Indigent Legal Services

Decisions of Interest

JULY 5, 2024

CRIMINAL

THIRD DEPARTMENT

People v Butts | July 3, 2024

ADA FORMER LAW CLERK | ORDER VACATED / APPEAL HELD

The appellant moved to vacate a Third Department order affirming his Broome County 2nd degree CPW and 2nd degree assault conviction. The Third Department granted the motion, vacated its prior order, and held the appeal for the appointment of a special prosecutor. Appellate counsel learned after this appeal was decided that the ADA who argued the case had been the trial judge's law clerk. The ADA's involvement with the appellant's case was "personal and substantial"—she drafted the court's decision and order on his omnibus motion and on the prosecutor's consolidation motion. The appellant did not provide written informed consent waiving the conflict, so screening procedures that were clearly not undertaken here would have been required. Kathy Manley represented the appellant.

People v Butts (2024 NY Slip Op 03566) (Motion)
People v Butts (2024 NY Slip Op 03567) (Memorandum & Order)

SECOND DEPARTMENT

People v Cantie | July 3, 2024

GUILTY PLEA | NOT JURISDICTIONALLY DEFECTIVE | AFFIRMED

The appellant appealed from a Kings County Supreme Court judgment convicting him of 2nd degree assault based on his guilty plea. The Second Department affirmed. The appellant was charged in an indictment with attempted 1st degree assault and 2nd degree assault, both relating to the same complainant. The court dismissed the 2nd degree assault count with leave to re-present. Although it was never re-represented, the appellant pled guilty to that charge. This was jurisdictionally permissible—the appellant pled to a lesser crime sharing common elements and involving the same complainant as the remaining count.

People v Cantie (2024 NY Slip Op 03694)

People v Haughton | July 3, 2024

INVALID WOA | AFFIRMED

The appellant appealed from a Queens County Supreme Court sentence imposed based on his guilty plea. The Second Department affirmed. The appellant's waiver of appeal

was invalid. The court did not discuss the appeal waiver until after the appellant had already admitted guilt and mischaracterized the appellate rights being waived as encompassing the loss of the rights to counsel and poor person relief. The written waiver did not cure the court's deficient colloquy. The court never ascertained whether the appellant understood the written waiver, this was his first felony conviction, he had documented mental health issues, and he executed the written waiver after having already admitted guilt. However, the sentence was not excessive. Appellate Advocates (Anna Jouravleva, of counsel) represented the appellant.
People v Haughton (2024 NY Slip Op 03696)

FOURTH DEPARTMENT

People v Zellefrow | July 3, 2024
SORA | FOREIGN REGISTRATION | UNCONSTITUTIONAL AS APPLIED
The appellant appealed from a Chautauqua County Court order designating him a sexually violent offender. The Fourth Department reversed and vacated the sexually violent offender designation, with two justices dissenting. County Court designated the appellant a sexually violent offender based solely on his prior Pennsylvania sex offense, which was not the equivalent of a sexually violent offense in New York. For the same reasons set forth in *People v Malloy*, 2024 NY Slip Op 03264 (4th Dept 2024), the foreign registration clause of Correction Law § 168-a (3) (b) was unconstitutional as applied to the appellant. If he had been convicted in New York, he would not be designated a sexually violent offender; the result should not change simply because he committed the offense in a neighboring state. The Chautauqua County Public Defender (Heather Burley, of counsel) represented the appellant.
Oral Argument (starts at 1:41) (argued with *People v Malloy*)
People v Zellefrow (2024 NY Slip Op 03605)

People v Wiggins | July 3, 2024
CELL PHONE SEARCH WARRANT | FACIALLY INSUFFICIENT
The appellant appealed from a Monroe County Supreme Court judgment convicting him of 2nd degree murder based on his guilty plea. The Fourth Department reversed, vacated the plea, granted the appellant's suppression motion, and remitted. The appellant's waiver of appeal was invalid and the court erred in denying the motion to suppress evidence seized from his cell phone. The search warrant lacked particularity; it authorized police to search for any cell phones, including their contents, located in the appellant's vehicle. The search was not limited by reference to any particular crime. Although the supporting affidavit contained information about the crime and the appellant's exchange of text messages with the victim, referencing an affidavit does not save a warrant from facial invalidity if it is not incorporated. The Monroe County Public Defender (David R. Juergens, of counsel) represented the appellant.
Oral Argument (starts at 58:30)
People v Wiggins (2024 NY Slip Op 03614)

