Indigent Legal Services

# Decisions of Interest

SEPTEMBER 26, 2024

## CRIMINAL

## APPELLATE DIVISION, FIRST DEPARTMENT

### ***People v Sparks*** | 9/19/2024

SENTENCE EXCESSIVE | SEVERE MENTAL ILLNESS | DISSENT

Appellant appealed from a New York County Court judgment convicting him of third-degree robbery and sentencing him, following a negotiated plea, to 3-to-6 years' imprisonment. The First Department reduced, finding the sentence excessive considering appellant's history of severe mental illness. The majority observed that "[t]here is no reason to believe that further incarceration will rehabilitate him, and the record clearly demonstrates that [appellant] needs rehabilitation, not punitive incarceration." The dissent opined that the negotiated sentence, allowing appellant to plead to a non-violent felony and thus avoid a life sentence as a persistent violent felony offender, was fair. Center for Appellate Litigation (Leanna J. Duncan, of counsel) represented Sparks.

People v Yusuf Sparks, NY Slip Op 04488

### ***People v Tapia*** | 9/19/2024

PROBABLE CAUSE FOR ARREST EXISTED | OBSERVED BEHAVIOR EQUIVOCAL | DISSENT

Appellant appealed from a New York County Court judgment convicting him of third-degree CSCS and CPCS. The First Department affirmed, holding that the hearing court properly declined to suppress drugs recovered from appellant because the police had probable cause to arrest. In a known drug location, an experienced officer observed a known drug user give appellant something, saw appellant put his hands into his pants and touch hands with the known user. "Probable cause can be found despite an officer's inability to identify the object that changed hands." The dissent observed that appellant was arrested and searched based on a brief interaction with a known drug user in a known drug area, and the observed behavior was at most equivocal and subject to innocent interpretation. The dissent would have held that the officer's observations did not give rise to reasonable suspicion or probable cause. The Legal Aid Society of NYC (Harold V. Ferguson, of counsel) represented Tapia.

People v Tapia, NY Slip Op 04487

# APPELLATE DIVISION, THIRD DEPARTMENT

***People v. Herbert* | September 19, 2024**

INVALID WAIVER OF APPEAL | SENTENCE NOT HARSH OR SEVERE | AFFIRMED

Appellant appealed from a Schenectady County Court judgment, following a guilty plea, convicting him of second-degree rape, third-degree criminal sexual act, and endangering the welfare of a child. The Third Department affirmed but found the waiver of appeal to be invalid, because the lower court's explanation was overly broad and signified a complete bar to any appellate rights. However, considering the nature and circumstances of the crimes, the sentence was not unduly harsh or severe. Aaron A. Louridas represented Herbert.
People v Herbert (2024 NY Slip Op 04494)

***People v Little* | September 19, 2024**

INVALID WAIVER OF APPEAL | SENTENCE NOT HARSH OR SEVERE | AFFIRMED

Appellant appealed from a Cortland County Court judgment convicting him of third-degree rape after a plea. The Third Department affirmed but found the waiver of appeal to be invalid. The court did not engage in any oral colloquy regarding the waiver, nor did it ask about the written waiver, including whether appellant understood its contents or had discussed it with his attorney. However, the sentence of 4 years' imprisonment, plus 15 years' PRS, as a second felony offender, was not unduly harsh or severe. Rural Law Center of New York (Lora J. Tryon, of counsel) represented Little.
People v Little (2024 NY Slip Op 04493)

***People v Gentry*| September 19, 2024**

INVALID WAIVER OF APPEAL | AFFIRMED | NOT HARSH OR SEVERE

Appellant appealed from a Schenectady County Court judgment convicting him of second-degree robbery after a plea. The Third Department affirmed but found the waiver of appeal to be invalid. The written waiver contained inaccurate and overbroad language, which was not remedied by the colloquy. However, the sentence of 6.5 years' imprisonment, plus 5 years of PRS, as a second felony offender, was not unduly harsh or severe. Terrence M. Kelly represented Gentry.
People v Gentry (2024 NY Slip Op 04490)

***People v Willis* | September 19, 2024**

30.30 | ILLUSORY COC | REVERSED AND INDICTMENT DISMISSED

Appellant appealed from a Columbia County Court judgment convicting her, following a guilty plea, of second- and third-degree CPCS, CPW, and endangering the welfare of a child. The People were not ready for trial within the 30.30 timeframe—as they conceded—rendering their COC illusory. The Third Department therefore reversed and dismissed the indictment. Shane A. Zoni represented Willis.
People v Willis (2024 NY Slip Op 04496)

