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Subject: Decisions of Interest and Issues to Develop at Trial

Attachments: Issues to Develop at Trial__January 2018.pdf

Below please find the latest installment of Decisions of Interest. Also, attached is CAL's latest edition of "Issues to Develop at Trial," which suggests next steps in light of *People v. Boone* on cross-racial identification and also provides an index to prior issues of the newsletter. Thank you.

CRIMINAL

Second Department

DECISION OF THE WEEK

Matter of Coleman v New York State Dept. of Corr. & Community Supervision, 1/10/18 – **PAROLE / DENIAL ANNULLED**

In 1979, the petitioner, then age 17, was convicted of two counts of murder in the second degree arising from his killing of a 14-year-old acquaintance. After the Board of Parole denied his application for parole release in 2016, he commenced an Article 78 proceeding. Although judicial review of Parole Board determinations is narrowly circumscribed, the petitioner demonstrated that the challenged determination should be set aside. There was no record support for findings that, if released, petitioner would likely violate the law, and that he had so deprecated the seriousness of his crime as to undermine respect for the law. On the contrary, the petitioner had taken full responsibility for his actions; during incarceration, he had earned three college degrees and received numerous commendations; and he had been assessed "low" for all factors on his COMPAS risk assessment. Since the denial of parole evinced an irrationality bordering on impropriety, the Article 78 petition was granted, the determination annulled, and the matter remitted for further proceedings. David Lenefsky represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_00138.htm

People v Thomas, 1/10/18 – **YOUTHFUL OFFENDER – SUPREME COURT FAILED TO COMPLY WITH STATUTE**

The defendant pled guilty to sex trafficking for acts committed at age 17 and 18. As the People conceded, he was eligible for youthful offender status. However, Supreme Court failed to consider whether the defendant should be afforded YO treatment, as required by CPL 720.20. Thus, the sentence was vacated and the matter remitted. Appellate Advocates (Meredith Holt, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_00175.htm

People v Butler, 1/10/18 – **DISSENT / INEFFECTIVE ASSISTANCE BY SORA COUNSEL**

The defendant appealed from an order designating him a level-three sex offender, following a Georgia

conviction for knowing production of sexually explicit photographs depicting children under the age of 18. The Second Department affirmed. A dissenting justice would have voted to reverse, based on ineffective assistance. Defense counsel had betrayed a lack of familiarity with a controlling decision and the police investigator's report. Further, counsel had failed to contest an assessment of 30 points under the risk factor for the age of the victim—even though the assertion that one victim was age 10 or less was based only on an investigator's estimate of the age of an unidentified victim in one photograph. However, there was clear and convincing evidence to support an assessment of 20 points for other victims aged 11 to 16; and the benefit of the 10-point difference would have resulted in a presumptive level-two score. Appellate Advocates (Joshua Levine, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_00181.htm

Third Department

People v Scott, 1/11/18 – **SORA Appeal – No Appeal Lies from Decision**
Ulster County Court classified the defendant as a level-three sex offender, and he appealed. However, the record on appeal did not reflect that the trial court had issued a written order, as required by Correction Law § 168-n (3). A transcript of the bench decision and a standard form designating the risk-level classification were not appealable papers. Although signed and dated, such documents did not state "so ordered." Thus, the appeal was not properly before the Third Department and had to be dismissed.
http://nycourts.gov/reporter/3dseries/2018/2018_00203.htm

***People v Sweat*, 1/11/18 – Clinton County Prison Escape / Conviction Upheld**
In 2015, two Clinton County inmates housed in Honor Block escaped. Weeks later, after a massive manhunt, one of the men was spotted and shot and killed by border patrol agents near the Canadian border. The other man, David Sweat, was shot by a state trooper and captured. A 2016 Inspector General's released found that systemic failures by DOCCS enabled the men to orchestrate their escape from the maximum-security facility. Defendant Sweat pled guilty to two counts of escape in the first degree and another crime. On appeal, he argued that County Court had abused its discretion in denying his motion to withdraw his plea without a hearing. The Third Department affirmed, finding that the defendant had entered a valid plea and had made no showing of innocence, fraud or mistake in the inducement. The argument that the aggregate term of 7 to 14 years was harsh and excessive was academic, since such term was to run consecutively to the defendant's sentence of life without parole for a murder conviction.
http://nycourts.gov/reporter/3dseries/2018/2018_00199.htm

