Indigent Legal Services

Decisions of Interest

DECEMBER 31, 2024

CRIMINAL

APPELLATE DIVISION, FIRST DEPARTMENT

People v Aponte | December 24, 2024

SORA | FAILURE TO RULE ON DOWNWARD DEPARTURE | REMANDED

Appellant appealed from a New York County Supreme Court order adjudicating him a level two sexually violent offender under SORA. The First Department remanded for a hearing on Aponte's request for a downward departure, which the SORA court erroneously declined to address, while otherwise affirming the SORA court's points assessment. The Legal Aid Society of NYC (Ying-Ying Ma, of counsel) represented Aponte.

People v Aponte, 2024 NY Slip Op 06546

People v Brown | December 24, 2024

PROSECUTION APPEAL | 440.10 VACATUR | IAC | REVERSED

The prosecution appealed from a Bronx County Supreme Court order granting Brown's CPL § 440.10 motion to vacate his 1999 judgment convicting him of attempted murder and related counts based on IAC. Brown cross-appealed from Supreme Court's denial of the motion's newly discovered evidence and actual innocence claims. The First Department reversed, in part, finding Brown had failed to sustain his IAC claims, and otherwise affirmed the denial. At arraignment, original counsel stated that Brown had, months earlier, been shot and sustained nerve damage; he could not have run after the victims as alleged. Following arraignment, Brown retained new counsel who did not assert the medical impossibility defense. In May 2019, 19 years after conviction, Brown filed this second 440.10 motion alleging counsel was ineffective for failing to raise the medical impossibility defense and that there were two new witnesses who could testify supporting his innocence. The First Department held that Brown failed to prove his IAC claims because it was unclear from the record whether counsel was informed of the medical impossibility defense and ignored it without investigation. It was "of note" that Brown did not mention this aspect of his IAC claim until this second 440 motion, after filing a direct appeal, pro se 440.10 and a federal habeas corpus petition. Brown failed to establish that counsel lacked a trial strategy in not pursuing the medical impossibility defense which might have opened the door to Brown's drug dealing history and potentially conflicted with medical records. Supreme Court properly denied the newly discovered evidence claims as resting on immaterial and false testimony and the actual innocence claim as not proven.

People v Brown, 2024 NY Slip Op 06550

Oral Argument (starts at 01:48:15)

People v Myree | December 24, 2024

EXCESSIVE SENTENCE | WEAPON POSSESSION | MODIFIED

Myree appealed from a Bronx County Supreme Court judgment convicting her of third-degree CPW and sentencing her to 3 ½ to 7 years' imprisonment. After hearing arguments regarding the violence and degradation Myree has experienced in prison as a transgender woman being housed in a male-designated prison, the First Department reduced the sentence to 3 to 6 years in the interest of justice, making Myree eligible for immediate release. The Legal Aid Society of NYC (Danielle A. Bernstein, of counsel) represented Myree.

People v Myree, 2024 NY Slip Op 06553

Oral Argument (starts at 01:06:40)

APPELLATE DIVISION, SECOND DEPARTMENT

People v Jenkins | December 24, 2024

EXCESSIVE SENTENCES | INVALID WAIVER OF APPEAL | MODIFIED

Appellant appealed from two Orange County Court judgments convicting him of third-degree CSCS and third-degree CPCS, following his guilty pleas, and sentencing him to two determinate terms of 6 years' imprisonment and 2 years' PRS, to be run consecutively. The Second Department affirmed the convictions but modified the sentences. The appeal waiver was invalid because the court mischaracterized the nature of the right to appeal by stating that the convictions and sentences would be final and failed to clarify in the written waiver that appellate review was available for select issues. Appellant's sentences were excessive and modified to two determinate terms of 4 years' imprisonment and 2 years' PRS, to be run consecutively. Richard L. Herzfeld represented Jenkins.

People v Jenkins (2024 NY Slip Op 06606)

People v Dixon | December 24, 2024

INVALID WAIVER OF APPEAL | YO DENIAL AFFIRMED | SENTENCE NOT EXCESSIVE

Appellant appealed from a Dutchess County Court judgment convicting him of second-degree CPW, following his guilty plea. The Second Department affirmed but found the appeal waiver invalid given that the court failed to discuss the waiver with appellant until after he had admitted guilt and given his young age (18) and lack of criminal history. Nevertheless, the Second Department affirmed the court's denial of YO status and found appellant's sentence—the minimum period of incarceration but maximum PRS—was not excessive. Dutchess County Public Defender's Office (Seth J. Gallagher, of counsel) represented Dixon.