People v Davonte S.B. | July 3, 2024
YOUTHFUL OFFENDER | REVERSED & YO GRANTED

The appellant appealed from a Monroe County Court judgment convicting him of 2nd degree robbery based on his guilty plea. The Fourth Department reversed, vacated the conviction, and adjudicated him a youthful offender. The seriousness of the offense, the appellant's alleged gang affiliation, and his failure to complete interim probation weighed against YO treatment. However, the appellant was only 15 years old at the time of the crime (the youngest participant by three years) and had no criminal record; he accepted responsibility and cooperated with police and probation; the crime was a senseless, spur-of-the-moment decision; he used no weapon, and there was no allegation that the crime was gang motivated. The Monroe County Conflict Defender (Kathleen R. Reardon, of counsel) represented the appellant.
People v Davonte S.B. (2024 NY Slip Op 03635)

People v Norris | July 3, 2024
JUVENILE OFFENDER | NOT CRIMINALLY RESPONSIBLE
The appellant appealed from an Ontario County Court judgment convicting him as a juvenile offender of 2nd degree kidnapping, 2nd degree CPW (two counts), and attempted 1st degree robbery based on his guilty plea. The Fourth Department vacated the kidnapping and robbery convictions, dismissed those counts, and otherwise affirmed. Because the appellant was 15 years old at the time of the offense, he could not be held criminality responsible for 2nd degree kidnapping or attempted 1st degree robbery (*see* Penal Law § 30.00). The Ontario County Public Defender (Braedan M. Gillman, of counsel) represented the appellant.
People v Norris (2024 NY Slip Op 03640)

People v Woods | July 3, 2024
KIDNAPPING MERGER DOCTRINE | MODIFIED
The appellant appealed from an Onondaga County Supreme Court judgment convicting him of attempted 2nd degree kidnapping as a sexually motivated felony, 1st degree stalking, and forcible touching. The Fourth Department vacated the kidnapping and forcible touching convictions and otherwise affirmed. The appellant approached the complainant while she walked down the street. He followed her, grabbed her buttocks, and restrained her before releasing her and walking away. The kidnapping merger doctrine applied; the appellant's restraint of the complainant was simultaneous with and inseparable from his stalking and forcible touching of her. Further, it was impossible to commit 1st degree stalking without also committing forcible touching. The Hiscock Legal Aid Society (Sara A. Goldfarb, of counsel) represented the appellant.
Oral Argument (starts at 1:48:07)
People v Woods (2024 NY Slip Op 03606)

People v Drager | July 3, 2024
CRIMINAL MISCHIEF | LEGALLY INSUFFICIENT EVIDENCE
The appellant appealed from a Monroe County Court judgment convicting him of 2nd degree criminal mischief, 4th degree grand larceny, and 2nd degree auto stripping. The Fourth Department dismissed the criminal mischief charge and otherwise affirmed. The appellant stole two catalytic converters from vehicles at a repair shop. The evidence was legally insufficient to support the criminal mischief conviction; it failed to establish property

damage in an amount exceeding $1,500. The shop owner testified about the value of the catalytic converters, but there was no evidence that the vehicles could not be repaired using the recovered catalytic converters. The Monroe County Public Defender (Alexander Prieto, of counsel) represented the appellant.
Oral Argument (starts at 1:06:25)
People v Drager (2024 NY Slip Op 03641)

People v Dupuis | July 3, 2024
SORA | RISK FACTOR 4 | MODIFIED
The appellant appealed from a Steuben County Court order adjudicating him a level three sex offender. The Fourth Department modified by adjudicating him a level two offender and otherwise affirmed. The court improperly assessed 20 points under risk factor 4 for engaging in a continuing course of sexual misconduct with at least one victim. There was no evidence that the appellant engaged in acts involving intercourse or oral, anal or aggravated sexual conduct. Nor was there evidence that the three acts of sexual contact against the complainant took place over a period of at least two weeks. Rosemarie Richards represented the appellant.
People v Dupuis (2024 NY Slip Op 03645)

People v Levalley | July 3, 2024
SORA | ACCEPTANCE OF RESPONSIBILITY | MODIFIED
The appellant appealed from a Monroe County Court order adjudicating him a level two sex offender. The Fourth Department modified by adjudicating him a level one offender and otherwise affirmed. County Court erred in assessing 10 points under risk factor 12 for failing to accept responsibility. At the plea colloquy, when asked whether he admitted to having engaged in the alleged conduct, the appellant responded, "I believe so." This did not constitute a failure to accept responsibility—he pleaded guilty and told probation that he stood by his plea. The Monroe County Public Defender (Clea Weiss, of counsel) represented the appellant.
People v Levalley (2024 NY Slip Op 03648)

