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CRIMINAL

DECISION OF THE WEEK

People v Parker, 4/11/18 – **Sealing Statute / Defendant Eligible**

In 2012, upon the defendant's plea of guilty to DWAI and certain drug possession charges, shock incarceration was ordered. After six months, the defendant was released from Shock, which had included alcohol and substance abuse treatment. Thereafter, he served one year of post-release supervision, during which he continued treatment. The defendant then graduated from college, moved out of state, applied to graduate school; and, pursuant to CPL 160.58, he sought to seal official records relating to the drug charges. Nassau County Court held that, due to his DWAI conviction, the defendant was ineligible for such relief. That was error, the Second Department held. The statute allows for the sealing of records regarding specified drug offense convictions, and a DWAI conviction does not preclude sealing. Further, the defendant's shock incarceration and ensuing treatment constituted the requisite judicially sanctioned drug treatment. The matter was remitted for a hearing. Andrea Hirsch represented the appellant.

http://nycourts.gov/reporter/3dseries/2018/2018_02487.htm

FIRST DEPARTMENT

People v Tineo-Santos, 4/10/18 – **No Argument to Suppress / Strategic Decision**

In a Bronx County murder prosecution, the defendant contended that trial counsel was ineffective because, at the *Huntley* hearing, he made no suppression arguments, even though the People called no witnesses with personal knowledge of the taking of his statement. The First Department stated that trial counsel might have decided that the defendant's statement would help the defense. In any event, the proof against the defendant was overwhelming. Appellate counsel criticized trial counsel on a second ground. After the jury submitted two deadlock notes as to the murder charge, trial counsel declined the court's offer to depart from the acquit-first rule (*People v Boettcher*, 69 NY2d 174) and allow the jury to consider the lesser-included manslaughter count, without first reaching a verdict of not guilty on the higher count. Counsel faced a choice that was "quintessentially a judgment call, involving a significant measure of instinct and intuition," the reviewing court observed.

http://nycourts.gov/reporter/3dseries/2018/2018_02425.htm

People v Findley, 4/12/18 – **Standby Counsel / Proper to Not Replace or Dismiss**
After permitting the defendant to represent himself at trial, New York County Supreme Court properly declined to dismiss or replace standby counsel, the First Department held. Proceeding with no counsel would have risked a mistrial if the defendant's pro se status ended—a real concern based on his history of disruptiveness. There was no good cause to replace counsel, the defendant's third assigned attorney. Substitution was not warranted by the defendant's unjustified hostility toward counsel. While the attorney's negative comments about the defendant in a newspaper article should have been avoided, they did not constitute an irreconcilable conflict. In requesting another Article 730 competency examination over the defendant's objection, the legal advisor sought to act in his client's interest.
http://nycourts.gov/reporter/3dseries/2018/2018_02545.htm

SECOND DEPARTMENT

People v Robinson, 4/11/18 – **Resentence / Reversal**
The defendant was charged under two indictments for various crimes. In return for his guilty pleas, Orange County Court promised a determinate term of five years and post-release supervision of 1½ to three years, with all sentences to be served concurrently. After the defendant pleaded guilty, County Court informed him that the sentences had to run consecutively. The defendant did not agree to the new sentence, yet the court did not offer him the opportunity to withdraw his guilty pleas. An aggregate determinate term of seven years, followed by two years' post-release supervision, was imposed. No appeal was taken from the judgments. Subsequently, the defendant was resentenced on his conviction of criminal sale of a firearm, because the sentence imposed was illegal. The period of post-release supervision was increased to five years. Again, the defendant was not given the opportunity to take back his pleas. The Second Department reversed. Since the supervision imposed exceeded the promised period, and the guilty pleas were induced by a promise of concurrent terms, the defendant was entitled to withdraw the pleas. Michele Marte-Indzonka represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_02490.htm

