

Decisions of Interest

JUNE 19, 2024

CRIMINAL

COURT OF APPEALS

People v Vargas | June 13, 2024

PEOPLE'S APPEAL | HARMLESS ERROR | REVERSED

The People appealed from a Second Department order reversing his 1st degree assault conviction and remitting for a new trial. The Court of Appeals reversed and remitted, with two judges dissenting. The appellant's conviction arose from an incident where he allegedly attacked his wife with a knife. The primary issue on appeal was whether it was harmless error to admit police testimony recounting the victim's daughter's description of the attack in violation of the Confrontation Clause, as well as two other hearsay statements. Given the strength of the properly admitted evidence, there was no possibility that these errors contributed to his conviction.

[People v Vargas \(2024 NY Slip Op 03200\)](#)

FIRST DEPARTMENT

People v Hall | June 11, 2024

PROBATION CONDITION | NOT REASONABLY RELATED

The appellant appealed from a Bronx County Supreme Court judgment convicting him of 3rd degree robbery and sentencing him to probation based on his guilty plea. The First Department struck a probation condition requiring that he consent to warrantless searches of his person and home, and otherwise affirmed. The appellant's challenge to the probation condition survived his valid waiver of appeal. The condition was not reasonably related to the appellant's rehabilitation; he was not armed during the underlying offense and had no history of violence or use of weapons. The Center for Appellate Litigation (David J. Klem, of counsel) represented the appellant.

[People v Hall \(2024 NY Slip Op 03144\)](#)

People v Moore | June 13, 2024

INDICTMENT | UNDERLYING OFFENSE | JURISDICTIONALLY VALID

The appellant appealed from a New York County Supreme Court judgment convicting him of persistent sexual abuse. The First Department affirmed. The indictment was jurisdictionally valid. Facial validity required that the indictment specify the underlying misdemeanor upon which the persistent sexual abuse charge was predicated by either incorporating its section number or stating its definition (see *People v Saenger*, 39 NY3d

433, 440 [2023]). The indictment alleged that the appellant “plac[ed] his hand on [the complainant’s] buttocks, without her consent.” Of the three misdemeanors that were eligible to support a persistent sexual abuse charge, only 3rd degree sexual abuse fit the conduct described. The other two qualifying offenses required additional elements not mentioned.

[Oral Argument \(starts at 2:01:30\)](#)

[People v Moore \(2024 NY Slip Op 03234\)](#)

SECOND DEPARTMENT

People v Ruiz | June 12, 2024

IMPROPER CONSECUTIVE SENTENCE | MODIFIED

The appellant appealed from a Queens County Supreme Court judgment convicting him of 1st degree robbery and 2nd degree robbery (two counts). The Second Department deleted a provision directing that the appellant’s 35-year sentence run consecutively to a pending federal sentence, and otherwise affirmed. The court had no authority to direct that the sentences imposed in this case run consecutively to a sentence not yet imposed.

[Oral Argument \(starts at 47:15\)](#)

[People v Ruiz \(2024 NY Slip Op 03189\)](#)

People v Ortega | June 12, 2024

INVALID WAIVER OF APPEAL | AFFIRMED

The appellant appealed from a Queens County Supreme Court judgment convicting him of attempted 2nd degree CPW based on his guilty plea. The Second Department affirmed. The appellant’s waiver of appeal was not knowing, voluntary and intelligent. The court failed to advise that he retained the right to file a notice of appeal, as well as the right to appellate counsel and poor person relief. Further, there was no indication that the written waiver was translated for the appellant, who required an interpreter. However, the sentence was not excessive.

