Indigent Legal Services

Decisions of Interest

SEPTEMBER 18, 2024

CRIMINAL

APPELLATE DIVISION, FIRST DEPARTMENT

People v Torres | September 12, 2024

WRONGFUL DENIAL OF SUPPRESSION | REVERSED AND DISMISSED | CONCURRENCE

Appellant appealed from a New York County Court judgment convicting him of fifth-degree CPCS. The First Department reversed and dismissed based on the suppression court's erroneous ruling upholding the frisk. Appellant's failure to produce his license and registration, along with the officers' observations of the vehicle shaking after being pulled over, PCP odor, poor lighting conditions, and the appellant's nervousness, provided, at most, a level-two founded suspicion that criminality was afoot. The officers too quickly escalated the encounter from a common-law right to inquire to a level-three frisk without the requisite reasonable suspicion, requiring suppression of the drugs, reversal, and dismissal. The concurrence observed that if the officers' testimony about smelling PCP had been credited by the hearing court, their actions would have been justified. The hearing court's refusal to credit this testimony meant the appellate court was precluded from considering it pursuant to *People v. LaFontaine*, 92 NY2d 470 [1998]. The Office of the Appellate Defender (Rosemary Herbert, of counsel) represented Torres.

People v Victor Torres (2024 NY Slip Op 04442)

APPELLATE TERM, SECOND DEPARTMENT

People v Jimenez | August 12, 2024

SUBSTANCE USE/WEAPONS UNRELATED TO CHARGES | PROBATIONARY CONDITIONS STRUCK

Appellant pled guilty in Dutchess County Town Court to third-degree identity theft and was sentenced to three years' probation, stemming from appellant's alleged use of a credit card without permission. The Appellate Term modified the sentence by striking six conditions of probation: (1) requiring consent to searches for narcotics and weapons; (2) prohibiting purchase or possession of weapons; (3) prohibiting alcohol or marijuana consumption; (4) requiring mental health and substance use evaluations and treatment; (5) prohibiting frequenting or buying alcohol at specific establishments; and (6) requiring an unspecified amount of restitution. Where appellant was a first-time offender, not armed or under the influence of drugs or alcohol at the time of the offense, and never assessed

as needing drug/alcohol treatment, these probationary conditions were not individually tailored to the offense or reasonably related to rehabilitation. Dutchess County Public Defender (Jenner Burton, of counsel) represented Jimenez.
People v Jimenez (2024 NY Slip Op 51179(U))

People v Fields | August 9, 2024

CANNIBIS USE UNRELATED TO CHARGES | PROBATIONARY CONDITION STRUCK

Appellant pled guilty in Queens County Criminal Court to third-degree CPFI, in satisfaction of an accusatory instrument charging menacing and CPW, and was sentenced to 20 days' jail, concurrent with 3 years' probation. Appellant had allegedly fired four gunshots at the complainant, saying, "I know where you live at, I will kill you," and fled in a vehicle with a forged license plate. The Appellate Term struck a probationary condition prohibiting the use of cannabis or "concentrated cannabis." While appellant had admitted to daily marijuana use, cannabis was not related to or implicated in any of the charged offenses; nor was appellant assessed as needing substance abuse treatment. The Court also recognized that marijuana possession for personal use was legalized by the time of sentencing. Appellate Advocates (Victoria L. Benton, of counsel) represented Fields.
People v Fields (2024 NY Slip Op 24232)

People v Harvey | August 9, 2024

SUBSTANCE USE TREATMENT NOT RECOMMENDED | CONSENT TO SEARCHES CONDITION STRUCK

Appellant pled guilty in Queens County Criminal Court to four charges of third-degree unauthorized use of a vehicle and was sentenced to four concurrent two-year terms of probation. Although appellant had admitted to being under the influence of alcohol and marijuana at the time of the offenses, the Appellate Term struck the condition of probation requiring appellant to consent to searches of his person, vehicle, and home, as well as seizure of any weapons or drugs, reasoning that the probation department had not recommended abstention or substance use treatment. Moreover, at the time of sentencing, simple marijuana possession had been legalized. Appellate Advocates (Russ Altman-Merino, of counsel) represented Harvey.
People v Harvey (2024 NY Slip Op 51167(U))

TRIAL COURTS

People v Banks | 2024 WL 4128665

ERLINGER | PERSISTENT VIOLENT FELONY OFFENDER STATUTE UNCONSTITUTIONAL | LEAVE TO REFILE PREDICATE STATEMENT

After Banks was convicted in New York County Supreme court of several violent sexual felonies, the prosecution requested sentencing as a persistent violent felony offender based on two prior felony convictions from 1984 and 1991. The prosecution argued that the statute's 10-year look-back period was extended by four intervening periods of state and local incarceration. Under the recent Supreme Court decision in *Erlinger v U.S.*, 144 S Ct 1840 [2024], facts concerning the tolling effect of Banks' prior incarceration must be

found by a jury, not a judge, before he could be subjected to enhanced sentencing. Accordingly, the Court held that CPL § 400.15(7)(a) is unconstitutional under the Sixth Amendment as applied to Banks. The court also lacked inherent authority to impanel a jury for sentencing. Not only does CPL § 400.15 require predicate determinations to be made by a judge, but it would infringe on the legislative function for judges to fashion policies and procedures concerning jury predicate determinations. Banks will be sentenced as a first felony offender, unless the prosecution submits a request for persistent felony offender status, as Supreme Court determined that the same constitutional problems with factual determinations regarding tolling would bar sentencing as a second violent felony offender. Susan Calvello represented Banks.
Note: ILS's Statewide Appellate Support Center (SASC) consulted on this case. The SASC is available to conduct or assist with moot arguments and case consultations upon request. Request a consult here.
People v Banks (2024 NY Slip Op 24241)

