

Decisions of Interest

JUNE 12, 2024

CRIMINAL

FIRST DEPARTMENT

People v Tookes | June 6, 2024

SORA | INSUFFICIENT NOTICE | REVERSED

The appellant appealed from a New York County Supreme Court order adjudicating him a level three sexually violent offender. The First Department reversed and adjudicated him a level two sexually violent offender. The People provided untimely notice that they were seeking additional points and a determination that differed from the Board's recommendation. They gave no advanced notice that they were seeking an upward departure—the basis for the resulting risk level three classification. The appellant's attorney did not waive his right to timely notice by stating that he would move forward with the hearing if the People's evidence was delivered the next day; there was no indication that the evidence was provided, and any waiver would not have included the unnoticed request for an upward departure. The Legal Aid Society of NYC (Richard Joselson, of counsel) represented the appellant.

[People v Tookes \(2024 NY Slip Op 03095\)](#)

People v Eason | June 6, 2024

INVALID WAIVER OF APPEAL | AFFIRMED

The appellant appealed from a Bronx County Supreme Court judgment convicting him of 2nd degree CPW based on his guilty plea. The First Department affirmed. The appellant's waiver of appeal was invalid. The court never advised him of the consequences of the appeal waiver, nor did it inquire whether he understood the rights being forfeited. The written waiver and defense counsel's confirmation that he discussed the waiver with the appellant were not substitutes for the court own inquiry. However, there was no basis for reducing the four-year sentence.

[People v Eason \(2024 NY Slip Op 03096\)](#)

People v Cisee | June 6, 2024

INVALID WAIVER OF APPEAL | AFFIRMED

The appellant appealed from a New York County Supreme Court judgment convicting him of attempted 2nd degree CPW based on his guilty plea. The First Department affirmed. The appellant's waiver of appeal was invalid. The court did not explain that the right to appeal is separate and distinct from the trial rights being waived or that the waiver of appeal is not an absolute bar to taking a direct appeal. The written waiver of appeal did

not cure these defects—conflicts between the colloquy and written waiver only caused further confusion about the waiver’s effect. However, the trial court properly granted suppression, and the appellant lacked standing to challenge the gun licensing statute or the constitutionality of his conviction under *Bruen*.

[People v Cisee \(2024 NY Slip Op 03093\)](#)

SECOND DEPARTMENT

People v Estevez | June 5, 2024

YOUTHFUL OFFENDER | DETERMINATION REQUIRED | REMITTED

The appellant appealed from a Kings County Supreme Court judgment convicting him of 3rd degree assault based on his guilty plea. The Second Department vacated the sentence and remitted for a determination of whether the appellant should be afforded youthful offender treatment. Appellate Advocates (Steven C. Kuza, of counsel) represented the appellant.

[People v Estevez \(2024 NY Slip Op 03060\)](#)

THIRD DEPARTMENT

People v Osman | June 6, 2024

VENTIMIGLIA VIOLATION | REVERSED AND REMITTED

The appellant appealed from a Tompkins County Court judgment convicting him of attempted 1st degree rape and 1st degree sexual abuse. The Third Department reversed and remitted for a new trial. During opening statements, the prosecutor improperly alluded to the appellant’s prior conviction and prison sentence without an advanced *Ventimiglia* ruling. The court determined that it would have permitted the statement had a pretrial *Ventimiglia* motion been made and denied the appellant’s request for a mistrial. This was error. The appellant was entitled to a pretrial determination of whether the probative value of this evidence outweighed the risk of prejudice. The evidence was not integral to the complainant’s narrative or inextricably interwoven with the alleged conduct. And the error was not harmless given the underwhelming trial evidence. Barket Epstein Kearon Aldea & Loturco, LLP (Donna Aldea, of counsel) represented the appellant.

[Oral Argument](#)

[People v Osman \(2024 NY Slip Op 03106\)](#)

People v Cruz | June 6, 2024

BATSON | PRETEXT DETERMINATION REQUIRED | HELD AND REMITTED

The appellant appealed from a Columbia County Supreme Court judgment convicting him of 1st degree rape, 2nd degree rape, and endangering the welfare of a child. The Third Department held the appeal and remitted. Defense counsel challenged the prosecutor’s peremptory strike of the only prospective juror of color on the panel—a person who “[hadn’t] said a word” during voir dire. The prosecutor’s race-neutral explanation was that the juror had been laughing inappropriately and may not take things seriously. Defense counsel emphasized that the prosecutor had not asked the juror a single question and argued that the proffered rationale was disingenuous. The court granted the peremptory

challenge based on its finding that the appellant did not satisfy his initial burden. The court failed to follow the sequential *Batson* procedure and erred in concluding that the appellant had not met his burden—a prima facie case may be made based on a single peremptory challenge that gives rise to an inference of discrimination. Remittal was required for a determination on the credibility-laden question of pretext. Dennis B. Schlenker represented the appellant.

