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CRIMINAL

DECISION OF THE WEEK

People v. Maricle, 2/22/18 – **Breaking Bad / Legally Insufficient Proof**

The defendant and co-defendant Yerian went to property owned by the parents of co-defendant Alberts. The trio was gathered in the rear of the garage when a police officer spied smoke rising from the garage, pulled into the driveway, smelled a chemical odor, and noticed that Alberts was nervous. The officer surmised that the garage housed an active methamphetamine (meth) lab. Police seized many items used in the manufacturer of meth. Ultimately, the defendant was convicted of second-degree criminal possession of a controlled substance and third-degree unlawful manufacture of meth. The Third Department reversed, finding the evidence legally insufficient as to both counts. The defendant's mere presence in the lab was insufficient to establish constructive possession. There was no proof that the defendant lived in the house or garage, kept any belongings there, or had keys. Further, no contraband was recovered from him, and there was no proof that he exercised control over the lab equipment and other materials used to make meth. The indictment was dismissed. Pamela Bleiwas represented the appellant.

http://nycourts.gov/reporter/3dseries/2018/2018_01217.htm

First Department

People v Kyser, 2/20/18 – **Complainant Belatedly Found / Defendant Prejudiced**

In a trial on burglary and other charges, the People omitted the complainant from their witness list, because they could not find him. The defense questioning and selection of jurors were geared to a trial without a complaining witness. But just before opening arguments, the People found the witness. After denying a defense application to preclude the complainant's testimony, the trial court erred in rejecting an alternate request to select a new jury. Defense counsel relied on the expectation that the People would not call the witness, and the defendant was prejudiced by the change of course. Thus, a new trial was ordered. The Legal Aid Society of New York (David Crow, of counsel), and Paul Weiss Rifkind (Nora Ahmed, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2018/2018_01160.htm

People v Hubel, 2/20/18 – **Parole Revocation / Hearsay Alone Too Flimsy**

The defendant's probation was revoked. That was error. During the revocation hearing, the court indicated that its determination was based solely on grand jury minutes related to a 2012 indictment. A finding, by a preponderance of the evidence, that a defendant violated a condition of probation may not be based on hearsay alone. The Center for Appellate Litigation (Siobhan Atkins, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_01154.htm

People v Brown, 2/20/18 – **Justification Defense / Error to Deny Instruction**
There was one eyewitness to a shooting by a correction officer of a younger man who had apparently come to see the officer's daughter at their apartment. The witness described escalating aggressive actions by the victim, who threw punches at the defendant, causing him to take out his gun and hold it by his body. The victim then moved toward the defendant, swung at him, and grabbed for his weapon, while stating: "You going to pull a gun out, you better use it." Defense counsel sought a justification charge. The court denied the request, and the defendant was found guilty of first-degree manslaughter and sentenced to 18 years. The reviewing court reversed. The jury could have concluded that: (1) the victim's statement was a threat—that if the defendant did not use the gun, the victim would take it and shoot him; (2) the defendant reasonably believed that the victim—who was younger and taller and only two feet away—would gain control of the weapon; and (3) the defendant did not have to wait until the victim grabbed the gun to act. Two justices dissented. A new trial was ordered. Kohler & Isaacs, LLP (Joey Jackson, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_01173.htm

Second Department

People v Loaiza, 2/21/18 – **Immigration Misadvice / 15-Year Saga**
In 2003, the non-citizen defendant pleaded guilty to criminal possession of a controlled substance in the fourth degree. At the plea proceeding, although deportation was mandatory for the subject crime, the defendant's attorney advised him that pleading guilty to a drug guilty "may affect his [immigration] status." At sentencing, the defendant moved unsuccessfully to withdraw his guilty plea, and counsel took a position adverse to the defendant's arguments. A judgment of conviction was rendered in 2004, and a timely notice of appeal was filed. However, in 2005, the People's motion to dismiss the appeal as abandoned was granted. In 2013, upon the defendant's motion, the dismissal was vacated, and the appeal was reinstated. Thereafter, in a prior decision (142 AD3d 564), the Second Department held that substitute counsel should have been assigned before the determination of the application to withdraw the guilty plea. The matter was remitted for a hearing and report. The remittal court's report concluded that, but for counsel's incorrect advice, there was a reasonable probability that the defendant would not have pled guilty. The Second Department agreed, reversed the judgment, and vacated the plea. Appellate Advocates (Patricia Pazner, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_01201.htm

