From: Feathers, Cynthia (ILS)
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Subject: Appellate Decisions; Newsletters
Attachments: Issues to Develop at Trial_November 2017.pdf; Corrected version_October 2017.pdf

Below are recent appellate decisions of interest, in both criminal and family cases. Attached is CAL's November newsletter, focusing on a constitutional challenge that can be made to the second-degree harassment statute (PL 240.30 [1][a]) as amended in 2014—a challenge that survives a guilty plea and also any appeal waiver (at least in the First Department). Also attached is a corrected version of the CAL October newsletter, which addresses a decision impacting the mandatory surcharge issue. Thanks.

CRIMINAL

Court of Appeals

***People v. Estremera* (11/16/17)**
CPL 380.40 states that "the defendant must be personally present at the time sentence is pronounced." Penal Law § 70.85 provides an exception to *Catu*, allowing for re-imposition of the original sentence without PRS under certain circumstances. When Supreme Court sentenced the *Estremera* defendant upon his guilty plea, the mandatory PRS term was not pronounced. Based on the *Catu* violation, the defendant sought to vacate the plea, whereas the People invoked the above statutory exception. In the defendant's absence, Supreme Court re-imposed the original sentence. Upon the defendant's appeal, the First Department affirmed. Because the defendant's fundamental right to be present when the court pronounced sentence was violated, the Court of Appeals reversed. The Office of the Appellate Defender (Samuel Mendez, of counsel) represented the appellant.

***People v. Flores* (11/16/17)**
CPL 460.10 (3) (a) requires an appellant to file an affidavit of errors to take an appeal from a judgment of a local criminal court if the underlying proceedings were not recorded by a court stenographer. Such requirement is jurisdictional. *People v. Smith*, 27 NY3d 643. Upon her conviction of second-degree criminal contempt in DeWitt Town Court, the defendant filed a notice of appeal, but not an affidavit of errors. Onondaga County Court upheld the conviction and reduced the sentence. That court lacked jurisdiction over such issues, the Court of Appeals held. Since County Court had not addressed the defendant's alternative motion to file a late affidavit of errors, the matter was remitted for consideration of such application. The Court of Appeals noted that CPL 460.10 (3) recently was amended to give appellants more time to file an affidavit of errors where a court used an electronic recording. Lance Salisbury represented the appellant.

***People v. Hardee* (11/16/17)**
Absent probable cause, it is unlawful for police to invade the interior of a stopped vehicle once suspects have been removed and patted down without incident; but a limited protective search of the vehicle for weapons may validly occur where circumstances indicate that a weapon inside the car presents an actual and specific danger to officer safety. *People v. Torres*, 74 NY2d 224. In *People v. Hardee*, Supreme Court denied suppression, finding that the *Torres* test was met. The First Department affirmed. Justice Acosta dissented, reasoning that evidence of the defendant's nervousness, glances into

the back seat, and momentary failure to comply with police directives to exit the vehicle did not justify a limited search. A divided Court of Appeals upheld suppression. Since the defendant's challenge involved a mixed question of law and fact, review was limited to whether there was record support for the determinations below. The majority found such support in its memorandum decision. In an expansive dissent, Judge Stein opined that a question of law was presented, and the search was unlawful. The People did not establish the requisite danger, and the officers could have asked the occupants to move further away from the vehicle. Judges Rivera and Wilson concurred in the dissent.

Second Department

***People v. Hill* (11/15/17)**
Assigned counsel's motion to withdraw as counsel was granted, but new counsel was assigned. The *Anders* brief did not contain an adequate statement of facts, adequately analyze potential appellate issues, or highlight record facts that might arguably support the appeal—including participation in plea negotiations by counsel who had been relieved based on a conflict of interest and a colloquy regarding a purported waiver of the right to appeal.

***People v. Oquendo* (11/15/17)**
Nassau County Supreme Court erred in denying, without a hearing, a CPL 440.10 motion. The application alleged that the defendant had pleaded guilty to certain charges in reliance on his attorney's representation that the State sentence would run concurrently to a federal sentence; that his plea was not knowing, voluntary, and intelligent; and that he had received ineffective assistance of counsel. As the People conceded, the defendant had raised a triable issue of fact. Thus, the challenged order was reversed, and the matter was remitted for a hearing. Alan Katz represented the appellant.

