

CRIMINAL

FIRST DEPARTMENT

***People v Collins*, 8/13/20 – SUPPRESSION / UNDECIDED ISSUE**

The defendant appealed from judgment of NY County Supreme Court, convicting him after a jury trial of 4th degree criminal possession of a controlled substance and another crime. The First Department held the appeal in abeyance and remanded. Two officers driving in a police car received a radio report of a “trespassing in progress” and drove to the subject apartment building. The building manager pointed out the defendant as the trespasser. When an officer asked to talk to the defendant, he ran down the block. The officers apprehended him and frisked him for weapons, patted down his drawstring bag, felt a hard object inside, and saw an apparent firearm silencer. A ballistics report later revealed that the object was a “non weapon” barrel extender, which was lawful to possess. At the precinct, in an inventory search, police recovered marijuana and cocaine. Before trial, defense counsel moved to suppress the barrel extender and drugs. Defense counsel argued that there was no search warrant nor exigent circumstances. Supreme Court found that the officers had probable cause to arrest the defendant and concluded that, since the arrest was lawful, the search incident to the arrest yielding the subject proof was legal. The appellate court agreed that police had probable cause to arrest the defendant. On appeal, the People argued that the police search of the bag was reasonable because exigent circumstances existed. However, the reviewing court could not reach that issue, because the lower court did not rule on it. The Office of the Appellate Defender (Margaret Knight, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2020/2020_04517.htm

***People v Gomez*, 8/13/20 – DISSENT / *PADILLA* VIOLATION / IAC**

The defendant appealed from a judgment of Bronx County Supreme Court, convicting him of attempted 2nd degree CPW. The First Department affirmed. One judge dissented. At issue was whether the existing record sufficiently demonstrated that the defendant, a non-citizen, was deprived of ineffective assistance of counsel. At the plea hearing, the court asked, “do we have any *Padilla* issue here.” Defense counsel responded that he had spoken to the defendant “about all possible consequences.” The defendant then pleaded guilty to the crime, an aggravated felony that subjected him to mandatory deportation. Defense counsel was obligated to inform the defendant of the clear immigration consequences of his guilty plea. Those consequences were not “possible,” but virtually certain. Therefore, counsel’s statement that he described “all possible consequences” made clear that he inaccurately conveyed the immigration impact. No matters outside the record needed to be examined via a CPL 440.10 motion. Nothing in the sentencing record contradicted the defendant’s claim that his counsel was ineffective. The majority failed to explain why this case was not governed by many previous decisions holding that the court could review an IAC claim where counsel represented that he or she advised the client of possible immigration consequences when the defendant, in fact, faced mandatory deportation.

http://nycourts.gov/reporter/3dseries/2020/2020_04518.htm

***People v Macon*, 8/13/20 – VERDICT SHEET / JUSTIFICATION**

The defendant appealed from a judgment of Bronx County Supreme Court, convicting him of 2nd degree assault. In connection with stabbings of three persons, the defendant was acquitted of three counts of attempted 2nd degree murder, one count of 1st degree assault, and two counts of 2nd degree assault. The defendant challenged the court's jury instructions and verdict sheet on the ground that they failed to convey that an acquittal on the top count, based on a justification defense, necessitated an acquittal of the lesser count, pursuant to *People v Velez*, 131 AD3d 129. The trial court's initial jury instruction, which was repeated, was consistent with *Velez*. As in *People v Davis*, 176 AD3d 634, the instant court declined to exercise its interest of justice jurisdiction to review the unpreserved claims. Although defense counsel had many chances to do so during the three-day charge conference, he interposed no objections.

http://nycourts.gov/reporter/3dseries/2020/2020_04519.htm

SECOND DEPARTMENT

***People v Sanchez*, 8/12/20 – MISSING WITNESS CHARGE / NEW TRIAL**

The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 1st and 2nd degree criminal contempt. The Second Department reversed and ordered a new trial. The charges arose from two incidents involving the defendant's former girlfriend—the complainant. In the first incident, the defendant followed her in his vehicle as she drove on the parkway. She called 911 and was advised to exit the highway, where police were waiting to pull over the defendant. In the second incident, the complainant and her date were returning to her car, when the defendant allegedly jumped out at them from a hiding place, lunging at them, threatening them, and pushing the complainant to the ground. The appellate court held that Supreme Court erred in denying the defendant's application for a missing witness charge as to the complainant's companion. The defendant met his prima facie burden of showing that the missing witness was believed to be knowledgeable about a material issue pending in the case; and he was expected to testify favorably to the People, who had failed to call him to testify. According to the complainant, her date was present during the second incident and was a victim. The People failed to rebut the prima facie showing and to establish that the complainant's date was unavailable. He appeared in court pursuant to the People's so-ordered subpoena. Counsel for the missing witness stated that, although he did not wish to be a witness, he was outside the courtroom and was prepared to testify. Further, the People did not establish that the complainant's companion was not under their control, such that he would not be expected to testify in their favor, nor did they demonstrate that the testimony would have been cumulative. The error was not harmless. Appellate Advocates (Ava Page, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2020/2020_04494.htm

