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DECISION OF THE WEEK

Carney v Carney, 3/23/18 – **Assigned Counsel Eligibility / Income May Not be Imputed**

In post-divorce custody and contempt proceedings in Monroe County Supreme Court, the defendant requested assigned counsel. The Public Defender informed the court that the defendant qualified for assigned counsel under the applicable guidelines. However, the trial court concluded that, in determining eligibility, it had the authority to impute income to the defendant and that an evidentiary hearing was needed. After the hearing, Supreme Court determined that $50,000 in income should be imputed to the defendant—an unemployed graduate student living with his parents—and that he was not eligible for the appointment of counsel. The Fourth Department reversed. A person seeking child custody or facing contempt proceedings, whether in Family or Supreme Court, had a statutory right to have counsel assigned in any case where he or she was financially unable to obtain counsel. The reviewing court agreed with the defendant and amici curiae that "the court had no authority to deprive the defendant of his constitutional and statutory right to counsel on the basis of imputed income." In determining eligibility for assigned counsel, the salient issue is whether a party currently possesses the financial ability to obtain counsel to represent him or her in the legal proceeding—not whether the party should have such ability or may have such ability in the future. The trial court had inaptly invoked maintenance and child support statutes allowing for the consideration of earning capacity and the imputation of income commensurate with education and skills. Those statutes deal with ongoing responsibilities over a period of time, not an immediate need for representation—which cannot be fulfilled "by paying a private attorney with hypothetical, imputed income." Thus, the appellate court granted the defendant's motion for the assignment of counsel and remitted the matter to Supreme Court for further proceedings before a different justice. Harris Beach PLLC (Svetlana Ivy, of counsel) represented the appellant. Amici curiae support was provided by the Chief Defenders Association of New York and the Legal Aid Bureau of Buffalo.

http://nycourts.gov/reporter/3dseries/2018/2018_02034.htm

CRIMINAL

COURT OF APPEALS

People v Sanchez, 3/22/18 – **People's Appeal / Don't Bring a Gun to a Knife Fight**

The defendant was convicted in Dutchess County of manslaughter in the first degree in a shooting death, and assault in the first and the second degrees in the shootings of two other victims. The Second Department (4-1) held that County Court should have submitted a justification charge, and the error was not harmless. Thus, the judgment was modified on the law, the convictions were vacated, and a new trial was ordered. In a memorandum decision, the Court of Appeals reversed, holding that the trial court had properly declined to charge the justification defense, because the jury could not have rationally concluded that the defendant's reactions were those of a reasonable person acting in self-defense, and there was no reasonable view of the evidence that he could not have safely retreated when deadly physical force was used. The case was remitted for consideration of the facts (CPL 470.25 [2] [d], 470.40 [2] [b]) and the issues raised, but not determined, on the appeal to the Second Department. A dissent authored by Judge Wilson, in which Judge Rivera concurred, detailed the evidence most favorable to the defendant. "Lurking somewhere beneath the majority's opinion is the thought that you mustn't bring a gun to a knife fight," the dissent observed regarding proof that the group threatening the defendant and his friends was armed with a knife and beer bottles, but not guns. The dissent continued that deadly force may exist when a group attacking an individual is not armed at all and when an unarmed victim grabs at a defendant's gun. Further, in other appellate decisions, a variety of items have been characterized as dangerous instruments which, if used as part of an attack, might justify the use of deadly force.
http://www.nycourts.gov/reporter/3dseries/2018/2018_01957.htm

People v Brooks, 3/22/18 – **Evidentiary Errors Harmless / Murder Conviction Affirmed**
Following a jury trial, the defendant was convicted of second-degree murder for killing his girlfriend, who was found dead, fully submerged in an overflowing bathtub in a Manhattan hotel room. On appeal, a unanimous First Department held that the trial court had properly granted the People's motion for a *Frye* hearing to address the defense expert's theory regarding the interaction of five prescription drugs found in the victim's system. The Appellate Division further held that Supreme Court had properly admitted character testimony from 11 of the victim's friends about her turbulent relationship with the defendant. In a memorandum decision, the Court of Appeals affirmed. To the extent that the trial court had improperly applied *Frye* to rule on the foundation of the expert's testimony—as opposed to the general acceptance and reliability of the relevant scientific principles or procedures—any such error was harmless. The challenge to the extensive character testimony was rejected, based on the limiting instructions delivered, the defendant's admissions to police about prior bad acts, and the lack of preservation regarding the cumulative nature of the testimony. The trial court had erred, however, in admitting testimony about an argument a month before the murder in which the defendant threatened to kill the victim. The subject testimony constituted double hearsay, was not admitted pursuant to any hearsay exception, and was clearly offered for its truth. But such error was also deemed harmless.
http://www.nycourts.gov/reporter/3dseries/2018/2018_01956.htm