People v Dixon (2024 NY Slip Op 06605)

Oral Argument (starts at 00:09:54)

APPELLATE DIVISION, THIRD DEPARTMENT

People v Davis | December 26, 2024

SORA | RELIABLE HEARSAY | REVERSED AND REMITTED

Appellant appealed from a Columbia County Court order classifying him as a level two sex offender. The Third Department reversed and remitted for a new hearing. Although County Court assessed 25 points under risk factor 2 for sexual contact with the victim, that determination was based on a contested statement by the district attorney: that there was a photograph depicting that sexual activity. While the court found that the photographs depicted sexual activity between an adult and a child, it made no finding as to the identity of the adult. The Third Department remitted for the prosecution to provide a foundation supporting the hearsay's reliability. Aaron A. Louridas represented Davis.
People v Davis (2024 NY Slip Op 06632)

People v Kellum | December 26, 2024

APPEARANCE IN SHACKLES | HARMLESS ERROR | AFFIRMED

Appellant appealed from an Albany County Supreme Court order convicting him of charges including second-degree burglary and aggravated criminal contempt and sentencing him, as a second violent felony offender, to 15 years' imprisonment and 5 years' PRS. The Third Department held that it was error for appellant to have appeared before the grand jury in prison garb and shackles, because the prosecution failed to articulate a reasonable basis for the restraints. The court nevertheless affirmed, finding that the prosecutor's cautionary instructions to the grand jury dispelled the potential prejudice.
People v Kellum (2024 NY Slip Op 06629)

TRIAL COURTS

People v Silone | 2024 WL 5195491

DWI | INVOLUNTARY CONSENT TO BREATH TEST | STATEMENTS POST-INVOCATION | SUPPRESSED

Silone was charged with driving while intoxicated and moved to suppress both the results of a chemical breath test and statements allegedly made to police. Queens County Criminal Court suppressed the test results and some of the statements. Silone's consent to taking the breathalyzer test was involuntary, where police warned her that her refusal could be introduced into evidence: the warning was inaccurate, since the breath test was being administered more than two hours after the arrest—a period measured by the court from when Silone was handcuffed, not the arrest time on the police paperwork. While some of Silone's pre-custodial statements at the scene were admissible, Silone later unequivocally invoked her right to counsel by saying "I want to talk to an attorney before I answer any questions." Any statements made after that invocation were suppressed. John Russo represented Silone.
People v Silone (2024 NY Slip Op 51738(U))

People v Aucanzhala | 2024 WL 5195507

30.30 | NO DEFENSE DUTY TO DILIGENTLY CONFER | DISMISSED

Charged with a misdemeanor, Aucanzhala timely filed pre-trial motions. The prosecution then sought adjournments on three separate court dates and finally filed a response four

months after the initial due date. Queens County Criminal Court granted the defense's subsequent motion to dismiss under CPL § 30.30, rejecting the prosecution's proffered excuses for the delay. The defense is not required to diligently confer with the prosecution before filing a 30.30 motion, and prosecutors are not entitled to advance notice that a 30.30 motion will be filed. Nor was the prosecution entitled to courtesy copies or EDDS notifications; paper copies marked "received" by the District Attorney's office are presumed to be received and directed to the assigned trial assistant. The Legal Aid Society of NYC (Andrea Natalie, of counsel) represented Aucanzhala.
People v Aucanzhala (2024 NY Slip Op 51737(U))

People v Rodriguez | 2024 WL 5205412

FACIAL SUFFICIENCY | OGA | SOR FILED WITHOUT GOOD FAITH | DISMISSED

Rodriguez was charged with OGA. The accusatory instrument alleged that after a traffic accident, but before the police arrived, Rodriguez exited the driver's side of the car and switched places with the vehicle's passenger. Kings County Criminal Court found the accusatory instrument facially insufficient and dismissed the case. The OGA count was so inadequately pled that it should have been readily apparent to a diligent prosecutor. Because the statement of readiness cannot be said to have been filed in good faith, the court declined to strike the OGA count to salvage the remainder of the complaint. The Legal Aid Society of NYC (Sarah Kaufman, of counsel) represented Rodriguez.
People v Rodriguez (2024 NY Slip Op 51747(U))