***M/O Singas v. Engel* (11/15/17)**
In a criminal action, the Nassau County District Attorney was ordered to disclose documents relating to tests of simulator solution used to calibrate a breathalyzer instrument used by police to test the defendant's BAC on the date of his arrest. The People, who indicated that they intended to introduce a "certification" of the accuracy of the simulator solution, filed an Article 78 proceeding in the nature of prohibition. Supreme Court dismissed the proceeding, and the Second Department affirmed. CPL 240.20 encompassed the materials to be disclosed and further required the People to make good faith, diligent efforts to obtain the documents if they were not in the possession of the District Attorney's office. Barket Marion Epstein & Kearon, LLP (Donna Aldea, of counsel), represented the criminal defendant.

Fourth Department

***People v. Mastowski* (11/17/17)**
On the defendant's appeal from a Monroe County judgment of conviction, the People correctly conceded that two DWI counts had to be dismissed as lesser inclusory counts of the first-degree vehicular manslaughter charge. Such issue required no preservation. As to alleged prosecutorial misconduct in summation, most instances were unpreserved, and the Appellate Division declined to review the matter in the interest of justice. However, the court admonished the People, reminding them of their "special responsibilities…to safeguard the integrity of criminal proceedings and the fairness in the criminal process," quoting *People v. Santorelli*, 95 NY2d 412, 421. The Monroe County Public Defender

(David Juergens, of counsel) represented the appellant.

People v. Pace **(11/17/17)**
The defendant was indicted in Herkimer County for three felonies and three misdemeanors, all arising from the same act or criminal transaction. Unbeknownst to the People, the defendant had already pleaded guilty to the misdemeanors in Town Court. When the People learned of the earlier disposition, County Court returned the misdemeanor charges to Town Court for sentencing. The trial on the felonies proceeded, without any defense objection based on double jeopardy under CPL 40.20. Upon conviction, the defendant did not raise such issue in his appeal, but he did so in a CPL 440.10 motion alleging ineffective assistance. County Court denied the motion on the ground that the issue should have been raised in the direct appeal. The reviewing court reversed and remitted for a hearing. The record on direct appeal lacked "lower court paperwork" needed to determine whether the acts establishing the misdemeanors were "in the main clearly distinguishable" from those establishing the felonies, so as to permit separate prosecutions under CPL 40.20 (2) (a). Kurt Schultz represented the appellant.

People v. Smith **(11/17/17)**
The Monroe County defendant, charged with second-degree burglary, was not advised that the sentence agreed to was fixed, without regard to the outcome of the second violent felony offender hearing. Since the defendant was not properly advised of the direct consequences of the plea, such plea was not knowing, voluntary, and intelligent. The judgment of conviction was reversed, the plea vacated, and the matter remitted. The Monroe County Public Defender (James Hobbs, of counsel) represented the appellant.

FAMILY

First Department

M/O Juana R. v. Chelsea R. **(10/31/17)**
An order granting a one-year order of protection was reversed. The appeal was not moot despite expiration of the order, in light of the adverse consequences that could flow from a finding that the appellant had committed a family offense. *See Matter of Veronica P. v. Radcliff A.*, 24 NY3d 668. Family Court found that the parties were not "getting long," but failed to make findings that the appellant had committed acts constituting a particular family offense. Richard Herzfeld represented the appellant.

Second Department

M/O Rhoda v. Avery **(11/8/17)**
An order of protection issued by Suffolk County Family Court was modified to delete a direction that the appellant surrender all firearms to police. After a hearing, Family Court found that the appellant had committed the family offense of second-degree harassment against his mother-in-law. However, the firearms surrender provision was not warranted, since the evidence did not establish any of the elements in Family Court Act § 842-a (2). That section (which parallels CPL 530.14) empowers the court to order the immediate surrender of firearms owned or possessed by a respondent in a family offense proceeding involving enumerated elements of violence or a risk of violence. Mitchell Devack represented the appellant.