[People v Ortega \(2024 NY Slip Op 03188\)](#)

FOURTH DEPARTMENT

People v Malloy | June 14, 2024

SEXUALLY VIOLENT OFFENDER | OUT-OF-STATE CONVICTION | UNCONSTITUTIONAL

The appellant appealed from a Chautauqua County Court order designating him a sexually violent offender based on his non-violent, out-of-state felony conviction. The Fourth Department reversed. The second disjunctive clause of Correction Law § 168-a (3) (b)—the foreign registration clause—was unconstitutional as applied to the appellant. Designating the appellant a sexually violent offender based solely on his nonviolent, out-of-state sex conviction violated substantive due process. It bore no rational relationship to public safety, or any other conceivable state interest. **NOTE: In *People v Talluto* (39 NY3d 306 [2022]), the Court of Appeals indicated that the foreign jurisdiction clause may contain a legislative drafting error and, if so, unequivocally called upon the Legislature to remedy it.**

[Oral Argument \(starts at 1:41:00\)](#)
[People v Malloy \(2024 NY Slip Op 03264\)](#)

People v McClendon | June 14, 2024

IAC | TAILORED JURY CHARGE REQUIRED | REVERSED

The appellant appealed from an Onondaga County Court judgment convicting him of 2nd degree burglary. The Fourth Department reversed and granted a new trial on that charge. Defense counsel was ineffective for failing to request a jury charge tailored to the People's theory of the crime as alleged in the indictment. The People are not required to allege or establish that a specific crime was intended to secure a burglary conviction. However, if the indictment limits their theory of the intent element, then they must prove that theory at trial. Defense counsel's failure to object to the general burglary charge permitted the jury to convict upon a theory not set forth in the indictment. In this case, counsel's error was sufficiently egregious and prejudicial that it compromised the appellant's right to a fair trial. Hiscock Legal Aid Society (Casey S. Duffy, of counsel) represented the appellant.

[Oral Argument \(starts at 41:02\)](#)
[People v McClendon \(2024 NY Slip Op 03260\)](#)

People v Dortch | June 14, 2024

JURY NOTE | SUPPRESSION HEARING REQUIRED | REVERSED

The appellant appealed from a Monroe County Supreme Court judgment convicting him of 1st degree robbery, 2nd degree robbery, and 2nd degree assault. The Fourth Department reversed and granted a new trial. The court did not meaningfully respond to a jury note requesting a readback of the complainant's testimony. The court read back only the complainant's direct testimony about the incident. It did not read back defense counsel's cross-examination, nor did it seek clarification from the jury regarding the scope of its request. The court also erred in refusing to hold a suppression hearing regarding a search of the appellant's girlfriend's car. The appellant had standing as the daily user of the vehicle, and he raised a factual dispute about the voluntariness of the girlfriend's consent to the search. David M. Giglio represented the appellant.

[Oral Argument \(starts at 1:11:00\)](#)
[People v Dortch \(2024 NY Slip Op 03283\)](#)

People v Mitchell | June 14, 2024

DISCOVERY | NO DUE DILIGENCE | HELD AND REMITTED

The appellant appealed from an Ontario County Court judgment convicting him of 1st degree sexual abuse, 3rd degree rape, 2nd degree assault, 3rd degree assault (two counts), endangering the welfare of a child (two counts), 2nd degree harassment (two counts), and 2nd degree unlawful imprisonment. The Fourth Department held the appeal and remitted. The People's failure to exercise due diligence in disclosing the complainant's criminal history rendered their initial COC improper and their SOR illusory. The People based their initial statement that the complainant had no criminal history on an erroneous sheriff's report prepared by an unidentified third party prior to commencement. Although this error may have been in good faith, it did not excuse their lack of diligence. The People had direct access to the complainant's criminal record through DCJS; but they did not run a

repository inquiry until prompted to do so by defense counsel's request for a subpoena. Remittal was required for a 30.30-time calculation. Easton Thompson Kasperek Shiffrin LLP (Brian Shiffrin, of counsel) represented the appellant.

