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Court of Appeals

The two entries below are amended. Please feel free to contact Cynthia.feathers@ils.ny.gov *with any comments or corrections on Decisions of Interest.*

People v. Arjune (11/20/17)

The Second Department's denial of a coram nobis application was affirmed. The Court of Appeals found that retained counsel was not ineffective where, after timely filing a notice of appeal, he failed to advise the defendant of his right to poor person relief or to act when served with a motion to dismiss the appeal as abandoned. Defendants are not constitutionally entitled to appointment of counsel to assist them in preparing a poor person application, the court held. In dissent, Judge Rivera pointed out that the representation rendered fell below professional standards set forth in Appellate Division Rules of each Department and relevant bar association standards. The NACDL submitted an amicus brief that advocated for a rule requiring that a lawyer who will not perfect the appeal must (a) advise the client about how to obtain appellate counsel and (b) assist the client in preparing necessary papers. The amicus brief warned against allowing a gap in representation during a critical period. Judge Wilson concurred in the dissent and wrote separately, focusing on the Sixth Amendment right to consult with counsel about whether, when, and how to appeal. Appellate Advocates (Jenin Younes, of counsel) represented the appellant.

People v. Helms (11/20/17)

In a People's appeal, the Court of Appeals held that the defendant's Georgia conviction for burglary was equivalent to a violent felony in New York, and based on such prior conviction, the defendant was properly sentenced as a second violent felony offender under Penal Law § 70.04. In so doing, the court clarified the scope of the strict equivalency test, in which the elements of the foreign conviction are

examined to see whether the crime corresponds to a New York felony. The court may examine any foreign statute or case law that informs the interpretation of a foreign code breached by the defendant. While the Georgia burglary statute appeared to contain no mens rea requirement, the state's statutory and case law established that such element was required. The Monroe County Public Defender (David R. Juergens, of counsel) represented the respondent.

***People v. Savage* (11/21/17)**

As jury selection was about to start, the defendant asked Onondaga County Court to relieve his assigned attorney, stating that counsel had been ineffective in, among other things, not hiring an investigator to interview exculpatory witnesses regarding a self-defense claim. Counsel purportedly told the defendant no funding was available for an investigator. County Court summarily denied the request for substitute counsel. The defendant represented himself at trial and was convicted. In a memorandum decision, the Court of Appeals held that the trial court had abused its discretion in failing to conduct a minimal inquiry. *See People v. Sides*, 75 NY32d 822. A new trial was ordered. Hiscock Legal Aid Society (Philip Rothschild, of counsel) represented the appellant.

***M/O Friedman v. Rice* (11/21/17)**

In 1988, Jesse Friedman pled guilty to multiple charges of sexual abuse and was released on parole in 2001. (In 2003, the convictions of the defendant and his father were the subject of a documentary, "Capturing the Friedmans.") During a 2010 reinvestigation of the case by the Nassau County District Attorney, Friedman made a FOIL request for all documents being reviewed. Ultimately, in an Article 78 proceeding, Supreme Court granted the request. However, the Second Department reversed, applying a blanket exemption to protect the confidentiality of statements by non-testifying witnesses, under Public Officers Law § 87 (2) (e) (iii). That statutory exemption encompasses documents compiled for law enforcement purposes which would identify a confidential source relating to a criminal investigation. In a decision authored by Judge Rivera, the Court of Appeals reversed and remitted for application of the correct standard: to justify withholding information, an express or implied promise of confidentiality is required, as other Departments have correctly held. Ronald Kuby represented the appellant.

<u>First Department</u>

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***People v. Cintron* (11/21/17)**

The defendant was charged with criminal possession of a controlled substance in the third degree. Immediately before the plea allocution, the defendant said that he had never possessed anything. Even though such statement cast significant doubt on his guilt and understanding of the nature of the charges, the trial court did not conduct any inquiry. On appeal, the judgment of conviction was reversed, and the guilty plea was vacated. The Office of the Appellate Defender (Sam Mendez, of counsel) represented the appellant.

***People v. Gonazalez* (11/21/17)**

The defendant was convicted of second-degree assault following a jury trial. On appeal, the reversing court found proper the denial of his motion to exclude expert testimony or to conduct a *Frye* hearing. At issue was expert testimony relating to LCN DNA testing. A court of coordinate jurisdiction had held that such testing was generally accepted as reliable in the forensic scientific community, and the *Gonzalez* properly relied on such ruling.