People v Elliott | 2024 WL 5205412

FACIAL SUFFICIENCY | CRIMINAL CONTEMPT & EWC | PHOTOS OF JURORS | DISMISSED

Elliott was charged with second-degree criminal contempt for allegedly taking still photographs of five sworn jurors in the vestibule of the Ontario County Courthouse as the jurors exited the courtroom. Elliott was also charged with EWC on the theory that the photographs were taken in view of the jury, causing the jurors to fear retaliation, which allegedly precipitated a mistrial, in turn causing the underage complainant acute distress. Canandaigua County City Court found both charges facially insufficient. The EWC charge failed to allege either that the child was under 17 years old or that Elliott had the requisite knowledge that the alleged behavior was likely to result in harm to the child. The criminal contempt charge was facially insufficient because taking the still photographs did not constitute a "breach of the peace" or "other disturbance" directly tending to interrupt the court proceeding. Calling this a case of first impression in the state, City Court held that the acts alleged fell below the definition of "breach of the peace" in PL § 722. Moreover, while Civil Rights Law § 52 makes it a misdemeanor to televise, broadcast, or take motion pictures of certain court proceedings involving subpoenaed live testimony, it is notable that the legislature did not opt to criminalize the taking of still photographs. While 22 NYCRR 29.1 of the Rules of the Chief Judge do prohibit photographing court proceedings without proper permission, this rule does not attach criminal liability. Finally, the allegations did not establish that taking the photographs "directly tend[ed] to interrupt a court's proceedings." City Court granted dismissal of the information, rendering moot the defense facial constitutional challenge. Carrie Bleakley, Conflict Defender of Ontario County (Peter G. Chambers, of counsel) represented Elliott.
People v Elliott (2024 NY Slip Op 51746(U))

People v Lackhan | 2024 WL 5205419

30.30 | DISMISSAL OF FELONY COUNT DOES NOT TOLL READINESS | DISMISSED

Lackhan was charged by felony complaint. Almost six months later, the prosecution filed and served off-calendar a COC, supporting deposition, SOR, and a motion to dismiss the felony count and convert the accusatory instrument to a misdemeanor information. Queens County Criminal Court held that the prosecution could not declare readiness on the misdemeanor information until the felony count was dismissed, which, under CPL § 180.50, cannot occur until the court rules on the motion at the next court appearance. The prosecution's motion to dismiss the felony count did not toll the readiness clock under CPL § 30.30[4][a], since that exclusion applies only to delay resulting from contested pre-trial motions and periods during which the court is considering those motions. Because the prosecution failed to advance the case promptly to engage in the CPL § 180.50 procedure, they exhausted their 30.30 time. City Court dismissed the case. Victor Knapp represented Lackhan.

People v Lackhan (2024 NY Slip Op 51743(U))

People v Sabater | 2024 WL 5205412

ERLINGER APPLIES TO RESENTENCING ON 2019 CONVICTION | RESENTENCING GRANTED

In 2019, Sabater was convicted of second-degree assault and sentenced as a persistent violent felony offender to 18 years-to-life imprisonment. After *Erlinger*, Sabater filed a CPL § 440.20 motion to vacate the sentence, arguing that the 2019 predicate felony statement was facially insufficient because it failed to allege the required tolling periods to bring Sabater's *first* alleged predicate violent felony within the 10-year lookback period. New York County Supreme Court granted the motion, on consent, and ordered resentencing. The prosecution then filed an amended predicate statement alleging the requisite tolling for both prior convictions. While *Erlinger* is not retroactive, it applies to Sabater's case, since it is now in a pre-judgment posture, and Sabater therefore cannot be sentenced as a persistent violent felony offender by a judge alone. The court rejected the prosecution's argument that Sabater had waived any *Erlinger* challenge by previously submitting to a bench trial: "even assuming that a knowing jury trial waiver can be retrospectively deemed to encompass additional factual determinations involving the particular circumstances of the crime for which guilt was being assessed, surely defendant's waiver could not 'knowingly, intelligently and voluntarily'…extend to facts about other, past offenses or, even more particularly, the incarceration that stemmed from them." Sabater can now be sentenced as either a second violent felony offender— based on his prior admissions to allegations in the initial predicate statement that brought the *second* conviction within the 10-year lookback period—or as a persistent felony offender, a determination that does not require judicial fact-finding related to tolling and falls "squarely within the *Almendarez-Torres* exception." The court reserved decision on 2FO versus PFO until after the persistent felony offender hearing. Center for Appellate Litigation (Alexandra Mitter, of counsel) represented Sabater.