THIRD DEPARTMENT

People v Ulmer, 4/12/18 – **Restitution Order / Reversal in Interest of Justice**
In an appeal from a Broome County judgment revoking probation, the defendant contended that he had been erroneously ordered to pay restitution to an individual who was not a victim of the subject crime. Although the claim was unpreserved, the Third Department took corrective action in the interest of justice. The individual to whom restitution was awarded was indeed not a victim of the underlying attempted burglary conviction. The People asserted that the restitution order related to the victim of a previous conviction for which the defendant received a conditional discharge, and that the disposition of the instant probation violation encompassed such matter. However, the record did not support that contention. Thus, the restitution order was reversed. Linda Campbell represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_02510.htm

People v Jackson, 4/12/18 – **Evidentiary and Summation Errors / Harmless**
The appellate court agreed with the defendant that Clinton County Court improperly admitted testimony

from a confidential informant, who said at trial that she had engaged in sexual intercourse with the defendant in exchange for drugs. Although such testimony was relevant to the CI's ability to identify the defendant, probative value was outweighed by potential for prejudice. Further, despite the defendant's failure to request limiting instructions, the trial court should have delivered them. The defendant further contended that, in summation, the prosecution improperly vouched for the CIs' credibility. On the one hand, some prosecution comments were in response to the defendant's argument that the drug charges were the result of forgeries and police corruption. On the other hand, the People's closing remarks were "troubling and would have been better left unsaid." Nevertheless, the errors were deemed harmless, given overwhelming proof of guilt.
http://nycourts.gov/reporter/3dseries/2018/2018_02505.htm

People v Warren, 4/12/18 – **Chemical Breath Test / Refusal to Submit**
Following a traffic stop of his vehicle based on excessive speed and erratic driving, the defendant was charged with DWI and another crime. The suppression court ruled that his refusal to submit to a chemical breath test was admissible. After a jury trial, the defendant was convicted. On appeal, he argued that Ulster County Court should not have allowed the People to present, as proof of consciousness of guilt, his refusal to submit to the test. The defendant contended that the arresting officer did not adequately advise him that his persistent requests to speak to an attorney could be construed as a refusal. The Third Department held that the arresting officer provided repeated and accurate warnings. A reasonable person would have understood that a third request to speak to an attorney—made 20 minutes after the first request and 30 minutes after the start of the observation period—would be interpreted as a refusal. County Court properly found such proof admissible at trial. In any event, any error in admitting such proof was harmless.
http://nycourts.gov/reporter/3dseries/2018/2018_02508.htm

People v Conklin, 4/12/18 – **Plea Withdrawal Motion / Denied After Hearing**
In Rensselaer County Court, the defendant pleaded guilty to second-degree burglary and second-degree unlawful imprisonment, but then moved to withdraw his plea. He contended that the People had misrepresented that the victim was willing to cooperate in the prosecution. The defendant also retained new counsel. A hearing was held. The victim, who had romantic feelings for the defendant, insisted that she had told the People that she would not cooperate and would not testify against the defendant. However, the ADA, a victim's advocate, and prior defense counsel said otherwise. County Court properly elected to credit the testimony of the People's witnesses and did not improvidently exercise its broad discretion in denying the defendant's motion, the Third Department held. Thus, the conviction was affirmed.
http://nycourts.gov/reporter/3dseries/2018/2018_02502.htm

FAMILY

FIRST DEPARTMENT

Matter of Carmen R. v Luis I., 4/10/18 – **Mootness Exception / Errant Support Ruling**
After determining that the father had willfully violated a child support order, a Bronx County Family

Court Support Magistrate deferred to a "post-dispositional hearing" the issue of whether his violation warranted incarceration. The hearing, which commenced 54 days later, was held over a period of several months. The mother filed objections, but Family Court denied them, holding that the fact-finding order was non-final. That was error and the issue was not moot, the appellate court held. Although the subject order had been superseded, the mootness exception (*Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 713-715) applied, based on these elements: (1) the relevant issues were capable of repetition; (2) the issues were likely to evade review; and (3) they were significant and novel. The First Department declared that the mother had been deprived of her Family Court Act § 439-a right to an expeditious final disposition of her violation petition. Under Family Court rules, upon completion of the hearing, the Support Magistrate was required to issue findings of fact within five days; and if a willful violation was found, a recommendation as to incarceration was mandatory. In denying the mother's objections—based on the purportedly non-final nature of the challenged order—Family Court had compounded the Magistrate's error. By statute, the Magistrate's order was final. The order did not recommend incarceration and thus had force and effect without confirmation by a judge. Rene Kathawala represented the appellant. Her Justice and Sanctuary for Families filed an amicus curiae brief.
http://nycourts.gov/reporter/3dseries/2018/2018_02422.htm