***M/O Nyair J. (ACS – Vernon J.)* (11/8/17)**
Kings County Family Court found that the father had abused and neglected child Nyair by shaking the weeks-old infant, thereby causing head injuries, and by causing a fractured tibia. The trial court found no derivative neglect as to child Nasir O., reasoning that the three-year-old was beyond the age where the father could similarly shake and injure him. Such ruling was error, per the reviewing court. The derivative neglect inquiry focuses on whether evidence of abuse or neglect of one child indicates a fundamental defect in the respondent's understanding of parental duties and thus will place other children at substantial risk of imminent harm. Such standard was met. The matter was remitted the matter for a dispositional hearing.

***M/O Delilah D. (Orange County DSS – Richard D.)* (11/8/17)**
The Orange County DSS filed a neglect petition against the mother and non-biological father. Family Court found neglect as to the mother and granted an ACD as to the father. Months later, another child was born to such parents and was removed by Family Court; and a finding of derivative neglect was made against both parents. The father appealed, and the reviewing court reversed. Citing *Matter of Marie B.*, 62 NY2d 352, the Second Department observed that an ACD is not a determination on the merits and leaves unanswered the question of neglect. Moreover, DSS had not sought to reopen the earlier proceeding to establish the father's neglect, based on his failure to comply with certain conditions imposed by Family Court. John Lewis represented the appellant.

***M/O Schmitt v. Troche* (11/8/17)**
In Suffolk County Supreme Court, a non-parent petitioned for custody of a child born in 2005. The respondent biological father moved to dismiss, based on the petitioner's lack of standing. The motion court granted the motion without a hearing. The Appellate Division affirmed. While the child had resided primarily with the petitioner for years, during such period the biological father had been working full-time, attending law school at night, and paying child support. Moreover, the parties had completed forms designating the petitioner as only a temporary caregiver. Where a parent had a compelling reason to allow a non-parent to assume custody for a defined period, extraordinary circumstances are not established, as required under *Matter of Suarez v. Williams*, 26 NY3d 440.

***M/O Trent v. Alburg* (11/15/17)**
The father appealed from an order of Suffolk County Family Court denying his objections to a Support Magistrate's order. The reviewing court reversed, holding that the order should have included a provision awarding the father a credit against his child support obligation for any amount he contributed toward college room and board expenses when the parties' child resided primarily at college. John Reno represented the appellant.

***M/O Tundis v. Tundis* (11/15/17)**
The parties' judgment of divorce incorporated a stipulation regarding custody and visitation. In a post-judgment petition in Nassau County Family Court, the father sought modification, but the petition was dismissed. He also charged that the mother had violated custody provisions, and that matter was resolved via settlement. Family Court denied the mother's application for attorneys' fees, pursuant to Family Court Act § 651 (b) and Domestic Relations Law § 237 (b). The reviewing court reversed, holding that such denial was an improvident exercise of discretion and remitting the matter for a hearing regarding the amount of the fee to be awarded. Blodnick, Fazio & Associates, P.C. (Jessica Sola and Dana Finkelstein, of counsel) represented the appellant.

***M/O Wei-Fisher v. Michael* (11/15/17)**
The father appealed from an order of Rockland County Family Court denying his objections to a Support Magistrate's child support order. The Second Department reversed and remitted. In derogation of Family Court Act § 424-a (a), without good cause, the mother had failed to submit her most recent tax returns; and other proof she had provided did not remedy such omissions. Thus, the matter should have been adjourned until she filed the required documents. The appellant represented himself.

Fourth Department

***Shaw v. Shaw* (11/17/17)**
The parties' marital agreement if, upon the mother's contemplated relocation with the child, the father would maintain a residence within 15 miles of her new home. The father did not comply with such provision when the mother moved, and cross petitions were filed. In a post-judgment proceeding, Monroe County Supreme Court directed the father to relocate within the required radius. The appellate court reversed. The parties' relocation constituted a change in circumstances that warranted an evidentiary hearing to re-examine the situation and determine whether the child's best interests would be served by enforcing, or by modifying, the parties' agreement. Michael Schmitt represented the appellant.

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