SECOND DEPARTMENT

People v Drayton-Archer, 3/21/18 – **Auto Presumption Inapplicable / New Trial**
The defendant was convicted, in Queens County Supreme Court, of second-degree criminal possession of a weapon (two counts) and other crimes. Police who pursued his vehicle testified that a gun was seen solely in the physical possession of the other occupant, and the automobile presumption did not apply. The error in charging the presumption was not harmless; it was impossible to determine whether the

guilty verdict was based on the improper instruction or proper jury charges as to the People's alternative theories of constructive possession and acting in concert. The weapon possession convictions were vacated, and a new trial was ordered. Appellate Advocates (Samuel Brown, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_01934.htm

People v Poullard, 3/21/18 – **Foreign Felony Conviction / Invalid Predicate**
The defendant failed to preserve his contention that his Virginia conviction of credit card fraud did not qualify as a predicate felony. However, the reviewing court exercised its interest of justice jurisdiction to hold that the People had failed to establish that the foreign conviction was equivalent to a New York felony. Thus, the defendant's adjudication as a second felony offender was vacated and the matter remitted to Queens County Supreme Court for resentencing. Appellate Advocates (Brian Kreykes and Yvonne Shivers, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_01940.htm

People v Winter, 3/21/18 – **Defendant Deported / Appeal Dismissed**
The defendant, born in Jamaica, came to this country at age two as a legal permanent resident. As a young man, he was convicted in Queens County on a plea of guilty of attempted criminal sale of a controlled substance in the third degree and sentenced to five years' probation. About a decade later, deportation proceedings were commenced against the defendant based on the drug sale conviction, as well as a Pennsylvania conviction. After his motion to vacate the New York conviction was denied, the Second Department granted leave to appeal. The People moved to dismiss the appeal because the defendant had been deported and thus was no longer available to obey the mandate of the court. Based on an involuntary deportation, the Appellate Division cannot dismiss a defendant's pending direct appeal, but can dismiss a pending permissive appeal. *See People v Harrison*, 27 NY3d 281. In the instant case, the appellate court granted the People's application and dismissed the appeal, without prejudice to the defendant to reinstate the appeal if he returned to the court's jurisdiction.
http://nycourts.gov/reporter/3dseries/2018/2018_01946.htm

People v Jackson, 3/21/18 – **Restitution Order / No Right to Appeal**
The defendant appealed from an amended order of restitution rendered in Nassau County Supreme Court. The appeal was dismissed. CPL 450.10 and 450.15, regarding criminal defendants' appeals to intermediate appellate courts, do not authorize appeals from such orders. Where restitution is imposed at sentencing, such order is reviewable upon appeal from the judgment of conviction. CPL 470.15 (1). If a restitution order is delayed, the defendant may be able to appeal as of right from the judgment of conviction, as well as from the sentence as amended to order restitution. *See People v Swiatowy*, 280 AD2d 71.
http://nycourts.gov/reporter/3dseries/2018/2018_01935.htm

THIRD DEPARTMENT

People v Booker, 3/22/18 – **Motion to Withdraw Plea / No Right to Appeal**
The defendant was convicted in Sullivan County Court on his plea of guilty of second-degree criminal possession of a weapon. The Third Department rejected his contention that, because the plea court did not issue a written decision, he was unable to appeal the denial of his motion to withdraw his guilty plea.

There was no requirement that a trial court render a written decision when denying such a motion. Further, unlike in civil appeals (CPLR 2219 [a], 5512), criminal appeals may be taken from oral orders. *See People v Elmer*, 19 NY3d 501, 507-508. However, under CPL article 450, a separate appeal from an order denying a motion to withdraw a guilty plea does not lie, the appellate court stated. Instead, the defendant could have challenged the denial of his motion upon appeal of the judgment of conviction.
http://nycourts.gov/reporter/3dseries/2018/2018_01959.htm

People v Schmitz, 3/22/18 – **RIGHTS WAIVED NOT EXPLAINED / PLEA VACATED**
The defendant was convicted in Sullivan County Court, upon his plea of guilty, of aggravated unlicensed operation of a motor vehicle in the first degree and driving while intoxicated. The record revealed that there was no meaningful plea colloquy and that County Court failed to explain the constitutional rights the defendant was relinquishing. The People conceded the deficiency. The judgment was reversed in the interest of justice, and the matter was remitted for further proceedings. Donna Maria Lasher represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_01960.htm

FOURTH DEPARTMENT

People v Carey, 3/23/18 – **PETIT LARCENY / AGAINST WEIGHT OF EVIDENCE**
The defendant was convicted of petit larceny pursuant to the common-law theory of larceny by trick, which occurs where the owner of the property is induced to part with possession but not title via a trick by the wrongdoer, who then misappropriates the property. The verdict was contrary to the weight of the evidence with respect to whether the defendant tricked the victim to obtain his property. Thus, the petit larceny count of the indictment was dismissed. The Ontario County Public Defender (Gary Muldoon, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_02050.htm

People v Anderson, 3/23/18 – **MURDER UPHELD / DISSENTERS DECRY PROPENSITY PROOF**
The Fourth Department affirmed a Monroe County murder conviction upon a jury verdict. Two judges dissented, opining that the defendant was denied a fair trial by the admission of propensity evidence painting him as a cold-blooded killer who intimated that he had committed numerous shootings. The People did not assert that the propensity evidence was admissible, but contended that the issue was unpreserved. The dissenters found the evidence highly prejudicial. Further, the proof of guilt was less than overwhelming in the cold-case investigation with no eyewitnesses. They would have granted a new trial in the interest of justice. Ineffective assistance of counsel provided a further basis for reversal, since the failure to object to the propensity could not be deemed a reasonable strategy.
http://nycourts.gov/reporter/3dseries/2018/2018_02105.htm

