COURT OF APPEALS

DECISION OF THE WEEK

People v Cummings, 5/8/18 – **911 CALL / NO EXCITED UTTERANCE**

Was it reasonably inferable that an unidentified declarant, heard in the background of a 911 call, personally observed the shooting being reported, so that his words could properly be admitted under the excited utterance exception? The Court of Appeals answered no, in an opinion by Judge Wilson. The court observed that numerous people arrived between the shooting and the statement, and there was no way to know whether the statement was made by someone who could see the assailant. Thus, admission of the statement at trial was error. Since the proof likely contributed to the convictions on assault and weapon possession charges, a new trial was ordered. Judge Rivera concurred, opining that the excited utterance exception warranted reconsideration, given scientific advances establishing a traumatized person's inability to accurately recall facts and belying the notion that immediacy negates likely fabrication. Susan Salomon represented the appellant.
http://www.nycourts.gov/reporter/3dseries/2018/2018_03306.htm

People v Kuzdzal, 5/8/18 **– PEOPLE'S APPEAL / JUROR MISCONDUCT**

At the close of evidence, it was reported that a spectator—defendant's lifelong friend—overheard two jurors calling him a "scumbag." The court questioned the spectator, found her incredible, and thus saw no need for a *People v Buford* (69 NY2d 290) inquiry. The defendant was convicted of murder and predatory sexual assault against a child as to his paramour's five-year-old son. The Fourth Department found that the trial court should have conducted a *Buford* inquiry and ordered a new trial. Writing for the majority, Chief Judge DiFiore held that the Appellate Division did not consider whether the trial court's credibility finding was supported, so remittal was required. Judge Wilson concurred, opining that the relevant CPL 270.35 standard was not whether the jurors were grossly unqualified, but whether they committed substantial misconduct in improperly engaging in premature deliberations. Judge Rivera dissented. Lyle Hajdu represented the respondent.
http://www.nycourts.gov/reporter/3dseries/2018/2018_03304.htm

People v Wallace, 5/8/18 **– "PLACE OF BUSINESS" / NARROW CONSTRUCTION**

The "place of business" exception to Penal Law § 265.03 (3) serves to reduce the level of the offense of possession of an unlicensed firearm. In an opinion authored by Judge Feinman, the Court of Appeals held that the exception does not apply to an employee who possessed an unlicensed firearm at work, such as the defendant "swing manager" at a McDonald's restaurant. Instead, the narrow exception encompassed persons such as a merchant, storekeeper or principal operator of a like establishment. Judge Stein concurred in the result.
http://www.nycourts.gov/reporter/3dseries/2018/2018_03305.htm

FIRST DEPARTMENT

People v Alston, 5/8/18 – **JUDICIAL DIVERSION / ERROR TO DENY RELIEF**
New York County Supreme Court erred in denying the defendant's request to participate in the judicial diversion program (JDP). His heavy use of marijuana cost up to $60 per day, which evidently contributed to his selling of cocaine (*see* Penal Law § 216.05 [3] [b] [iii]), for which he was convicted. Thus, the trial court was directed to order judicial diversion, giving due recognition to the drug treatment program the defendant had already completed. Such result was consistent with a purpose of the JDP, which was to permit a defendant to achieve a disposition other than a felony conviction, where appropriate. The Legal Aid Society of New York (David Crow and Frederick Glasgow, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_03324.htm

People v Villalon, 5/10/18 – **DUPLICITOUS COUNT / INDICTMENT DISMISSED**
The defendant appealed from a New York County judgment convicting him of criminal contempt in the first degree. The First Department reversed and dismissed, with leave to re-present any appropriate charges to another grand jury. The criminal contempt count was duplicitous. The defendant's acts of violating an order of protection, by regularly showing up at the victim's apartment over the course of about 50 days, constituted distinct crimes that had to be alleged in separate counts. *See People v Keindl*, 68 NY2d 410 (where one count alleges commission of particular offense occurring repeatedly during designated period, that count encompasses more than one offense and is duplicitous). The defendant preserved the argument by moving to dismiss the count. The defect was in the language of the indictment itself and did not depend on the trial evidence or the court's charge. The Center for Appellate Litigation (Matthew Bova, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_03431.htm