Third Department

People v Lavalley, 2/22/18 – **Rural Crime / Hunter Shoots Hunter**
While hunting with a shotgun, the defendant shot at what he thought was an animal in the woods. It turned out to be another hunter, who was seriously injured. Following a jury trial, the defendant was

convicted of assault in the second degree and criminal possession of a weapon in the fourth degree. The Third Department found that legally sufficient evidence supported the assault conviction, but that Essex County Court had erred in refusing the defendant's request to charge the lesser included offense of assault in the third degree. The jury could have reasonably found that the defendant acted with criminal negligence, rather than recklessness, in that he did not disregard, but did fail to perceive, an unjustifiable risk of injury to the victim when opening fire without sufficient observation. The assault conviction was reversed, and a new trial was ordered. Mark Schneider represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_01223.htm

People v Busch-Scardino, 2/22/18 – **PLEA VACATED / PRESERVATION EXCEPTION**
The defendant pleaded guilty to first-degree criminal contempt and waived appeal. On appeal, her claim that her plea was not knowing, voluntary, and intelligent survived the unchallenged waiver. Further, the narrow exception to the preservation rule applied. During the plea allocution, the defendant stated that she did not intend to violate the underlying order of protection, thus negating an element of the crime. Because further discussion was held off the record, the appellate court could not ascertain whether the requisite inquiry was made. Since the doubt cast on the plea was not removed, the plea was vacated and the matter remitted. Brian Callahan represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_01218.htm

People v Oliver, 2/22/18 – **COUNSEL'S POSITION ADVERSE TO CLIENT / SENTENCE VACATED**
After pleading guilty to sexual abuse in the first degree, the defendant pro se wished to move to withdraw his plea. On appeal, he contended that Fulton County Court had erred in not assigning a new attorney to represent him in his motion. The reviewing court agreed. While defense counsel could properly advise the court that the defendant's application was being made despite her legal advice to the contrary, the defendant was denied effective assistance of counsel when his attorney thereafter undermined his arguments. The sentence was vacated and the matter remitted for assignment of new counsel and reconsideration of the motion. The Rural Law Center of New York (Kelly Egan, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_01221.htm

People v Lee, 2/22/18 – **JUDICIAL DIVERSION / WRONG PRESIDING JUDGE**
The defendant was convicted of several drug crimes. The Third Department held that Sullivan County Court should have referred his application for judicial diversion to the court designated by the Administrative Judge for the Third Judicial District as the Superior Court for drug treatment in the county, as required by Judiciary Law § 212 (2) (r) and applicable regulations. While County Court had jurisdiction to hear the felony case, once an alcohol and substance abuse evaluation was ordered, that court was without authority to preside over the defendant's judicial diversion hearing. The judgment was reversed and the matter remitted. Donna Maria Lasher represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_01216.htm

People v Martz, 2/22/18 – **YO STATUS / COURT DID NOT FOLLOW STATUTE**
Hamilton County Court's comments about the defendant's application for youthful offender status failed to satisfy the requirements of CPL 720.10; and the issue was not foreclosed by a valid appeal waiver. Where the only barrier to YO status is an enumerated sex offense, the court must determine on the record whether the defendant is an eligible youth based on statutory mitigating factors. The court failed to

do so. Therefore, the sentence was vacated and the matter remitted. Edward Graves represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_01222.htm

FAMILY

Second Department

Matter of Joseph O. v Danielle B., 2/21/18 – **EQUITABLE ESTOPPEL / NO PATERNITY**
The respondents married and then entered into a three-party donor contract in which the petitioner sperm donor agreed that he would have no parental rights or duties. After artificial insemination, the subject child was born to the respondent birth mother. Four years later, the petitioner commenced proceedings to establish paternity and obtain visitation. The respondents' motion to dismiss was denied. The Second Department reversed: dismissal should have been granted, in the best interests of the child, on the ground of equitable estoppel. Although the petitioner had had some contact with the child, he did not have a parental relationship with her; and he had acquiesced in the development of a close relationship between the child and another parent figure. The Kurland Group and the LGBT Bar Association of Greater NY represented the appellants.
http://nycourts.gov/reporter/3dseries/2018/2018_01192.htm