***Matter of Carnright v Williams*, 1/11/18 – Plea Terms Illicitly Altered / Prohibition Denied**
The criminal defendant was charged with aggravated DWI in Ulster County. Under the terms of a plea deal, she pled guilty as charged in a SCI and, upon completing interim probation, withdrew her felony plea, pled guilty to DWI as a misdemeanor, and received a conditional discharge. Thereafter, over the objection of the District Attorney, County Court reduced the charge to DWAI as a violation. The DA commenced an Article 78 proceeding in the nature of prohibition and mandamus. Where the prosecutor's consent to a plea is premised on a negotiated sentence and a lesser sentence is later deemed more appropriate, the People should be given the opportunity to withdraw consent. *People v Farrar*, 52 NY2d 302. Such requirement had been violated. However, the extraordinary remedy of

prohibition was not appropriate. In part, petitioner sought to prevent the County Court judge from accepting future guilty pleas to reduced charges without the prosecutor's consent; but the judge's actions in the instant case were an anomaly. Further, the request to prohibit the judge from accepting the criminal defendant's plea of guilty was moot, where the plea was accepted, the sentence was imposed, and the defendant had started to serve the conditional discharge portion of the sentence.
http://nycourts.gov/reporter/3dseries/2018/2018_00206.htm

FAMILY COURT

Second Department

Matter of Boston G. (Jennifer G.), 1/10/18 – **FAMILY CT ACT § 1061 / GOOD CAUSE TO VACATE NEGLECT FINDING**
The mother consented to a finding of neglect without an admission, pursuant to Family Ct Act § 1051 (a). Her child was released to her custody under the supervision of the petitioner agency for a period of 12 months, which ended five months early. When the mother moved to vacate the neglect order, the petitioner argued that Family Court lacked jurisdiction to entertain the motion, since the case had been closed and the neglect finding had been made on consent. Kings County Family Court disagreed and granted the mother's motion. In affirming, the reviewing court observed that, in Family Ct Act § 1061, the legislature had expressed a strong policy in favor of continuing court jurisdiction over the family and the child. Good cause to vacate the neglect finding was established by the mother's lack of prior child protective history, her compliance with services, and her commitment to addressing the underlying issues. Brooklyn Defender Services and Paul, Weiss, Rifkind represented the respondent.
http://nycourts.gov/reporter/3dseries/2018/2018_00140.htm

Matter of Royster v Murray, 1/10/18 – **FAMILY OFFENSE PETITION DISMISSED / NO INTIMATE RELATIONSHIP**
The petitioner lived with her boyfriend in a Westchester County apartment building. The boyfriend's sister—the appellant—lived in the same building. The petitioner filed a family offense petition against the appellant. Following a hearing, Family Court granted the petition and issued an order of protection. However, the Second Department held that, because the parties had no direct relationship and were connected only through a third party, they did not fit within the Family Ct Act § 812 (1) (e) definition of "intimate relationship." Carl Birman represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_00151.htm

Matter of Catalina A. (Evelyn C.), 1/10/18 – **PRIMA FACIE SHOWING OF NEGLECT / REVERSAL**
The mother was charged with having neglected her infant. At the close of the petitioner's case, Queens County Family Court granted the mother's motion to dismiss, based on the agency's failure to establish a prima facie case. The Second Department reversed. The proof showed that, while holding the baby, the mother was hitting her sister and was manic. An attending ER psychiatrist who had assessed the mother's condition soon thereafter opined that she was unable to care for the child; and medical records revealed that the mother's condition required admission for extended observation. A new hearing was ordered.
http://nycourts.gov/reporter/3dseries/2018/2018_00135.htm

Third Department

Matter of Lea VV. (Theresa WW.), 1/11/18 –

NEGLECT AS TO INFANT DROWNED IN TUB / ANOTHER REVERSAL

The respondent was the mother of five children, ranging in age from 16 months to 12 years. One morning, she left the youngest child alone in the bathtub to attend to her three-year-old in the kitchen. The other children were still in bed. When the mother returned to the baby, he was unresponsive. The baby died, and the cause of death was found to be cardiac arrest and drowning. The mother was charged with neglect; but after a fact-finding hearing, Sullivan County Family Court dismissed the petition. The Third Department reversed. The proof showed that the mother was bathing the baby in four inches of water and left him alone for up to 10 minutes. Her actions were "intrinsically dangerous," and she had offered no reasonable explanation for how the child sustained his injury. Thus, the neglect petition should have been granted.

http://nycourts.gov/reporter/3dseries/2018/2018_00201.htm

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