[Oral Argument \(starts at 1:03:12\)](#)

[People v Mitchell \(2024 NY Slip Op 03256\)](#)

People v Williams | June 14, 2024

CPL 30.30 | EXECUTIVE COVID TOLL | HELD AND REMITTED

The appellant appealed from a Monroe County Supreme Court judgment convicting him of attempted 2nd degree CPW. The Fourth Department held the appeal and remitted. The waiver of appeal was invalid; the court improperly characterized the waiver as an absolute bar to post-conviction relief and failed to cure this error by confirming that the appellant understood the contents of the written waiver. The appellant challenged the constitutionality of the COVID-19 executive orders purporting to extend the toll of CPL 30.30 beyond May 8, 2020 or, alternatively, after grand jury proceedings had reconvened in Monroe County. Remittal was required; although the trial court denied the appellant's 30.30 motion, it did not rule on the constitutional claims. The Monroe County Public Defender (Clea Weiss, of counsel) represented the appellant.

[Oral Argument \(starts at 43:13\)](#)

[People v Williams \(2024 NY Slip Op 03275\)](#)

People v Walker | June 14, 2024

DISCOVERY | REFUSAL HEARING TRANSCRIPTS | HELD AND REMITTED

The appellant appealed from a Monroe County Court judgment convicting him of DWAI. The Fourth Department held the appeal and remitted. Defense counsel moved to dismiss on speedy trial grounds based on the People's failure to disclose refusal hearing transcripts. Although the transcripts were not in the People's possession, the trial court erred in failing to consider whether they were required to exercise due diligence to obtain the transcripts and, if so, whether they made reasonable efforts to comply. The court also failed to address the People's argument that the dismissal motion was untimely. Remittal was required to determine the outstanding issues. The Monroe County Public Defender (James Eckert, of counsel) represented the appellant.

[People v Walker \(2024 NY Slip Op 03278\)](#)

People v Kohmescher | June 14, 2024

UNDECIDED TRIAL ORDER OF DISMISSAL | HELD AND REMITTED

The appellant appealed from a Monroe County Court judgment convicting him of 1st degree assault. The Fourth Department held the appeal and remitted. The trial court never ruled on the appellant's motion to dismiss based on legally insufficient evidence that the complainant suffered a serious physical injury. Because the failure to rule on a motion for a trial order of dismissal cannot be deemed a denial, remittal was required. The Monroe County Public Defender's Office (Jane I. Yoon, of counsel) represented the appellant.

[Oral Argument \(starts at 1:33:10\)](#)

[People v Kohmescher \(2024 NY Slip Op 03287\)](#)

People v Sumler | June 14, 2024

DISCOVERY | HELD AND REMITTED

The appellant appealed from an Onondaga County Court judgment convicting him of 1st degree rape, 1st degree burglary, 3rd degree assault, aggravated criminal contempt, 1st and 2nd degree criminal contempt, 2nd degree burglary, petit larceny, and 4th degree stalking. The Fourth Department held the appeal and remitted. The court erred in denying the appellant's CPL 30.30 motion based on its finding that the People had complied with their discovery obligations; they impermissibly used a screening panel to decide whether to disclose police disciplinary records. Remittal was required for a determination on whether the People exercised due diligence and made reasonable efforts to comply. Keem Appeals, PLLC (Bradley E. Keem, of counsel) represented the appellant.

[Oral Argument \(starts at 1:02:44\)](#)

[People v Sumler \(2024 NY Slip Op 03307\)](#)

People v Lewis | June 14, 2024

IAC | DISSENT | AFFIRMED

The appellant appealed from a Monroe County Supreme Court judgment convicting him of 2nd degree CPW (four counts) and resisting arrest. The Fourth Department affirmed, with two justices dissenting. The appellant waived his right to effective assistance of counsel. The appellant requested on the eve of trial that the court discharge his retained attorney and assign him new counsel. The court denied his request, advised that trial would proceed, and gave him the option of proceeding pro se. The appellant directed that the attorney not represent him at trial, refused to answer the court's questions, and left the courtroom. Trial proceeded in his absence, with defense counsel present, but not participating other than to move for a trial order of dismissal. In the dissent's view, the appellant was denied the effective assistance of counsel. The decision to remain silent at trial was not tactical; rather, it was based on counsel's misperception of his ethical obligation to comply with his client's directive. A defendant represented by counsel does not retain authority over strategic decisions like whether counsel should stand mute.

