

## CRIMINAL

### FIRST DEPARTMENT

***People v Guillermo P.*, 6/18/20 – DISSENT / HARSH YO SENTENCE**

The defendant appealed from a judgment of NY County Supreme Court, convicting him upon his plea of guilty of 3<sup>rd</sup> degree robbery and sentencing him as a youthful offender to a term of 60 days' incarceration and five years' probation. The Second Department vacated the DNA databank fee, which was not authorized for a YO, and otherwise affirmed. One justice dissented, opining that the probation term should be reduced to a period of three years, based on several factors. The defendant's actions were minor—at a Dunkin Donuts, he took a sandwich without paying for it. The record did not indicate what his forcible actions were, and there were no allegations that anyone suffered harm. Three years was the maximum probation period for the original misdemeanor charges—which would have applied, had the People not elevated this minor incident to a felony. The defendant was only 18 at the time of his impulsive actions. Aside from a minor drug offense, he did not have any other contact with the criminal justice system; and he faithfully came to all court appearances, except one. His decision to plead guilty was likely influenced by 81 days served at Rikers Island, after the court set bail that his family struggled to pay. Under bail reform, the lower court would not have had the authority to set bail.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_03464.htm](http://nycourts.gov/reporter/3dseries/2020/2020_03464.htm)

### SECOND DEPARTMENT

***People v Butler*, 6/17/20 – MENTAL HEALTH RECORDS / BRADY**

The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 1<sup>st</sup> degree sexual abuse (three counts). The Second Department reversed and ordered a new trial. Before trial, the defendant requested copies of the complainant's mental health records, relating to her counseling after disclosure of the purported abuse. Following in camera review, Supreme Court redacted most of the records, including a handwritten notation, "Sexual abuse denied;" and part of an assessment checklist containing a box, entitled "Sexual abuse (lifetime)," that was left unchecked. The appellate court held that disclosure of certain redacted information was required. The complainant and the defendant presented sharply divergent accounts; credibility was key to resolution of the case; and the defendant was acquitted of the rape charge. The jury could have found the redacted material exculpatory and material. Further, counts two and three—involving the same victim in a single continuous incident on the same day—were multiplicitous, so one of the counts had to be dismissed upon retrial. Appellate Advocates (Sam Feldman, of counsel) represented the appellant.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_03374.htm](http://nycourts.gov/reporter/3dseries/2020/2020_03374.htm)

***People v Sabirov*, 6/17/20 – INTOXICATION / CHARGE WARRANTED**

The defendant appealed from a judgment of Kings County Supreme Court, convicting him of certain sexual offenses. The Second Department reversed and ordered a new trial. An intoxication instruction should have been given. The complainants testified that the defendant did not appear drunk at the time of the incident, and the arresting officer did not recall how the defendant appeared upon arrest. However, the officer's notes and the defendant's testimony supported the requested charge. In addition, the trial court improperly excluded as a business record a Desk Appearance Ticket form, containing the notation, "intox," and a checked box, indicating that the defendant was "under the influence of drugs/marihuana to the degree that he may endanger himself or others." Steven Feldman represented the appellant.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_03378.htm](http://nycourts.gov/reporter/3dseries/2020/2020_03378.htm)

***People v Sutton*, 6/17/20 – WAIVER OF APPEAL / IMPROPER**

The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 2<sup>nd</sup> degree assault. The Second Department affirmed, but found the waiver of the right to appeal invalid. Supreme Court, not the People, insisted on the waiver as a condition of the plea. But judicial extraction of such a waiver, without articulating the reasons for doing so, could create the appearance that the court sought to insulate its decision from review. Finally, the defendant received no benefit from the waiver, which was gratuitously demanded after the plea deal had been struck. However, the challenged denial of youth offender status and the sentence were upheld.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_03400.htm](http://nycourts.gov/reporter/3dseries/2020/2020_03400.htm)

