

CRIMINAL

FIRST DEPARTMENT

DECISION OF THE WEEK

***People v Watson*, 1/10/19 – *BATSON* RECONSTRUCTION / INDICTMENT DISMISSED**

On a prior appeal, the First Department held that Bronx County Supreme Court failed to follow the *Batson v Kentucky* protocol and remanded for a reconstruction hearing to recreate a record of the prosecutor's justifications for striking certain venire persons. At such a hearing, it is typical to rely on the contemporaneous notes of the prosecutor and to elicit testimony from him or her. That did not happen here. The ADA who conducted the voir dire did not appear, and no testimony or notes were offered. The procedure was insufficient. The People noted that seated venire persons who expressed hostility toward police had not been the victims of police harassment. The appellate court observed that refusing to seat potential jurors who had been unfairly stopped or otherwise been victims of police harassment was a pretext for excluding a protected group. There was no basis to remand for a second *BATSON* hearing. The judgment convicting the defendant of 2nd degree assault and other charges was reversed, and the indictment was dismissed. Two judges dissented. The Center for Appellate Litigation (Jody Ratner, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2019/2019_00217.htm

***People v Allende*, 1/10/19 – ROBBERY CONVICTION / COUNT DISMISSED**

The defendant appealed from a judgment of New York County Supreme Court, convicted him after a jury trial of 1st and 2nd degree robbery. The First Department vacated the robbery one conviction and dismissed that count. The robbery was accomplished by assaulting the victim and taking his wallet. Although an eyewitness saw what appeared to be a firearm, there was no evidence that the victim saw it. Two justices dissented as to the sentence, opining that the term of eight years should have been reduced to five years. The defendant was only 21 at the time of the crime, his first felony conviction. After his mother died when he was 16, the defendant struggled with untreated depression and bipolar disorder. Further, the codefendant was the one who violently punched the victim, yet he received only five years. The defendant's sentence appeared to be an unnecessarily harsh response to his exercise of the right to go to trial. The Center for Appellate Litigation (Megan Byrne, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2019/2019_00195.htm

***People v Ataraoua*, 1/10/19 – ATT. ROBBERY / BAD JURY CHARGE / NEW TRIAL**

The defendant appealed from a judgment of Bronx County Supreme Court, convicting him of 2nd degree murder and 2nd degree CPW. The First Department reversed and ordered a new trial. In connection with the larceny element of attempted robbery—the offense underlying the felony murder charge—upon the defense request, the trial court should have instructed the jury on the definition of “deprive.” The failure to do so constituted reversible error, since such omission could have misled the jury into thinking that *any* withholding, permanent or temporary, constituted larceny. It was the function of the jury to determine whether the defendant intended to rob the victim and permanently keep the property taken

from him. The court usurped that function. The Center for Appellate Litigation (David Klem, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2019/2019_00197.htm

SECOND DEPARTMENT

***People v Alexander*, 1/9/19 – ANOTHER *BATSON* ERROR / NEW TRIAL**

The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 1st degree manslaughter and 2nd degree CPW. The Second Department reversed and ordered a new trial. Supreme Court should not have granted the prosecutor's peremptory challenge to a prospective black juror. The trial court did not rule on the defendant's initial *BATSON* challenge relating to the prosecutor's view that the potential juror was too young and inexperienced to serve on a jury for a murder trial. Appellate Advocates (Sean Murray, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2019/2019_00135.htm

***People v Andre*, 1/9/19 – ENHANCED SENTENCES ERROR / VACATED**

The defendant appealed from three judgments of Kings County Supreme Court, convicting him of 2nd degree burglary and other crimes upon his pleas of guilty. In the interest of justice, the Second Department vacated the sentences and remitted for resentencing. The defendant entered pleas of guilty under three separate indictments and was promised concurrent sentences. After he did not appear on the sentencing date, Supreme Court directed that two sentences would run consecutively. Since the court did not warn the defendant that his return for sentencing was a condition of the plea/sentencing commitments, enhanced sentences should not have been imposed. Appellate Advocates (Lynn Fahey, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2019/2019_00136.htm

***People v Griffith*, 1/9/19 – *PEQUE* VIOLATION / REMITTAL**

The defendant appealed from a judgment of Kings County Supreme Court, convicting him, upon his plea of guilty, of 2nd degree criminal sale of a controlled substance and 2nd degree conspiracy. The Second Department remitted to allow the defendant to move to vacate his plea. The plea court had failed to make a statement on the record about the possibility of deportation. In order to withdraw or obtain vacatur of the plea based on a violation of *People v PEQUE*, the defendant would have to show that there was a reasonable probability that he would not have pleaded guilty and would have gone to trial, had Supreme Court provided the required information regarding potential deportation. Kristina Schwarz represented the appellant.