People v Vinson, 5/10/18 – **UNLOCKED STORE RESTROOM / EXPECTATION OF PRIVACY**
After a jury trial, the defendant was convicted of tampering with physical evidence and criminal possession of a controlled substance in the seventh degree. New York County Supreme Court erred in denying his suppression motion on the ground that the police entry into a single-use restroom, located in an adult film and novelty store, was not a search. Once the defendant closed the door, he had a reasonable expectation of privacy. The closed door of the restroom was comparable to closed bathroom stalls in public restrooms. The expectation of privacy was not negated by the fact that the restroom was in a commercial establishment and was unlocked. The First Department held the appeal in abeyance and remanded the matter. The Center for Appellate Litigation (Jacqueline Meese-Martinez, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_03437.htm

SECOND DEPARTMENT

People v Ryan, 5/9/18 – **VEHICULAR MANSLAUGHTER / REVERSAL**
The defendant was driving in Nassau County when his vehicle sideswiped another car. Shortly thereafter, the defendant "cut off" another vehicle, resulting in a second collision. The defendant's vehicle spun and came to rest in the high-occupancy vehicle lane of the expressway. An officer aiding the defendant was struck and killed by an SUV whose driver failed to pay attention to roadway conditions and approached the accident scene at an excessive speed. An hour after the accident, the defendant had a BAC of .12%. Upon a jury verdict, he was convicted of second-degree manslaughter, second-degree vehicular manslaughter, aggravated criminally negligent homicide, criminally negligent homicide, and other charges. The Second Department held that the verdict as to the manslaughter and homicide counts was against the weight of evidence. The officer's death was not temporally proximate to the defendant's conduct. Instead, a substantial amount of time passed between the accidents involving the defendant's vehicle and the subsequent fatal accident involving the SUV. However, legally sufficient proof supported the convictions of third-degree assault, reckless endangerment, and leaving the scene of an incident without reporting. One judge dissented. Matthew Hug represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_03380.htm

People v Vasquez, 5/9/18 – **UNCHARGED THEORY / CONVICTION REVERSED**
Regarding a count for endangering the welfare of a child, the defendant was accused of subjecting a 14-year-old complainant to certain sexual contact not involving kissing. At trial, evidence was adduced that the defendant kissed the complainant. Over objection, the People argued in summation that the defendant's guilt of the endangering charge was established by his kissing the victim. The trial court delivered an instruction allowing for conviction based on such theory. The defendant was convicted of the endangering charge, but acquitted on other charges. The Second Department reversed and ordered a new trial. Where the prosecution is limited by the indictment or bill of particulars to a certain theory or theories, the court must hold the prosecution to such approach. Here the relevant count of the indictment restricted the People to a particular theory of endangering the welfare of a child. Thus, Supreme Court erred in permitting the jury to consider a theory not charged in the indictment—that kissing endangered the complainant's welfare. The Legal Aid Society of NYC (Anita Aboagye-Agyeman, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_03382.htm

FAMILY

FIRST DEPARTMENT

Matter of Rushane P. v Boris L.R., 5/10/18 – **FAMILY OFFENSE / REINSTATED**
New York County Family Court erred in dismissing a petition, which alleged that family offenses occurred in New York, Pennsylvania, and Jamaica. Family Court reasoned that the only incident alleged to have occurred in New York happened in 2014, three years before the filing of the petition. That was wrong in two ways. First, Family Court's subject matter jurisdiction was not limited by geography; the court could have made findings of fact as to incidents that occurred outside its jurisdiction. *See Matter of Richardson v Richardson*, 80 AD3d 32. Second, a court must not dismiss a petition solely on the basis that the acts alleged were not relatively contemporaneous with the date of the petition. *See* Family Ct Act § 812 (1). The Sanctuary for Families represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_03459.htm

SECOND DEPARTMENT

Matter of Denia M. E. C. v Carlos R. M. O., 5/9/18 – **SIJS / REVERSAL**
Nassau County Family Court erred in denying the mother's petition to be appointed guardian of the subject child and her motion for issuance of an order making the requisite findings to enable the child to petition for special immigrant juvenile status. Reunification of the child with the father was not viable due to his death. It was not in the child's best interests to return to Honduras. No one there was available to care for him, and he faced the threat of violence if he returned. Bruno Bembi represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_03355.htm

Isichenko v Isichenko, 5/9/18 – **MAINTENANCE / ERROR TO DENY HEARING**
Westchester County Supreme Court should not have denied, without a hearing, the husband's motion to reduce spousal maintenance. His statements—that he was only able to obtain employment at a salary far lower than the one he earned shortly before the divorce—were supported by sworn submissions of job recruiters, colleagues, and a vocational expert. Thus, the proof established a genuine issue of fact as to whether a downward modification in maintenance was warranted. David Bliven represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_03341.htm