## **THIRD DEPARTMENT**

***People v Kaminski*, 6/18/20 – SORA MOD / PROCEDURAL ERROR**

The defendant appealed from a Chemung County Court order, denying his petition to reduce his sex offender risk level. The Third Department reversed. The SORA court did not consider an updated recommendation from the Board of Examiners of Sex Offenders. *See* Correction Law § 168-o (2). John Cirando represented the appellant.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_03431.htm](http://nycourts.gov/reporter/3dseries/2020/2020_03431.htm)

## FAMILY

### FIRST DEPARTMENT

***Matter of Donna F.T.*, 6/18/20 – GRANDPARENTS / HEARING NEEDED**

The mother appealed from an order of NY County Family Court, awarding the paternal grandparents visitation with the subject child. The First Department reversed. Family Court based its decision on a truncated record. The grandfather did not testify, and the mother was not present, due to a medical procedure. Further, the AFC was not given an opportunity to ascertain the seven-year-old child's position—which was important, given proof that the child did not want to see the grandparents so soon after the father's death and would be traumatized by visitation. The grandparents petitioned, and were represented, separately. They may have been separated from each other at the time of the proceedings. There was insufficient information to support the award of joint visitation. Larry Bachner represented the appellant.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_03469.htm](http://nycourts.gov/reporter/3dseries/2020/2020_03469.htm)

***Michael R. v Pamela G.*, 6/18/20 – CUSTODY / INSUFFICIENT REASONING**

The mother appealed from an order of Bronx County Family Court, which awarded sole custody of the subject child to the father. The First Department reversed and remanded. In her decision, the referee failed to address alleged domestic violence by the father against the mother. The appellate court could not determine whether the referee found that the mother was not credible, or that DV did occur but custody to the father was nevertheless in the child's best interest. Further, there were no findings regarding allegations that the father interfered with the mother's parental access. Andrew Baer represented the appellant.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_03481.htm](http://nycourts.gov/reporter/3dseries/2020/2020_03481.htm)

***Matter of Khan v Shahida Z.*, 6/18/20 – SIJS / REVERSED**

The petitioner appealed from a Bronx County Family Court order, which denied his petition and the subject child's motion for an order enabling him to petition for Special Immigrant Juvenile Status. The First Department reversed. The child was unmarried and under age 21 at the time of the hearing. The appointment of a guardian rendered the child dependent on a juvenile court. Reunification with the parents was not viable due to neglect or abandonment. Without warning, his father left the child in the U.S. with his uncle (the petitioner), and both parents said they did not want the child back. He had little contact with his parents and received no support from them. Family Court should have considered evidence regarding what occurred between the child's 18<sup>th</sup> and 21st birthday. The child's Thai visa was on the verge of expiring; he had no way to renew it; and he had no other place to live or way to support himself in Thailand or in Bangladesh, where he was a citizen. Finally, the child was doing well in the petitioner's care. Genet Getachew represented the appellant.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_03480.htm](http://nycourts.gov/reporter/3dseries/2020/2020_03480.htm)

## SECOND DEPARTMENT

### *Matter of Maximo M.*, 6/17/20 – JD / ACOD

The appellant appealed from an order of disposition of Queens County Family Court adjudicating him a JD, based on his admission to acts constituting 2<sup>nd</sup> degree sexual abuse. The Second Department reversed. While the term of probation had expired, the appeal was not academic; there could be collateral consequences. Family Court abused its discretion in denying an ACOD given that: this was the appellant's first contact with the court system; he took responsibility for his actions and expressed remorse; he voluntarily participated in counseling; and he maintained a strong academic record. The Legal Aid Society of NYC (Dawne Mitchell and Susan Clement, of counsel) represented the appellant.

[http://nycourts.gov/reporter/3dseries/2020/2020\\_03428.htm](http://nycourts.gov/reporter/3dseries/2020/2020_03428.htm)

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