[Oral Argument](#)

[People v Cruz \(2024 NY Slip Op 03108\)](#)

People v Philippe | June 6, 2024

PEQUE | CPL 440.10 | HEARING REQUIRED

The appellant appealed from a Saratoga County Court order that summarily denied his 440.10 motion seeking to vacate his attempted 3rd degree grand larceny conviction. The Third Department reversed and remitted for a hearing. The appellant averred that neither his attorney nor the court inquired about his immigration status or advised that he could be deported as a result of his plea. Further, he would not have pleaded guilty had he been so informed—he moved to the U.S. 20 years ago, when he was six years old, and his entire family lived in this country. The appellant sufficiently alleged that he was prejudiced by counsel’s failure to provide any information regarding the deportation consequences of his plea, warranting a hearing. Danielle Neroni Reilly represented the appellant.

[People v Philippe \(2024 NY Slip Op 03105\)](#)

People v Graham | June 6, 2024

INCLUSORY COUNT | RIGHT TO BE PRESENT | MODIFIED

The appellant appealed from a Chemung County Court judgment convicting him of 1st degree CPW and attempted 3rd degree CPW. The Third Department reversed the attempted 3rd degree CPW conviction, dismissed that count, and otherwise affirmed. The attempted 3rd degree CPW charge—which requires possession of any explosive substance—was an inclusory concurrent count of the 1st degree CPW charge—which requires possession of any explosive or incendiary bomb. It would be impossible to commit the greater offense, without also committing the lesser one. Further, the trial court violated the appellant’s right to be present by resentencing him in his absence, even though he benefited from the corrected prison term. Adam G. Parisi represented the appellant.

[People v Graham \(2024 NY Slip Op 03104\)](#)

FAMILY

SECOND DEPARTMENT

Matter of Acker v Teneyck | June 5, 2024

FAMILY OFFENSE | HEARING REQUIRED | REVERSED

The mother appealed from a Rockland County Family Court order imposing a two-year stay-away order of protection in favor of the father and child except for court-ordered parental access. The Second Department reversed and remitted for a hearing on the

father's family offense petition before a different judge. Family Court failed to conduct a hearing and made no finding that the mother had committed a family offense, instead issuing the order in response to the mother's behavior at a court conference that it found objectionable. Ilene Kim Graff represented the mother.

[Matter of Acker v Teneyck \(2024 NY Slip Op 03043\)](#)

THIRD DEPARTMENT

Matter of Theresa M. v Gaddiel M. | June 6, 2024

PARENTING TIME | IMPROPER DELEGATION | MODIFIED

The father appealed from a Schenectady County Family Court order that granted the parties joint custody and the mother primary physical residence and provided that the father "shall have parenting time with the children at such times and places and under such conditions determined by the mother." The Third Department modified the order and remitted for the Family Court to make an order including a specific parenting time schedule. Family Court improperly delegated its authority to structure parenting time to the mother. Sandra M. Colastoti represented the father.

[Matter of Theresa M. v. Gaddiel M. \(2024 NY Slip Op 03115\)](#)

CIVIL

FIRST DEPARTMENT

R.C. v The City of New York | June 4, 2024

PRELIMINARY INJUNCTION | SEALED RECORDS | REVERSED AND REMITTED

The NYPD appealed from a New York County Supreme Court order granting injunctive relief. The First Department reversed and remitted. The plaintiffs alleged that the NYPD had been unlawfully using sealed criminal records for investigatory purposes. Supreme Court issued a preliminary injunction and directed the NYPD to submit a proposed plan to cease its violations. The court rejected the NYPD's plan and adopted the plan submitted by plaintiffs, which implemented records-management directives and prohibitions regarding the use of sealed records. The court erred by prematurely issuing an overbroad, permanent injunction without first making a final determination on the merits. By its own language, the order was meant to be a permanent solution to the NYPD's alleged violations—rather than maintaining the status quo—and it granted relief beyond that requested by the plaintiffs. The Bronx Defenders and Cleary Gottlieb Steen & Hamilton LLP represent the class action plaintiffs.

[R.C. v The City of New York \(2024 NY Slip Op 03017\)](#)

[The Bronx Defenders – Impact Litigation](#)

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