People v Miller, 3/23/18 – **BURGLARY / DISSENTERS SAY DEFENDANT WANTED TO WALK DOG**
The appellate court affirmed the Wyoming County conviction of second-degree burglary and petit larceny based on proof that the defendant entered an ex-girlfriend's residence with the intent to steal her dogs. Two dissenting justices concluded that the verdict was against the weight of evidence. The complainant conceded that the defendant was a joint owner of the dogs. He helped buy the pets and paid toward their continuing care. Moreover, there was no dispute that the complainant had previously consented to the defendant using a window to enter her house and gain access to the dogs. It appeared

that, prior to arrest, he simply intended to take the dogs for a walk and then return them.
http://nycourts.gov/reporter/3dseries/2018/2018_02109.htm

People v Davis, 3/23/18 – **MOTION TO PRECLUDE ID TESTIMONY / HEARING NEEDED**
The defendant was convicted of criminal possession of a weapon in the second and third degrees. In response to his omnibus motion, the People had asserted that no identification procedure requiring CPL 710.30 notice had occurred. However, the record established that police may have engaged in show-up identification procedures. A hearing was needed to determine whether that had occurred and, if so, whether the identification was merely confirmatory. Thus, the Fourth Department reserved the decision and remitted the matter. The Monroe County Public Defender (Janet Somes, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_02051.htm

People v Reed, 3/23/18 – **HEARING ON 440 MOTION / *BRADY* VIOLATION**
The defendant was convicted, upon a plea of guilty, of third-degree assault and third-degree criminal possession of a controlled substance. Thereafter, Erie County Supreme Court summarily denied a CPL 440.10 motion that was based on a *Brady* violation. The defendant had submitted credible documentary evidence establishing that the prosecutor had failed to disclose material, exculpatory evidence and had failed in his duty to correct knowingly false or mistaken material testimony at the suppression hearing. The order denying the CPL 440.10 motion was reversed, and the matter was remitted for a hearing. Phillip Modrzynski represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_02068.htm

People v Wilson, 3/23/18 – **HEARING ON PLEA WITHDRAWAL MOTION / *BRADY* VIOLATION**
The defendant was convicted, upon a plea of guilty, of second-degree manslaughter and two other charges. Seneca County Court summarily denied his motion to withdraw his plea, which was based on the People's failure to disclose the autopsy and toxicology reports of the motorcycle operator. That was error. A guilty plea did not forfeit a *Brady* claim, and prior Fourth Department decisions holding otherwise were no longer to be followed. Evidence of the motorcyclist's intoxication was relevant with respect to the fatal accident and the defendant's culpability. The motion court should not have summarily determined whether and to what extent the exculpatory information, if disclosed, would have affected the decision to plea of guilty. Thus, the court reserved decision and remitted for a hearing. J. Scott Porter represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_02106.htm

FAMILY

SECOND DEPARTMENT

Matter of Jason (Sonia O.), 3/21/18 – **ADOPTION / AGREEMENT SATISFIED DRL § 110**
Domestic Relations Law § 110 provides that an adult married person who has executed a legally enforceable separation agreement may adopt a child. After separating from her spouse, the petitioner executed a separation agreement and sought to adopt her grandson. Queens County Family Court

dismissed the petition because the agreement did not contain substantive provisions settling marital issues. That was error; the agreement satisfied the statutory requirements. The order was reversed, the petition reinstated, and the matter remitted. Ira Eras represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_01922.htm

Matter of Mastronardi v Milano-Granito, 3/21/18 – **GRANDPARENT VISITATION / AFFIRMED**
Paternal grandparents sought visitation with their two grandchildren. The children's father had died, which gave the grandparents automatic standing to seek visitation. Nassau County Family Court properly determined that visitation was in the children's best interests. The mother's animosity toward the grandparents caused the children's estrangement from them. The record supported the forensic evaluator's determination that the discord was not the grandparents' fault.
http://nycourts.gov/reporter/3dseries/2018/2018_01923.htm

FOURTH DEPARTMENT

Matter of Reynolds v Evans, 3/23/18 – **NJ SUPPORT MODIFICATION / PETITION REINSTATED**
The father sought to modify a New Jersey child support order. He resided in New York, and the mother and child had relocated to Tennessee. Ontario County Family Court erred in dismissing the petition based on a lack of subject matter jurisdiction. While the father could not bring the petition under the Uniform Interstate Family Support Act, he could do so under the Full Faith and Credit for Child Support Orders Act, which preempted UIFSA. *See Matter of Bowman v Bowman*, 82 AD3d 144. The challenged order was reversed, the petition reinstated, and the matter remitted for further proceedings. The Ontario County Public Defender (Mollie Dapolito, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_02077.htm

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