People v Sabater (2024 NY Slip Op 24321)

FAMILY

APPELLATE DIVISION, SECOND DEPARTMENT

Matter of Elina M. | December 24, 2024

NEGLECT | SINGLE INCIDENT OF CORPORAL PUNISHMENT | ALLEGATIONS OUTSIDE PETITION | REVERSED

The father appealed from a Kings County Family Court order finding that he neglected the subject child and releasing the child to the custody of the nonrespondent mother under ACS supervision. The Second Department reversed and dismissed the neglect petition. Noting that corporal punishment has become less acceptable, the court highlighted several of its cases holding that a single incident of corporal punishment may constitute neglect. But it also emphasized that each case is highly fact-specific, and the incident giving rise here—the father grabbing the child's arm or shoulder—did not meet that standard. Family Court also improperly based its ruling on allegations of alcohol misuse that were not contained within the petition, and ACS failed to conform the pleadings to the proof. Further, the sole evidence supporting those allegations was the child's uncorroborated out-of-court statements. Brooklyn Defender Services (Kathryn V. Lissy and Aubrey Austin Rose, of counsel) represented the father.

Matter of Elina M. (2024 NY Slip Op 06574)

Oral Argument (starts at 00:23:35)

Matter of Morales v Diaz | December 24, 2024

PARENTAL ACCESS | CHANGE OF CIRCUMSTANCES | MODIFIED

The mother appealed from an Orange County Family Court order denying her petition to modify prior orders to, among other things, grant her additional parental access to the children. The Second Department modified and directed the father to produce the children for in-person therapeutic or supervised parental access, as well as phone or video contact. The mother's relocation from North Carolina back to New York, where the children lived with their father, constituted a change of circumstances. The father's testimony established that the children did not wish to have contact with the mother while she lived in North Carolina and he felt "there was nothing he could really do," so failing to modify the order would improperly condition her right of parental access on the desires of the children. The Second Department therefore modified the order and remitted for Family Court to set a specific parental access schedule. Alex Smith represented the mother.

Matter of Morales v Diaz (2024 NY Slip Op 06610)

APPELLATE DIVISION, THIRD DEPARTMENT

Matter of Christopher Y. v Sheila Z. | December 26, 2024

HABEAS CORPUS | VISITATION | MODIFIED AND REMITTED

The father appealed from a Tompkins County Family Court order dismissing his petition seeking a writ of habeas corpus for the mother to produce the child. The Third Department modified, converted the matter to a visitation modification proceeding, and remitted to Family Court. The mother, who had sole custody of the child, moved to Florida without court permission, depriving the father of his previously-ordered supervised parenting time. Family Court found the mother to be in willful violation of an enforcement order and held

her in contempt but denied the father's application for a writ based on its potential negative impact on the child. But while the mother did fail to produce the child for visitation, it also appeared that the father had not complied with other Family Court directives, including that he obtain a mental health evaluation. Because Family Court had taken no testimony on these issues, the court remitted for an evidentiary hearing to determine a parenting time schedule in the child's best interests. Craig S. Leeds represented the father.
Matter of Christopher Y v Sheila Z. (2024 NY Slip Op 06631)

TRIAL COURTS

Matter of Sarah W. v Andrew W. | 2024 WL 5231412

UCCJEA | HOME STATE DETERMINATION | CASE TRANSFERRED

At issue in these custody and family offense proceedings was whether Massachusetts or New York was the home state of the children, conferring subject matter jurisdiction under the UCCJEA. Tompkins County Family Court determined that Massachusetts was the home state of the children, dismissed the New York custody petition, and directed that a UCCJEA conference take place with the Massachusetts judge. The family—who lived in Massachusetts at the time—planned an extended sailboat trip to Central and South America and sailed along the coasts of Mexico, El Salvador, and Costa Rica before losing their propeller off the coast of Panama. Afterward, the mother took the child to visit her sister in Ithaca, New York and decided to remain there. The mother claimed that the sailboat trip was of indefinite duration, and the parties did not have specific plans where they would live upon return to the United States. The father, however, testified about specific plans to return to Massachusetts after the one-year sailboat trip concluded. Family Court credited the father's testimony and found that Massachusetts was the home state, following the Third Department's intent test to determine that the family's temporary absence from the state did not show a permanent intent to change residency.
Matter of Sarah W. v Andrew W. (2024 NY Slip Op 51762(U))

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