***People v. Sanchez* (11/21/17)**

Upon a guilty plea, a defendant forfeits CPL 30.30 speedy trial claims. However, in this case, Supreme Court misadvised the defendant on that score and thereby induced a plea to a longer sentence—imposed the same day as the court's erroneous statement. Under such circumstances, preservation of the issue was not required. The plea was vacated and the matter remitted. The Center for Appellate Litigation (Arielle Reid, of counsel), represented the appellant.

<u>Second Department</u>

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***People v. Smith* (11/22/17)**

After his 30.30 motion was denied, the defendant entered a plea of guilty, based upon assurances that he retained the right to appeal the speedy trial issue. Such assurances did not preserve the right to appeal. But the defendant was entitled to withdraw his guilty plea because the promise could not be fulfilled. The plea was vacated and the matter remitted. Andrew MacAskill represented the appellant.

Third Department

People v. Coon (11/22/17)

Under a plea deal, the DWI defendant was sentenced in 2013 to a definite jail term of one year, followed by three years of conditional discharge. The conditional discharge ran consecutively to the jail term and required installation of an ignition interlock device, consistent with Penal Law § 60.21 and VTL § 1193 (1) (c) (ii). The defendant served his jail term in full. Upon release, the period of conditional discharge began. During such period, the defendant admitted violating the ignition interlock device requirement; and County Court revoked the conditional discharge. In such circumstances, the law did not permit imposition of an additional period of imprisonment as a sanction for the violation. Yet County Court sentenced the defendant to an additional term of two to six years, followed by three years' conditional discharge. The Third Department vacated the sentence. David Woodin represented the appellant.

People v. Davis (11/22/17)

The defendant was convicted of first-degree murder and two counts of second-degree murder in connection with the same victim. The appeals court dismissed the second-degree murder charges as inclusory counts of the first-degree murder charge. *See* CPL 300.40 (3) (b).

People v. Rose (11/22/17)

In a People's appeal, taken pursuant to CPL 450.20 (8) and 450.50, the Third Department upheld a Broome County Court order suppressing physical evidence and statements. At 3 a.m., a Sheriff's Office sergeant had received a report that a stolen vehicle had just been found; the sergeant then saw the defendant within a block of such vehicle; and the defendant walked at a brisk pace on that cold winter night. These facts did not create a founded suspicion that criminal activity was afoot, triggering a common law right of inquiry. Thus, the sergeant should not have activated his overhead lights and ordered the defendant to stop. Moreover, by disregarding the order to stop, the defendant did not create a reasonable suspicion of crime validating the ensuing pursuit, forcible stop, and search. Alyssa Congdon represented the defendant-respondent.

Court of Appeals

M/O Jamie J. (Wayne County DSS – Michelle E.C.) (11/20/17)

In a unanimous decision authored by Judge Wilson, the Court of Appeals declared that dismissal of an Article 10 neglect petition divested Family Court of jurisdiction, thereby rejecting the position of Wayne County DSS that Family Court retained subject matter jurisdiction to conduct an Article 10-A permanency hearing. In *Jamie J.*, pre-petition, the child had been temporarily removed. Upon dismissal of the Article 10 petition, the child was not released to the mother's custody. Instead, a second permanency hearing was held. The Fourth Department affirmed the resulting permanency order. The appeal was not mooted by subsequent hearings and orders, since the same jurisdictional objection continued. After discussing the interplay between Article 10 and 10-A, the *Jamie J.* court rejected DSS' "hyper literal" reading of Family Court Act § 1088 and reasoned that such provision must be read within the context of Article 10. The proposed interpretation would permit a temporary order issued in an ex parte proceeding to do an end-run around the protections of Article 10; subvert the statutory scheme; and infringe upon the constitutional rights of parents and children, the Court of Appeals held. Katharine Woods represented the appellant.