***People v Baldner*** **|** September 19, 2024

DEPRAVED INDIFFERENCE | PROSECUTION APPEAL| REVERSED | DISSENT

The prosecution appealed from an Ulster County order that had partially granted a motion to dismiss depraved indifference murder and first-degree reckless endangerment charges based on legally insufficient evidence before the grand jury. The Third Department reversed and reinstated the charges, finding that the evidence was legally sufficient to establish that Baldner—a state trooper—acted with depraved indifference, an essential element of both crimes. The charges arose from two incidents in which the trooper engaged in high-speed chases on the NYS Thruway, one of which resulted in an 11-year-old girl's death in an overturned vehicle. The dissenting justice agreed with County Court that reckless driving alone was insufficient to establish the element of depraved indifference. Larkin Ingrassia LLP (John Ingrassia, of counsel) represented Baldner.
People v Baldner (2024 NY Slip Op 04495)

***Matter of Moorer v Annucci*** **|** September 19, 2024

ARTICLE 78 | PRISON DISCIPLINARY VIOLATION | PARTIALLY REVERSED

The petitioner sought review of a determination that he had violated prison disciplinary rules. The court held—and the respondent DOCCS conceded—that the determination that Moorer was guilty of possessing contraband was not supported by substantial evidence. The court remitted for a redetermination of the penalty to be imposed on additional charges, which were affirmed. Petitioner Devonte Moorer represented himself.
Matter of Moorer v Annucci (2024 NY Slip Op 04501)

# APPELLATE TERM, FIRST DEPARTMENT

***People v Chamol*** **|** 2024 WL 4178817
***People v Scottmanson*** **|** 2024 WL 4178826
***People v Vasquez*** **|** 2024 WL 4179070

DLSRA | NOT RETROACTIVE | FEES AND SURCHARGES AFFIRMED

Chamol, Scottmanson, and Vasquez pled guilty to driving while impaired and were sentenced, inter alia, to fines of $300 and $255 in mandatory surcharges and fees. The Appellate Term, First Department affirmed and declined to waive the imposition of these financial penalties in the interest of justice, holding that the Driver's License Suspension Reform Act (DLSRA) does not apply retroactively to someone whose conviction occurred prior to the statute's enactment.
People v Chamol (2024 NY Slip Op 51260(U))
People v Scottmanson (2024 NY Slip Op 51260(U))
People v Vasquez (2024 NY Slip Op 51261(U))

# TRIAL COURTS

### ***People v Wilber S.*** | 2024 WL 4195377

30.30 | PORTABLE BREATH TEST RECORDS | BWC AUDIT TRAILS | CHARGES DISMISSED

Wilbur S. was charged with DWI and DWAI and sought speedy trial dismissal. Criminal Court, Queens County, granted the 30.30 motion and dismissed the charges, because the prosecution had failed to turn over records pertaining to the portable breath test performed on Wilbur S. prior to filing the COC. Under CPL 245.20[1], it does not matter that the prosecution had agreed not to introduce these records into evidence, and they failed to either provide an explanation for the discovery lapse or to establish that they made diligent efforts to obtain them prior to filing the COC. Criminal Court rejected the defense 30.30 argument, however, regarding belated disclosure of BWC audit trails, citing "uncertainty in the law." The Legal Aid Society of NYC (Donna Lewis, of counsel) represented Wilber S.
People v Wilbur S. (2024 NY Slip Op 51279(U))

### ***People v Perkett*** | 2024 WL 4220549

DOUBLE PREDICATE RULE | APPLIES TO NON-QUALIFYING OFFENSES | REMAND REQUIRED

Perkett, who had at least three prior felony convictions, faced charges of third-degree burglary, petit larceny, and fourth-degree criminal mischief. At arraignment in Herkimer County City Court, he sought release on electronic monitoring. The court denied the request, holding that remand was required under the double predicate rule, which prohibits local criminal courts from authorizing ROR or bail where the accused has multiple felony convictions. Citing the unambiguous statutory language in CPL 530.20[2][a][ii], City Court declined to resort to an examination of legislative history, disagreeing with People ex rel Bradley v Baxter, 79 Misc 3d 988 [Sup Ct, Monroe Cty 2023], People v Logvinsky, 2024 NY Slip Op 24137 [Cty Ct, Monroe Cty], and Parker v Hilton, 2024 NY Slip Op 32652[U] [Sup Ct, Oswego Cty], which read "felony" in the double predicate rule to include only *qualifying* felony offenses. City Court also noted that People v Arroyo, 79 Misc 3d 1213[A] [Rochester City Ct, Monroe Cty 2023], held the double predicate rule required remand after examining the same legislative history. Philip O'Donnell represented Perkett.
People v Perkett (2024 NY Slip Op 51292(U))