People v Harris | July 3, 2024
HARSH AND EXCESSIVE | SENTENCE REDUCED
The appellant appealed from a Monroe County Court judgment convicting him of 2nd degree murder, 2nd degree attempted murder, and 2nd degree CPW (two counts) and imposing an aggregate sentence of 44 years to life. The Fourth Department reduced the aggregate sentence to 35 years to life and otherwise affirmed. The appellant's codefendant received an aggregate sentence of 25 years to life. Although the appellant's lengthier sentence was appropriate since he was the shooter, 44 years was harsh and excessive. The Monroe County Public Defender (Paul Skip Laisure, of counsel) represented the appellant.
Oral Argument (starts at 19:50)
People v Harris (2024 NY Slip Op 03590)

People v Wright | July 3, 2024
GUILTY PLEA | SAME ACT | CONCURRENT SENTENCES REQUIRED

The appellant appealed from a Cayuga County Court judgment convicting him of 1st degree riot and attempted 2nd degree assault (three counts) based on his guilty plea. The Fourth Department vacated the consecutive sentences imposed on two of the assault counts and remitted for resentencing. No facts were adduced to establish that the appellant committed two separate and distinct acts causing injury to the complainants named in those counts. Accordingly, concurrent sentences were required. Banasiak Law Firm (Piotr Banasiak, of counsel) represented the appellant.
People v Wright (2024 NY Slip Op 03613)

People v Clark | July 3, 2024
CROSS-RACIAL ID | SUGGESTIVE PROCEDURE | DISSENT
The appellant appealed from a Monroe County Supreme Court judgment convicting him of 1st degree robbery (two counts) and 2nd degree robbery (two counts). The Fourth Department affirmed, with one justice dissenting. In the dissent's view, the conviction was against the weight of the evidence. The sole evidence of the appellant's guilt was a single witness' cross-racial identification, which was the product of her flawed memory tainted by police suggestivity. The witness first identified the appellant in a non-blind photo array. When she expressed uncertainty about her identification, the same investigator conducted a second non-blind photo array, after which he confirmed that she had identified the same person twice. That she later identified the appellant in a lineup and at trial did not cure the suggestive police conduct; rather, it showed the extent to which it tainted her subsequent identifications.
Oral Argument (starts at 52:00)
People v Clark (2024 NY Slip Op 03586)

APPELLATE TERM

People v Anderson | July 1, 2024
CHANGED JURY CHARGE | RIGHT TO EFFECTIVE SUMMATION | REVERSED
The appellant appealed from a Nassau County District Court judgment convicting him of public lewdness. The Appellate Term, Second Department reversed and remitted for a new trial. The court agreed to give the standard jury instruction for public lewdness for conduct committed in private premises based on its incorrect belief that the subject premises (a CVS) were private. After summation, the court reversed its decision and charged the jury with public lewdness in a public place. By doing so, the court deprived the appellant of the right to an effective summation. Martin Geoffrey Goldberg represented the appellant.
People v Anderson (2024 NY Slip Op 24184)

FAMILY

FOURTH DEPARTMENT

Matter of Jaycob S. | July 3, 2024
ABUSE | ORDER OF PROTECTION VACATED

The grandfather appealed from a Steuben County Family Court order finding that he had abused the subject children and issuing a full stay-away order of protection against him. The Fourth Department vacated the order of protection and otherwise affirmed. Family Court Act § 1056 (4) permits Family Court to issue an independent order of protection, but only against a person unrelated to the child by blood or marriage. Mullen Associates PLLC (Alan P. Reed, of counsel) represented the grandfather.
Oral Argument (starts at 1:16:20)
Matter of Jaycob S. (2024 NY Slip Op 03595)

Matter of Hudson v Carter | July 3, 2024

VISITATION | CHANGE OF CIRCUMSTANCES| REVERSED

The father appealed from a Monroe County Family Court order denying his modification petition. The Fourth Department reversed and remitted for Family Court to set an in-person visitation schedule. Family Court erred in determining that the father had not established the requisite change of circumstances. The prior order provided that the father exercising twice-weekly supervised visitation for six months would constitute a change of circumstances. It was uncontroverted that he had done so. The mother's relocation to Arizona was also a substantial change of circumstances because it interfered with the father's visitation rights. The record further demonstrated that modification to include in-person visitation would serve the children's best interests. The Monroe County Public Defender (Tonya Plank, of counsel) represented the father.
Oral Argument (starts at 1:38:30)
Matter of Hudson v Carter (2024 NY Slip Op 03615)

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