First Department

M/O Wendy P. (ACS – Edwin S.) (11/21/17)

An appeal from an order of fact-finding determining that the appellant had sexually abused his daughter did not bring up for review a prior order denying a *Frye* hearing as to an expert's validation testimony. The fact-finding order was affirmed. *[Under Family Ct Act § 1112 (a), in Article 10 proceedings, an appellant has the option of taking an appeal as of right from an intermediate order, such as a fact-finding order, or awaiting the dispositional order. Pursuant to CPLR 5501 (a) (1), only an appeal from a* ***final*** *judgment brings up for review any non-final judgment or order which necessarily affects the final judgment and has not previously been reviewed by the court to which the appeal is taken.]*

Zappin v. Comfort (11/21/17)

The husband lawyer was sanctioned for misconduct committed in representing

himself in a divorce action. Thereafter, in challenging a child support award made to the wife in the judgment of divorce, he claimed that the sanctions, which resulted in negative publicity, caused him to lose his law firm position. The reviewing court stated that the husband's termination and unemployment resulted from his own misconduct at trial; he had not shown diligent efforts to find work; and income was properly imputed to him. Since the need for the supervision of visitation also stemmed from the husband's misconduct, he was not entitled to a reduction in child support to account for his costs for supervision.

Second Department

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***M/O Gurwinder S.* (11/22/17)**

Under federal statute, the appellant child was a special immigrant, that is, a resident alien, under age 21 and unmarried, who was a dependent of a state juvenile court or had been placed with a child welfare agency. The record established the other two elements needed to qualify for special immigrant juvenile status (SIJS). First, reunification with the father was not a viable option due to his neglect, including inflicting corporal punishment and having the young teenager work, not go to school. Second, it would not be in the child's best interests to return to India. Family Court had thus erred in denying the child's motion for an order making findings enabling him to petition for SIJS status. Jill Zuccardy represented the appellant.

Third Department

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***M/O Lucien HH. (Otsego Co. DSS – Michelle PP.)* (11/22/17)**

The respondent mother had lived with her four-month-old son and his father. Family Court previously found that the father had abused the child, causing an acute fracture of the right ankle and prior fractures of the left arm and leg. On appeal, the mother challenged a finding that she was also guilty of abuse and neglect. The Third Department held that the proof did not show that the mother knew, or reasonably should have known, that she was placing the child in danger by leaving him in the care of the father when she went to work. The mother had not seen the father act inappropriately; not every fracture in an infant produces visible signs of injury; and the pediatrician had not seen anything amiss during periodic well-child visits. Teresa Mulliken represented the appellant.

***M/O Frederick-Kane v. Potter* (11/22/17)**

The parties agreed on child support in a marital stipulation that fully complied with CSSA requirements in deviating from the presumptive amount. The stipulation was incorporated but not merged in the judgment of divorce. In a support modification proceeding, Albany County Family Court erred in finding that the support provisions in the judgment of divorce were invalid and unenforceable because they did not repeat the CSSA recitals. Upon remittal, Family Court was directed to apply the modification standard set forth in the stipulation, i.e. a change of circumstances, which was less burdensome that the standard that would otherwise apply. Monique McBride represented the appellant.

***M/O Triestman v. Cayley* (11/22/17)**

The pro se father filed objections to a Support Magistrate's order. Ulster County Family Court dismissed the objections based on the failure to file proper proof of service, as required by Family Court Act § 439 (e). In affirming, the reviewing court observed that Family Court had discretion to overlook a failure to timely file proof of service; but demanding adherence to the statutory requirement did not constitute an abuse of discretion.

***M/O Eldad LL. v. Dannai MM.* (11/22/17)**

The Third Department held that Broome County Family Court should not have awarded sole custody to the father. He was controlling. The mother was angry and frustrated with him. But there was little evidence that they could not communicate for the sake of the child. At a minimum, they did text each other. Further, by granting sole legal custody to the father, the court deprived the mother—the non-custodial parent and an Israeli citizen—of the ability to file a petition under the Hague Convention on International Child Abduction. Therefore, the custody order was modified to grant joint legal custody. The matter was remitted for structuring meaningful parenting time in light of the expiration of the mother's Visa and her return to Israel—which had been anticipated during the custody proceedings. Alena Van Tull represented the appellant.

***Kimberly C. v. Christopher C.* (11/22/17)**

In a matrimonial action, Tompkins County Supreme Court delegated too much authority in a provision awarding supervised visitation to the husband until the child

—with the approval of the wife—lifted the supervision requirement. Such authority belonged with the court. Barrett Mack represented the appellant.

M/O Kuklish v. Delanoy (11/22/17)

In modifying custody, Broome County Family Court failed to articulate a reason for dramatically reducing the parenting time of the father, who had a positive relationship with the child. Parental access had been reduced from half of each week to two out of every 14 days, plus two weeks in the summer. The reviewing court increased the parenting time to two out of three weekends and alternating weeks in the summer. Elizabeth Sopinski represented the appellant.

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