Matter of Guy M. J. v Abiola N. S., 2/21/18 – **EQUITABLE ESTOPPEL / NO PATERNITY DENIAL**
After the 2005 birth of the subject child, the respondent mother and the appellant believed that he was the child's biological father. For seven years, he financially supported the child and cultivated a relationship with her. In 2013, the appellant terminated contact with, and support of, the child and commenced a paternity proceeding seeking genetic marker testing. After a hearing, Family Court concluded that the appellant was equitably estopped from denying paternity, declined to order testing, and adjudicated him to be the father. The reviewing court held that, given the long-standing parent-child relationship, Family Court had ruled properly.
http://nycourts.gov/reporter/3dseries/2018/2018_01189.htm

Third Department

Matter of Perry v Leblanc, 2/22/18 – **VISITATION ORDER / CURTAILMENT UNSUPPORTED**
A hearing regarding the parents' dueling petitions yielded proof of a change of circumstances. However, reducing the father's visitation was not in the child's best interests. His delays in returning the child were negligible, and there was no proof that incomplete homework harmed the academic progress of the child, who enjoyed a close relationship with the father. The Rural Law Center of New York (Kelly Egan, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_01232.htm

Matter of Imrie v Lyon, 2/22/18 – **COURT PSYCHOLOGIST / UNPERSUASIVE OPINION**
On the one hand, the reviewing court found no fault with Warren County Family Court's rejection of the court-appointed psychologist's opinion regarding child custody. The expert recommendations were at odds with the fact-finding proof and did not account for the father's parental shortcomings and

misrepresentations. On the other hand, the psychological evaluation was deemed an effective vehicle for conveying the wishes of the children, which were not ascertained via a *Lincoln* hearing.
http://nycourts.gov/reporter/3dseries/2018/2018_01230.htm

Matter of Romero v Guzman, 2/22/18 – ***Lincoln* Hearing / Confidentiality Snafu**
The appellate court upheld a child custody order. In so doing, the court noted that the *Lincoln* hearing transcript was transcribed together with the fact-finding hearing, apparently because there was no break in the proceedings (and the transcriptionist was not properly advised). Since a child's testimony at a *Lincoln* hearing is to remain confidential, the Third Department reminded Columbia County Family Court to take appropriate precautions and prevent inadvertent disclosure of such information to the parties.
http://nycourts.gov/reporter/3dseries/2018/2018_01224.htm

Matter of Audreanna VV. v Nancy WW., 2/22/18 – **AFC / Substitution of Judgment Okay**
In affirming a custody order issued by Schuyler County Family Court in 2016, the Third Department rejected the grandmother's contention that the attorney for the children improperly substituted his judgment for the children's. The issue was unpreserved, since the grandmother failed to move for removal of the AFC after being notified of his position, as presented in a written summation. In any event, the reviewing court would find that counsel properly substituted his judgment, because the children (born in 2009 and 2010) lacked the capacity for knowing, voluntary, and considered judgment, due to their age, their special needs, and the grandmother's hostility toward the mother.
http://nycourts.gov/reporter/3dseries/2018/2018_01227.htm

Matter of Rumpel v Powell, 2/22/18 – **Visitation / Criminal Conviction**
In a 2014 consent order, Broome County Family Court awarded custody of the subject child to the maternal grandparents. A prior appeal denied relief to the father, since he was not aggrieved by the consent order, and since visitation was statutorily precluded due to his conviction for murdering the child's mother. Thereafter, the father moved to vacate the order, asserting that his consent was the product of coercion or duress. The motion was denied, and the Third Department sustained that ruling. When the father's conviction was overturned and a new trial was ordered, he had failed to move to reargue the denial of his motion to vacate. His appropriate remedy was to file a new petition seeking visitation.
http://nycourts.gov/reporter/3dseries/2018/2018_01233.htm

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