Indigent Legal Services

Decisions of Interest

AUGUST 27, 2024

CRIMINAL

FIRST DEPARTMENT

People v Wilson | August 22, 2024

LEGAL SUFFICIENCY | LESSER INCLUDED REQUIRED | REVERSED & REMITTED

The appellant appealed from a New York County Supreme Court judgment convicting him of 1st degree attempted assault and 2nd degree assault. The First Department reversed and remanded for a new trial. The appellant and his alleged co-conspirator got into a fight with a group of men; one man was stabbed, and another was knocked out. The evidence was legally insufficient to support an acting in concert theory; there was no indication that the appellant was aware that his alleged co-conspirator had a dangerous weapon. Nevertheless, the verdict was not against the weight of the evidence; it may be presumed that the jury convicted on the alternate, factually sufficient ground. However, the trial court erred by failing to charge the jury with attempted 3rd degree assault as a lesser included offense. There was a reasonable view of the evidence that the appellant merely attempted to cause physical injury without use of a dangerous instrument. Office of the Appellate Defender (Margaret E. Knight, of counsel) represented the appellant.

Oral Argument (starts at 1:10:30)

People v Wilson (2024 NY Slip Op 04285)

TRIAL COURTS

People v McClaine | 2024 WL 3884510

VEHICLE STOP | SEARCH NOT JUSTIFIED | EVIDENCE SUPPRESSED

McClaine moved to suppress statements and physical evidence relating to a 2nd degree CPW charge. Erie County Court granted the motion. An officer stopped the U-Haul truck that McClaine was driving for failing to signal within 100 feet of a turn. McClaine provided a valid driver's license but could not find his cell phone which contained a copy of the truck rental agreement. McClaine gave the officer his other phone so that he could talk to the renter directly. The officer ordered McClaine and his passenger out of the truck, told the renter to text a copy of the agreement to McClaine's cell phone, tossed that phone on the front seat of the patrol car, and locked McClaine and his passenger in the back. A search of the truck uncovered the lost cell phone and a gun. The officers never attempted to retrieve a copy of the agreement from the recovered cell phone, nor did they check to see if the agreement was sent to the phone locked in the patrol car. Regardless, they were not justified in searching the truck based on the absence of a rental agreement—

there was no indication that the truck was stolen. NOTE: The court, while remarking on the fundamental unfairness of the outcome, denied the co-defendant/passenger's suppression motion for lack of standing because he was charged based on constructive possession of the gun and not the statutory automobile presumption—even though the People relied on the statutory presumption at his CPL 180.80 hearing.
People v McClaine (2024 NY Slip Op 24220)

People v Torhan | 2022 WL 22865750

DWAI DRUGS | NO PROBABLE CAUSE | REFUSAL SUPPRESSED

Torhan moved to suppress evidence of his refusal to submit to a chemical test. Beacon City Court granted the motion. An officer approached Torhan after he was involved in a car accident. Torhan denied having consumed alcohol and reported that he was taking several prescription medications, had diabetes, a foot injury and "wet brain" and had suffered a stroke. Torhan failed the nystagmus test by not keeping his head still, was unable to perform the walk and turn test due to his foot injury, and failed the one leg stand test. He consented to a breathalyzer test, which was negative. The officer arrested Torhan even though he was unsure what, if anything, he had taken, and Torhan refused a chemical test. There was no probable cause for the arrest. There was no evidence that the officer was trained or experienced in identifying individuals under the influence of narcotics; Torhan never admitted to taking any drugs listed under Public Health Law § 3306; and there was no indication that any drug paraphernalia or non-prescribed medications were recovered.
People v Torhan (2024 NY Slip Op 51442[U])

People v Tsui | 2024 WL 3883520

SORA | BACK-TO-BACK OFFENSES | DOWNWARD DEPARTURE GRANTED

Tsui requested a downward departure after the RAI placed him as a presumptive level two sex offender. New York County Criminal Court granted the application and adjudicated him a level one offender. In December 2023, Tsui pleaded guilty to forcible touching and was sentenced to a conditional discharge requiring sex offender treatment. Six days later, he committed the instant offense of forcible touching. The RAI failed to adequately account for the circumstances of this case. Tsui was only 26 years old and had limited criminal contacts. He committed the second, similar offense before he had the chance to engage in and benefit from treatment. After starting treatment, he showed signs of improvement, made consistent efforts to participate, and acknowledged his need for treatment. He received an overall favorable treatment report and had not reoffended.
People v Tsui (2024 NY Slip Op 51076[U])

FEDERAL COURTS

U.S. v Johnson | August 20, 2024

ERLINGER | ACCA | JURY DETERMINATION REQUIRED

The appellant appealed from a Southern District of Indiana judgment convicting him of possession of a firearm as a convicted felon and sentencing him as a career offender under the ACCA. The Seventh Circuit reversed and remitted. The appellant had been previously convicted of three counts of robbery under Indiana law—a violent felony under

the ACCA. He argued that he did not qualify as a career offender because he committed two of those robberies on the same occasion. Relying on the Seventh Circuit's precedent, the district court rejected that contention, concluded that the robberies were committed on different occasions, and sentenced him as a career offender. In light of the Supreme Court's recent holding in *Erlinger v U.S.* (144 S Ct 1840, 1852 [2024]), the district court was required to send the different-occasions question to the jury.
U.S. v Johnson (No. 23-2338)

FAMILY

SECOND DEPARTMENT

Matter of Mackay v Bencal | August 21, 2024

VISITATION CONDITIONED ON THERAPY | ORDER OF PROTECTION | MODIFIED AND REMITTED

The mother appealed from Suffolk County Family Court orders: (1) granting the father sole legal and residential custody of the child; (2) conditioning the mother's parental access on her participation in psychotherapy and the determination of the father and her psychologist; and (3) directing the mother to have no contact with the child for two years pending further order of the court. The Second Department deleted the provision conditioning the mother's parental access on her participation in psychotherapy and vacated the stay-away order of protection. The court's determination to issue a two-year full stay away order lacked a sound and substantial basis in the record, and it was error for the court to condition the mother's future parental access on her participation in psychotherapy. Tabat, Cohen, Blum, Yovino & Diesa, P.C. (Angela A. Ruffini, Kevin Mulligan, and Robert A. Cohen, of counsel) represented the mother.
Matter of Mackay v Bencal (2024 NY Slip Op 04266)

Statewide Appellate Support Center
New York State Office of Indigent Legal Services
80 S Swan St, Ste 1147, Albany, NY 12210 | www.ils.ny.gov
(518) 486-6602 | SASC@ils.ny.gov