[Oral Argument \(starts at 50:42\)](#)

[People v Lewis \(2024 NY Slip Op 03245\)](#)

TRIAL COURTS

People v V.R. | 2024 WL 2948933

DVSJA | RESENTENCE GRANTED

V.R. moved to be resentenced on her attempted 2nd degree murder conviction under the DVSJA. Erie County Court granted the motion and reduced her prison sentence from 9 years to 5 years. V.R. was the victim of domestic violence, which was a substantial contributing factor to her offense, and the imposed sentence was unduly harsh. V.R. suffered years of verbal, emotional, financial, and physical abuse at the hands of her boyfriend—the intended victim in this case. V.R. conspired with her cousin to attack her boyfriend to try and stop the abuse, but the cousin was killed instead. She almost immediately took responsibility for her actions, saying she just “couldn't take the abuse anymore.” V.R., now 52 years old, had an unstable upbringing and was the victim of physical and sexual abuse throughout her life. Despite this, she maintained positive

relationships, supported her family by working in the public school system for 20 years, and had no criminal history. The Legal Aid Bureau of Buffalo (Abigail Whipple and Kerry Conner, of counsel) represented V.R.

[People v V.R. \(2024 NY Slip Op 50702\[U\]\)](#)

FAMILY

FIRST DEPARTMENT

Matter of Leroy W. (Shanequa W.) | June 13, 2024

VISITATION | MODIFIED

The mother appealed from a Bronx County Family Court order granting the father's visitation petition and awarding him one in-person visit every six months at any correctional facility where he was incarcerated. The First Department vacated the provision requiring the child to visit once every six months. The evidence overcame the presumption that visitation is in the child's best interests. The father had been incarcerated for most of the child's life; they did not have a meaningful relationship.

[Matter of Leroy W. \(Shanequa W.\) \(2024 NY Slip Op 03238\)](#)

FOURTH DEPARTMENT

Matter of Rodcliffe M., Jr. (Rodcliffe M., Sr.) | June 14, 2024

TPR | MODIFIED | REMITTED

The father appealed from a Monroe County Family Court order that terminated his parental rights based on permanent neglect. The Fourth Department vacated the provisions terminating his parental rights and remitted for entry of a suspended judgment. The father was released from prison two months before the dispositional hearing. In that time, he secured full-time employment, visited weekly with the children, communicated regularly with the foster family, and engaged in mental health services and parenting classes. Given the father's efforts since his release, the children's young age and their reported happiness to be visiting with their father regularly, a suspended judgment was in the children's best interests; the father should have been granted a second chance at reunification. Guy A. Talia represented the father.

[Oral Argument \(starts at 2:24:40\)](#)

[Matter of Rodcliffe M., Jr. \(Rodcliffe M., Sr.\) \(2024 NY Slip Op 03267\)](#)

CIVIL

FOURTH DEPARTMENT

Matter of Flynn v DiTullio | June 14, 2024

ARTICLE 78 | SPECIAL PROSECUTOR NOT REQUIRED | PETITION GRANTED

The Erie County District Attorney commenced this CPLR article 78 proceeding seeking to prohibit County Court from enforcing an order appointing a special prosecutor in the prosecution of respondent Patrick Prim. The Fourth Department granted the petition. County Court exceeded its authority in granting Prim's motion to disqualify the DA's office from prosecuting a criminal case against him and appoint a special prosecutor. The mere fact that an ADA was a victim in another, unrelated case against Prim did not create an appearance of impropriety.

[Matter of Flynn v DiTullio \(2024 NY Slip Op 03280\)](#)

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