People v Smith | 2024 WL 4157997

WADE HEARING | POLICE CONDUCT UNREASONABLE | SUPPRESSION GRANTED

Smith challenged the admissibility of an identification by an eyewitness to a shooting who identified him in the second of two purportedly double-blind photo arrays, given four days apart. Supreme Court, Kings County, determined, after a *Wade* hearing, that the prosecution had not met their burden of going forward and suppressed the identification. While successive photo arrays are not *per se* unduly suggestive, here (1) the same photo of Smith was used in both arrays, with different fillers, (2) there were significant inconsistencies in both the written reports and the testimony of the detectives who conducted the arrays, (3) the investigating detectives were present for the first photo array, and (4) the prosecution failed to call the lead detective on the case, who was "a critical link" between the two viewings. Based on the totality of the circumstances, the prosecution failed to prove the reasonableness of the police conduct.
People v Smith (2024 NY Slip Op 51246(U))

People v Green | 2024 WL 4140061

DISORDERLY CONDUCT | FACIALLY INSUFFICIENCT INFORMATION | DISMISSED

A Monroe County misdemeanor information charging disorderly conduct alleged that Green took a "fighting stance" and was "involved with a disturbance with another male," in front of the attesting officer. The information was facially deficient and must be dismissed. There was no description of Green's actions, specific body language, or the "so-called disturbance." The accusatory instrument also relied on the conclusory allegation that the incident took place in a "public setting," devoid of facts from which the court could infer that Green's actions caused public harm. Monroe County Public Defender (Sara Gaylon, of counsel) represented Green.
People v Green (2024 NY 51240(U))

FAMILY

THIRD DEPARTMENT

Matter of C.M. v. Z.N. | September 12, 2024

CUSTODY MODIFICATION | REVERSED AND REMITTED

The mother appealed from a Tioga County Family Court order awarding sole legal custody to the father and granting the mother parenting time "as the parties agree, taking into consideration the child's wishes." The Third Department reversed both parts of the order and remitted to Family Court for a hearing regarding parenting time. There was no indication on the record that the parties were unable to effectively communicate to meet the child's needs, or that joint legal custody was otherwise rendered unfeasible or inappropriate, and therefore, reverted to the prior order of joint legal custody. Family Court also improperly delegated the parenting time determination to the father. The Third Department reminded Family Court that disclosures in a *Lincoln* hearing must remain confidential. John A. Cirando represented the mother.

Matter of C.M. v Z.N. (2024 NY Slip Op 04427)

Matter of Carrie X. (Amber Y.) | September 12, 2024

TERMINATION OF PARENTAL RIGHTS | UNTIMELY NOTICE OF APPEAL | DISMISSED

The mother appealed from a Broome County Family Court order terminating her parental rights. The court dismissed the appeal as untimely because the Notice of Appeal filed by the mother, not represented by counsel, was filed well after the 35-day statutory time limit had run. The Third Department therefore lacked jurisdiction to hear the appeal. The mother was represented in Family Court, and the court had emailed the termination order to her attorney on the same day it mailed the order to her.

Matter of Carrie X. (Amber Y.) (2024 NY Slip Op 04423)

Matter of Marilyn Y. v. Carmella Z. | September 12, 2024

GRANDPARENT VISITATION | PARTIALLY AFFIRMED AND REMITTED

The mother appealed from a Schenectady County Family Court order awarding the paternal grandmother biweekly unsupervised visitation. The Third Department affirmed but remitted for a hearing to determine a new visitation schedule in accordance with the best interests of the child. The five-hour unsupervised biweekly visitation was inappropriate because the grandmother has become an unfamiliar person to the child, following no contact in nearly two years. Carl D. Birman represented the grandmother.

Note: ILS's Statewide Appellate Support Center (SASC) conducted a moot argument for Mr. Birman in this case. The SASC is available to conduct or assist with moot arguments and case consultations upon request. Request a consult here.

Matter of Marilyn Y. v Carmella Z. (2024 NY Slip Op 04425)

Matter of John O. (Cassandra P.) | September 12, 2024

ARTICLE 10 | EFFECT OF DV ON CHILDREN | REVERSED IN PART

The mother appealed from an Otsego County Family Court order granting custody of her youngest child to the grandparents after a finding of neglect and order of disposition in an Article 10 case. Although the custody and dispositional order were entered on consent,

the appeal from that order permitted the Third Department to review the underlying findings of neglect. The Third Department affirmed the finding of educational neglect but reversed the finding of domestic violence. The record was devoid of any testimony as to the impact of the mother's and boyfriend's arguments on the children's physical, mental, or emotional condition, or whether such exposure placed the children at imminent risk of impairment. A physical altercation, while serious, took place outside of the children's presence, and they were unaware of it. Lisa K. Miller represented the mother.
Matter of John O. (Cassandra P.) (2024 NY Slip Op 04420)

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