followed by 10 years of PRS. The Third Department dismissed two counts, reduced the sentence to an aggregate prison term of 20 years to life, with 10 years' PRS, and otherwise affirmed. Two convictions for first-degree sexual abuse were inclusory concurrent counts of a third count: predatory sexual assault against a child, requiring dismissal of those convictions. Another count was a material element of the continuing crime of predatory sexual assault against a child, and the sentence on that count was therefore modified to run concurrently. The court also found the 140-year sentence to be unduly harsh and severe, noting the disparity between it and the 12-to-15 year prison term the prosecution offered twice before trial. Cambareri & Brenneck (Melissa K. Swartz of counsel) represented Mayette.
People v Mayette (2024 NY Slip Op 06083)
Oral Argument

TRIAL COURTS

People v Rodney, 2024 WL 4942709
ERLINGER | NOT RETROACTIVE | RESENTENCING DENIED
Rodney filed a *pro se* CPL § 440.20 motion seeking to vacate, on *Erlinger* grounds, his 2017 sentence as a second felony drug offender previously convicted of a violent felony. New York County Supreme Court denied the motion, holding that, although the tolling determination would currently need to be made by a jury, *Erlinger* created a "new rule" that was not retroactive under federal or state standards. The United States Supreme

Court's previous *Apprendi* jurisprudence involved sentencing enhancements based on judge-found facts pertaining to the manner of or circumstances surrounding the crime, such as whether it was committed with racial bias. *Erlinger's* requirement that juries must decide recidivist sentencing questions imposed a new obligation and was not dictated by precedent existing at the time Rodney's conviction became final. Also, as *Erlinger* did not implicate the reliable determination of guilt or innocence, it should not be retroactively applied under state law standards.
People v Rodney (2024 NY Slip Op 24304)

People v Mendez, 2024 WL 4965976

30.30 | COC ILLUSORY | ACCUSATORY INSTRUMENT DISMISSED

Mendez was charged with operating a motor vehicle while intoxicated and impaired. She sought dismissal of the accusatory instrument based on the prosecution's failure to timely comply with its discovery obligations, rendering its Certificate of Compliance illusory. New York County Criminal Court held that the prosecution's failure to timely provide gas chromatography for the simulator solution lots used in the breathalyzer machine's calibration violated its discovery obligations. As the prosecution failed to articulate any steps taken to disclose this information prior to filing the COC, no due diligence had been demonstrated. More than 90 days were chargeable and thus Mendez's 30.30 motion to dismiss was granted. Gina Wicik represented Mendez.
People v Mendez (2024 NY Slip Op 51634(U))

People v Morales, 2024 WL 4984267

MOTION TO COMPEL DNA BUCCAL SWAB | OCME CONTAMINATION EVENT | HELD IN ABEYANCE

Morales was charged in Kings County Supreme Court with CPW2 after police recovered a gun from his fanny pack on arrest. The gun was swabbed for DNA and the OCME determined that there was evidence suitable for comparison. The prosecution moved to compel a buccal swab to obtain Morales's DNA. Morales cross-moved for a protective order arguing that the prosecution had not demonstrated that the intrusion would supply probative evidence, as the lab testing the evidence was under investigation for contamination and integrity issues. The prosecution responded that the contamination issues previously disclosed by OCME did not impact Morales' case and provided the name of the analyst who conducted the testing. Supreme Court deemed this response insufficient, because it merely named the analyst without providing documentation to establish that a Root Cause Analysis had been completed. As the OCME had not confirmed whether the contamination event affected Morale's case, the prosecution could not establish the reliability or relevance of the testing and its results. The motion to compel was held in abeyance until the OCME confirmed that the contamination event did not impact this case. Cassandra Charles represented Morales.
People v Morales (2024 NY Slip Op 24307)

People v Higgins, 2024 WL 4998577

DEFENSE EXPERT DNA TESTIMONY | PROBATIVE | PROSECUTION'S MOTION TO PRECLUDE DENIED

Higgins was charged with CPW2 in Kings County Supreme Court after police recovered a loaded pistol from a bag stored in the ceiling of his basement. OCME performed analysis of swabs taken from the weapon and issued a report that the DNA mixture found was

estimated to be 2.54 times more probable if the sample originated from Higgins, a likelihood ratio deemed "within the uninformative range." Higgins filed notice to call a DNA expert to explain the state of scientific research on considering relatives when formulating a likelihood ratio in DNA analysis. The prosecution moved to preclude the expert testimony as irrelevant, because there was no positive association between Higgins and the recovered evidence. Supreme Court held that the proposed expert testimony would be probative and helpful to the jury in understanding the issues presented by the DNA evidence. Brooklyn Defender Services (Yolanda Chitohwa and Clinton Hughes, of counsel) represented Higgins.
People v Higgins (2024 NY Slip Op 51638(U))