Sheehan v Sheehan, 5/9/18 – **MAINTENANCE / AMOUNT PROPER**
Dutchess County Supreme Court properly awarded spousal maintenance to the wife in the sum of $2,100 per month for a period of three years. The court limited the duration to a reasonable time to allow the mother to fulfill her plan to obtain her Associate's Degree and training that would enable her to be self-supporting and to regain self-sufficiency. Both parties complained about the award, but neither established that the amount or duration of the award was improper.
http://nycourts.gov/reporter/3dseries/2018/2018_03388.htm

Paul v Paul, 5/9/18 – **REMOVAL OF AFC / MISSED OPPORTUNITY**
In the context of a custody appeal, the mother contended that Orange County Supreme Court had erred when it denied her motion to relieve the attorney for the child in a 2013 order. The Second Department generally did not consider any issue raised on appeal that could have been raised in an earlier appeal which was dismissed for failure to perfect. However, the reviewing court had inherent authority to do so. In the instant case, the court declined to consider the merits of the belatedly raised issue.
http://nycourts.gov/reporter/3dseries/2018/2018_03377.htm

Matter of Worsoff v Worsoff, 5/9/18 – **ISRAEL'S JURISDICTION / MISSED OPPORTUNITY**
The father appealed from an order of Nassau County Family Court which denied his petitions for registration and enforcement of California custody orders. He contended that Family Court erred in concluding, without a hearing on jurisdiction, that an Israeli custody order modified the California custody order. The appellate court pointed out that the father received the requisite notice of the mother's application to register the Israeli custody order, and he did not contest registration of that order. Had he done so, the issue of the Israeli court's jurisdiction to issue an order of custody could have been raised. The confirmation of the registered order precluded further contest of the order with respect to any matter that could have been asserted at the time of registration.
http://nycourts.gov/reporter/3dseries/2018/2018_03373.htm

THIRD DEPARTMENT

Prag v Prag, 5/10/18 – **UNSEALING CRIMINAL RECORDS / CUSTODY CONTEXT**
The wife commenced a divorce action and filed a family offense petition accusing the husband of committing domestic violence in 2015. The husband denied the allegations, and charges stemming from the 2015 incident were deemed dismissed due to an ACOD. Therefore, the records were sealed. The wife sought to unseal the records pursuant to CPL 160.50. Schenectady County Supreme Court denied the motion, the wife appealed, and the trial was stayed pending appeal. On appeal, the wife contended that, in commencing a civil action and denying the alleged abusive behavior, the husband placed in issue the information protected by the sealing statute and thus waived the statutory protection against disclosure. The Third Department rejected such argument. By filing the family offense petition, the wife placed in issue elements related to the prior criminal action. The reviewing court observed that there may be instances where a defendant affirmatively raises issues and thereby waives CPL 160.50 protections. However, more than simply denying allegations was required. Further, the wife could not invoke the inherent authority of courts to unseal criminal records in the interest of justice, since that authority was confined to attorney disciplinary matters.
http://nycourts.gov/reporter/3dseries/2018/2018_03414.htm

Rosen v Kaplan, 5/10/18 – **AGREEMENT BREACH / NO SUMMARY JUDGMENT**
The parties' separation agreement encompassed custody issues. When the mother petitioned for sole custody, the father moved to dismiss the petition based on a provision requiring the parties to attempt mediation prior to seeking court intervention. It was unclear from the record whether Family Court denied the motion outright or reserved. After an

evidentiary hearing, Family Court dismissed the custody petition because the mother had failed to comply with the mediation provision. The father commenced an action in Albany County Supreme Court alleging that the mother breached the agreement. He moved for partial summary judgment on the issue of liability, asserting that Family Court had already determined that the mother breached the provision. The motion was denied. That was proper, the Third Department held. Collateral estoppel did not apply where the mother raised questions of fact as to whether she was afforded a full and fair opportunity in Family Court to address the issue of whether she complied with the mediation provision.
http://nycourts.gov/reporter/3dseries/2018/2018_03410.htm

Matter of Isgro v Troiano, 5/10/18 – **CONSENT ORDER / APPEAL MOOTED**
Following a hearing, Otsego County Family Court dismissed the mother's application to modify a child support order. The mother appealed. The father advised the Third Department that, while the appeal was pending, the parties stipulated that support would be increased and that no arrears were owed. The reviewing court took judicial notice of the consent order and noted that the mother had failed to reserve any rights regarding the instant appeal. Thus, the appeal was rendered moot in its entirety and was dismissed.
http://nycourts.gov/reporter/3dseries/2018/2018_03412.htm

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