***People v Rodriguez*, 8/12/20 – RESENTENCE / REMITTAL**

The defendant appealed from a resentence imposed by Kings County Supreme Court for his conviction of 1st degree course of sexual conduct against a child, upon his plea of guilty. The Second Department reversed and remitted. A defendant has a fundamental right to be personally present when sentence is pronounced (CPL 380.40 [1]; *People v Rossborough*,

27 NY3d 485), and that extends to resentencing. While a defendant convicted of a felony may waive such right, the waiver must be expressly made. Here, the defendant was not produced at resentencing, and the record was devoid of any indication that he expressly waived his right to be present. Appellate Advocates (Anders Nelson, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2020/2020_04493.htm

THIRD DEPARTMENT

People v Cruz, 8/13/20 – **DISSENT / DEFECTIVE PLEA**

The defendant appealed from a judgment of St. Lawrence County Court, convicting him of attempted 5th degree possession of a controlled substance. The Third Department affirmed. Two dissenters opined that County Court did not fully advise the defendant of the constitutional trial-related rights he was giving up by pleading guilty, and thus his plea was not valid. The dissenting justices would have reached the unpreserved issue in the interest of justice. In its brief exchange with the defendant, County Court failed to advise him of his right to be confronted by witnesses. Further, when asked if he had discussed the plea and its consequences with counsel, the defendant merely stated, “She told me about violating, would be like 90 days. I understand.” This record did not establish that the defendant understood and affirmatively waived the rights he was automatically forfeiting by pleading guilty. Thus, his plea was invalid.

http://nycourts.gov/reporter/3dseries/2020/2020_04514.htm

People v Hightower, 8/13/20 –

GEOGRAPHIC JURISDICTION / SMITTEN JUROR

The defendant appealed from a Warrant County Court judgment, convicting him of drug and weapon possession crimes and other offenses. The Third Department affirmed. The defendant moved to dismiss the indictment on the ground that it was jurisdictionally defective in that the traffic stop occurred in Saratoga County. After inspecting the grand jury minutes, County Court found that jurisdiction did lie under CPL 20.40 (4). The appellate court rejected the defendant’s contention that the grand jury proceeding was defective because a trooper inaccurately testified that he stopped the defendant within 500 yards of Warren County. The People’s instructions did not limit the source of jurisdiction to such distance from the county boundary; and the mistake in the trooper’s grand jury testimony did not demonstrate prosecutorial wrongdoing or fraudulent conduct. The reviewing court also upheld the denial of the defendant’s CPL 330.30 (2) motion to set aside the verdict. Prior to sentencing, a juror sent a letter and photograph of herself to a deputy/witness, expressing a romantic interest in him. At a hearing, the juror said that she judged the trooper’s testimony based on credibility, not his appearance, and she did not speak to other jurors about him. The reviewing court upheld the finding that the juror’s amorous attitude toward the deputy did not prevent her from being unbiased, fair, and impartial.

http://nycourts.gov/reporter/3dseries/2020/2020_04513.htm

FAMILY

THIRD DEPARTMENT

***Matter of Gerard P. v Paula P.*, 8/13/20 – CUSTODY / REVERSED**

The mother appealed from orders of Saratoga County Family Court, which granted the father's petition to find a willful violation and granted his motions to dismiss her two custody modification petitions. The Third Department reversed the challenged orders and remitted for an evidentiary hearing before a different judge. The parents shared custody of their children, pursuant to an order on consent. Without holding a hearing, Family Court granted the father's motions to dismiss the mother's applications. That was error. The lower court did not liberally construe the mother's pro se petitions, which viably alleged a change of circumstances; and it improperly made factual findings and credibility determinations against her. Given the overlap in the matters addressed in the various applications, the violation decision was irreparably tainted by the premature findings as to the mother's petitions. Family Court may have prejudged the violation matter or been predisposed to a certain outcome. The appellate court also found impermissible a sanction imposed for the mother's violation—modification of custody, without any analysis as to the children's best interests. Monique McBride represented the appellant.

http://nycourts.gov/reporter/3dseries/2020/2020_04515.htm

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