FAMILY

APPELLATE DIVISION, FIRST DEPARTMENT

Matter of Michael B. v Patricia S. | December 3, 2024

VISITATION | IMPERMISSIBLE DELEGATION OF AUTHORITY | REVERSED

Father appealed from a Bronx County Family Court order granting the mother's motion to modify a prior order of visitation and directing the parents to agree on a parenting time schedule for the child, in writing and in consultation with the subject child. The First Department reversed. Family Court's order impermissibly delegated its authority to set a visitation schedule to the mother and child. It was undisputed that the child did not wish to visit the father, so the effect of the order would be no visitation at all. The First Department remitted the case to Family Court to establish a visitation order to include phone and/or written contact with the father and noted that the court may also order forensic mental health evaluations, therapeutic or other supervised visitation, and counseling as a component of a visitation plan. Thomas R. Villecco represented the father.
Matter of Michael B. v Patricia S. (2024 NY Slip Op 06005)

APPELLATE DIVISION, SECOND DEPARTMENT

Matter of Jahmeir T. | December 4, 2024

DELINQUENCY | WEIGHT OF THE EVIDENCE | REVERSED

Appellant appealed from a Nassau County Family Court order finding that he committed acts which, if committed by an adult, would have constituted third-degree assault and third-degree menacing, adjudicated him a juvenile delinquent, and placed him on probation for 6 months. The Second Department reversed and dismissed the petition, determining the finding was against the weight of the evidence. The case turned on the identification of a single witness, the complainant, who was struck from behind and fell face-down to the ground. Although he identified appellant in a show-up procedure, it was from 238 feet away, through the windshield of a police car where appellant was detained in the back seat, and using only one eye, since the other was injured in the incident. Although the complainant claimed he had seen appellant shortly before the incident, his

testimony on that point was inconsistent. The Second Department also would have found that the show-up was unduly suggestive, and the police lacked the requisite suspicion to stop appellant and his friends, since they had only a general description of "five black male youths riding bicycles" and appellant only had two companions with him. Frederick K. Brewington (Jonathan I. Edelstein of counsel) represented Jahmeir T.
Matter of Jahmeir T. (2024 NY Slip Op 06052)

Matter of Ahmand T. | December 4, 2024

DELINQUENCY | AGAINST WEIGHT OF EVIDENCE | REVERSED

Appellant appealed from a Nassau County Family Court order: finding he committed acts which, if committed by an adult, would have constituted third-degree assault and third-degree menacing; adjudicated him a juvenile delinquent; and placed him on probation for 6 months. Applying the same reasoning in *Jahmeir T.*, the Second Department reversed and dismissed the petition. Lesley J. Lanoix represented Ahmand T.
Matter of Ahmand T. (2024 NY Slip Op 06051)

Matter of Teresa S. v Christopher H. | December 4, 2024

GRANDPARENT VISITATION | PARENTAL OBJECTION | REVERSED

The children appealed from a Suffolk County Family Court order granting the grandmother's petition for visitation with the children and setting a schedule for visitation. The Second Department reversed and denied the petition. Family Court's determination that visits with the grandmother would be in the children's best interests lacked a sound or substantial basis in the record. The parents opposed the visits, and the Second Department, noting that courts are generally reluctant to overrule the objections of fit parents regarding grandparent visitation, found their opposition well founded. Ronna L. DeLoe and Steven P. Forbes represented the children.
Matter of Teresa S. v Christopher H. (2024 NY Slip Op 06050)
Oral Argument (starts at 00:09:00)

Matter of Euceda v Romero | December 4, 2024

SPECIAL IMMIGRANT JUVENILE STATUS | REVERSED

The subject child's aunt appealed from a Nassau County Family Court order denying her guardianship petition and the motion for an order making specific findings enabling the subject child to petition the United States Citizenship and Immigration Services for special immigrant juvenile status. The Second Department reversed, granted the guardianship petition and motion, and found that it would not be in the subject child's best interests to be returned to Honduras based upon an independent factual review of the record. The child's active relationship with his father did not compel a different result. Bruno J. Bembi represented the aunt.
Matter of Euceda v Romero (2024 NY Slip Op 06041)

Matter of Shala C. | December 4, 2024

ACKNOWLEDGEMENT OF PATERNITY | NEWLY DISCOVERED EVIDENCE | REVERSED

Appellant appealed from a Queens County Family Court order denying and dismissing his petition to vacate his acknowledgment of paternity. The Second Department reversed and reinstated the petition. The petition was potentially meritorious, because appellant

alleged that he had been unaware that the mother had another sexual partner during the relevant time period, and he later received newly discovered evidence: a private DNA test that excluded him as the child's biological father. Green Kaminer Min & Rockmore LLP (Nancy M. Green, of counsel) represented appellant.
Matter of Shala C. v Dacia A.D.S. (2024 NY Slip Op 06040)

Matter of O'Connor v Shaw | December 4, 2024

CHILD SUPPORT | OUT OF STATE ORDER | REVERSED

Appellant appealed from a Westchester County Family Court order granting the mother's petition for an upward modification of child support, arriving at the child support amount by applying Colorado law. The Second Department reversed. Although the parties divorced in Colorado and the mother was awarded child support there, all parties have since relocated to New York. The Uniform Interstate Family Support Act provides that the state issuing the child support order loses jurisdiction where none of the parties or children continue to reside in that state. The Second Department remitted the matter to Family Court for a new child support calculation in accordance with New York law.
Matter of O'Connor v Shaw (2024 NY Slip Op 06046)

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