Matter of Luis P., 4/12/18 – **DISSENT / JUVENILE DELINQUENT'S STATEMENT INVOLUNTARY**
In a 55-page decision, a divided First Department grappled with the question of whether the presentment agency adequately proved that the 13-year-old appellant's written statement was voluntary. The majority answered in the affirmative and therefore upheld the Bronx County Family Court order adjudicating the appellant to be a juvenile delinquent based on certain sexual offenses. Justice Gesmer wrote a dissent, in which Presiding Justice Acosta joined, opining that the written statement was involuntarily made. The statements of children must be analyzed pursuant to *Matter of Jimmy D.*, 15 NY3d 417, which cautions that special care must be taken to protect the rights of minors. The *Luis P.* dissent focused on three factors: (1) the appellant's age and inexperience in the juvenile justice system; (2) the absence of his mother when he wrote the subject "apology letter," and (3) law enforcement's use of deception. The detective waited until after the mother left the room to suggest that the appellant write an apology letter to the victim. Interrogation tactics that may be acceptable with an adult may be unacceptable with a juvenile. Appellant likely did not understand that the detective's suggestion was a disguised attempt to procure a written statement to use against him at trial. In the dissenters' view, the failure to suppress the written statement was not harmless error simply because a different oral statement was found admissible. The instant letter, which was more reliable and detailed than the appellant's oral statements, constituted an important element in the presentment agency's case.
http://nycourts.gov/reporter/3dseries/2018/2018_02564.htm

SECOND DEPARTMENT

Matter of Alan S. M. C., 4/11/18 – **GUARDIANSHIP PETITIONS / IMPROPER DISMISSAL**
The two subject children each filed a petition pursuant to Family Court Act Article 6 to appoint the mother as their guardian to obtain an order making specific findings: that the children were unmarried and under age 21; that reunification with the fathers was not viable due to parental abandonment; and that it would not be in their best interests to be returned to Mexico. Such findings would enable the children to petition for Special Immigrant Juvenile Status (SIJS). Queens County Family Court dismissed the petitions, finding that the mother did not have legal status in this country and thus was not a New York

domiciliary. The Second Department reversed. The mother's lack of lawful status in the United States was immaterial to the salient issue: whether she showed an intent to permanently reside here. She did. Further, the best interests of the children would be served by the appointment of the mother as guardian, and the record supported the findings necessary to permit the children to petition for SIJS. Make the Road New York and Paul Weiss Rifkind represented the appellants.
http://nycourts.gov/reporter/3dseries/2018/2018_02459.htm

Matter of Mirza S. A. (Mirza A. A.), 4/11/18 – **TESTIMONY / OUTSIDE FATHER'S PRESENCE**
The father's appeal from a Family Court Act Article 10 disposition brought up for review the fact-finding order, which held that he had neglected his child based on his acts of domestic violence in the child's presence. At the hearing, Queens County Family Court concluded that the child would suffer emotional trauma if compelled to testify in the father's presence. Therefore, the father viewed the testimony via video linkup, while his attorney was present in the courtroom during the testimony. After a recess to allow the father and counsel to consult, the father's attorney cross-examined the child. The Second Department held that such procedure properly balanced the parties' rights and interests, and that the father's due process right and Sixth Amendment right of confrontation were not violated. Further, the finding of neglect was supported by a preponderance of the evidence.
http://nycourts.gov/reporter/3dseries/2018/2018_02455.htm

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