http://nycourts.gov/reporter/3dseries/2019/2019_00141.htm

***People v Barney*, 1/9/19 – *SORA* / RIGHT TO BE PRESENT**

The defendant appealed from an order of Queens County Supreme Court, which designated him a level-two sex offender. The Second Department reversed and remitted for a new hearing. Though unpreserved, the defendant's contention that he did not waive his right to be present at the *SORA* hearing was reached, in the interest of justice. A sex offender facing *SORA* risk-level classification has a due process right to be present at the hearing. To

establish that the right was waived, evidence must show that the defendant was advised of the hearing date; the right to be present; and the fact that the hearing would be conducted in his absence, if he did not appear at the scheduled time. Reliable hearsay evidence was admissible. Here the sole evidence that the defendant waived his rights was a statement by the court that the NYPD informed it off-the-record that the defendant resided at a Manhattan address and that a hearing notice was sent there and was not returned as undeliverable. There was no evidence that the defendant expressed a desire to forgo his presence at the hearing. Jeffrey Cohen represented the appellant.

http://nycourts.gov/reporter/3dseries/2019/2019_00153.htm

FAMILY

SECOND DEPARTMENT

***Matter of Lintao v Delgado*, 1/9/19 – CUSTODY / REVERSAL**

The mother appealed from an order of Kings County Family Court which denied her custody application. The Second Department reversed. Family Court awarded the father sole custody with specified parental access to the mother. The trial court's determination lacked a sound and substantial basis in the record. Contrary to the court's conclusion, the parties had not been sharing custody equally. Instead, the mother had been the primary caregiver and, unlike the father, had been proactive in addressing the child's medical, education, and social needs. The court also failed to take into account the 50/50 arrangement requested by the father. The matter was remitted for entry of an order awarding sole custody to the mother and establishing parental access for the father. Molly Zamoiski represented the appellant.

http://nycourts.gov/reporter/3dseries/2019/2019_00125.htm

***Pecoraro v Ferraro*, 1/9/19 – DEFAULT ORDER / VACATUR APP / REVERSAL**

The father appealed from an order of Westchester County Family Court which denied his motion to vacate a default order. The Second Department reversed. After the father filed a petition seeking to reduce child support, a hearing was scheduled. When the father failed to appear at 9 a.m., the Support Magistrate dismissed his petition by 9:30 a.m. The father arrived at 9:40 a.m. and explained that he had miscalendared the time. Denial of the vacatur motion was an abuse of discretion, in light of: (1) the relatively short delay; (2) the proceedings that had already taken place; (3) the absence of prejudice to the mother; and (4) the public policy in favor of resolving cases on the merits. Moreover, the father showed that he had a potentially meritorious petition.

http://nycourts.gov/reporter/3dseries/2019/2019_00125.htm

***Matter of Richard S.*, 1/9/19 – JD / FLAWED ALLOCUTION AND ADMISSION**

The appellant appealed from orders of fact-finding and disposition rendered by Queens County Family Court. Upon his admission, the trial court found that he had committed an act which, if committed by an adult, would have constituted 4th degree grand larceny. The order of disposition adjudicated the appellant a juvenile delinquent and placed him in the custody of the Commissioner of Social Services for 18 months. The Second Department

reversed and remitted. The allocution was inadequate, since Family Court did not elicit a sufficient factual basis to support the admission. While the appellant did not move to withdraw his admission on the grounds raised on appeal, the recitation of the facts underlying the crime pleaded to cast significant doubt on his guilt. In addition, the admission was defective because the trial court failed to conduct an allocution of the foster care case planner to ascertain from him that the appellant committed the subject act, was voluntarily waiving his rights, and was aware of the possible dispositions. The statutory requirement of such an allocution may not be waived. Larry Bachner represented the appellant.

http://nycourts.gov/reporter/3dseries/2019/2019_00130.htm

LISTSERV

IMMIGRATION LISTSERV

For the Regional Immigration Assistance Centers, since November 2018, ILS has prepared weekly summaries focusing on New York appellate decisions addressing immigration issues and other matters relevant to post-conviction representation of non-citizen defendants, as well as relevant Board of Immigration Appeals and federal court decisions. FYI, this week's RIAC Decisions of Interest entry is attached. If you'd like to have RIAC Decisions forwarded to you weekly, send an email to cynthia.feathers@ils.ny.gov.

CYNTHIA FEATHERS, Esq.

Director of Quality Enhancement
For Appellate and Post-Conviction Representation
NY State Office of Indigent Legal Services
80 S. Swan St., Suite 1147
Albany, NY 12210
Office: (518) 473-2383
Cell: (518) 949-6131