### ***People v Dorcena*** | 2024 WL 4247509

30.30 | BREATH MACHINE RECORDS | UNSUBSTANTIATED *GIGLIO* | CHARGES DISMISSED

Dorcena was charged with operating a motor vehicle under the influence and sought speedy trial dismissal. Justice Court of the Town of Clarkstown, Rockland County, granted the 30.30 motion and dismissed the charges, because the prosecution had not established that they exercised due diligence in ensuring that breath machine documentation was accessible to the defense via a discovery link. "The prosecution cannot not rely on an automatic system of discovery maintained by other law enforcement agencies; they must review and check a discovery link to determine that the mandated discovery items are present." Justice Court rejected the defense's 30.30 argument regarding non-disclosure of unsubstantiated allegations of misconduct by a police witness. While acknowledging the "majority view…that unsubstantiated allegations are

subject to discovery," the Court found that the "confusing and unsettled split of authority" in this area meant the prosecution had exercised sufficient due diligence.
People v Dorcena (2024 NY Slip Op 51303(U))

### ***People v Palma*** | 2024 WL 4247534

30.30 | BREATH MACHINE RECORDS | *GIGLIO* FOR NON-TESTIFYING OFFICERS | CHARGES DISMISSED

Palma was charged with aggravated unlicensed operation of a motor vehicle and operating a motor vehicle while under the influence of alcohol, along with numerous traffic infractions. Justice Court of the Town of Clarkstown, Rockland County, granted the defense's 30.30 motion and dismissed the charges. The prosecution had provided the accused's DMV abstract, breath machine records, and *Giglio* material for police witnesses beyond the discovery deadline, rendering their initial COC illusory. Because "the DMV records and breath machine repair records—routinely produced discovery materials—were critical to the underlying case" and "[t]he failure to produce them would have been readily apparent to a prosecutor exercising due diligence," the prosecution's failure to recognize this evinced a lack of due diligence. Justice Court disagreed with the defense argument, however, that the COC was invalid based on the failure to turn over *Giglio* material for *non-testifying* police officers, citing "confusion caused by contradictory and inconsistent court rulings" on this issue. Rockland County Public Defender (Samuel Coe, of counsel) represented Palma.
People v Palma (2024 NY Slip Op 51304(U))

# FAMILY

## APPELLATE DIVISION, FIRST DEPARTMENT

### ***Matter of Emmanuel C.F. (Patrice M.D.F.)*** | September 19, 2024

DENIAL OF EXPEDITED 1028 HEARING | REVERSED AND REMITTED

The mother appealed from a Bronx County Family Court order denying her request for an expedited 1028 hearing. The First Department reversed and remitted for an expedited hearing with no further adjournments except for good cause shown. Although the 1028 hearing commenced within three court days as required, Family Court continued it in a piecemeal fashion over many months, contrary to the plain language of the statute requiring expediency. Arnold & Porter Kaye Scholer LLP (William T. Sharon, of counsel) represented the mother.
Matter of Emmanuel C.F. (Patrice M. D. F.) (2024 NY Slip Op 04482)

## APPELLATE DIVISION, THIRD DEPARTMENT

### ***Matter of Joanna PP. v Ohad PP.*** | September 19, 2024

MODIFICATION OF CUSTODY | REVERSED AND REMITTED

The father appealed from a Chenango County Family Court order awarding the mother sole custody of the children, with a week-on-week-off parenting time schedule and equal

access to the children's medical and educational records. The Third Department reversed. Family Court had an unbalanced approach to the evidence, in particular the children's allegations of excessive corporal punishment and the mother's acknowledged purposeful noncompliance with the parties' stipulation. Since numerous violations and modification petitions, containing serious allegations, were filed since entry of the order on appeal, the Third Department remitted the case for updated fact-finding. Rosenberg Law Firm (Jonathan Rosenberg, of counsel) represented the father.
Matter of Joanna PP. v Ohad PP. (2024 NY Slip Op 04497)

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