CRIMINAL

FOURTH DEPARTMENT

People v Borcyk, 6/12/20 – **EXCULPATORY PROOF / IAC**
The defendant appealed from a Monroe County Court order, which denied his CPL 440.10 motion seeking to vacate a murder conviction. The Fourth Department reversed and ordered a new trial based on ineffective assistance of counsel. At the time of trial, counsel spoke with a witness who said that her former boyfriend admitted killing the victim. The defense theory was that the former boyfriend or two associates committed the crime; and evidence at trial included eyewitness testimony that the trio entered the victim's home, and later two of them emerged with what appeared to be the victim's body. Yet when the subject, critical witness failed to appear at trial, defense counsel took no action to secure her presence. At the CPL Article 440 hearing, the witness testified about her former boyfriend's admission of guilt. Two justices dissented. Jonathan Edelstein represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_03359.htm

People v Allen, 6/12/20 – **SUPPRESSION / IAC**
The defendant appealed from an Onondaga County Supreme Court judgment, convicting him of 2nd degree CPW and other crimes. The Fourth Department reversed. Supreme Court erred in allowing evidence obtained after police stopped a vehicle in which the defendant was a passenger, based on the driver's unsafe backing-out maneuver. Vehicle & Traffic Law § 1211 (a), addressing operating a vehicle in reverse, did not apply; the housing complex parking area where the maneuver occurred was not a "parking lot" as defined in VTL § 129-b. Counsel's failure to raise the clear-cut, dispositive argument at the suppression hearing constituted ineffective assistance. Hiscock Legal Aid Society (Piotr Banasiak, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_03295.htm

People v Thomas, 6/12/20 – **SHOOTER / SPECULATION**
The defendant appealed from a judgment of Onondaga County Supreme Court, convicting him of 1st degree reckless endangerment, menacing a police officer or peace officer, and another crime. The Fourth Department held that the verdict as to the above-named counts was against the weight of evidence. At trial, the People's evidence consisted of one officer's testimony that, while pursuing the defendant on foot, he heard a gunshot from about 10' feet away, and a second officer's testimony that he heard a shot from his northwest and believed that the defendant had fired at the officers. Only sheer speculation could have led to the verdict. Hiscock Legal Aid Society (J. Scott Porter, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_03318.htm

People v Simmons, 6/12/20 – **COCAINE / NOT DANGEROUS**
The defendant appealed from a judgment of Jefferson County Court, convicting him of1st degree promoting prison contraband and other crimes. The Fourth Department reduced the contraband conviction to a 2nd degree offense and remitted for sentencing. In the interest of justice, the appellate court found legally insufficient the evidence that three baggies of cocaine found on the defendant were dangerous contraband. General penological concerns about the drug possessed were not enough. The only evidence of dangerousness was a correction officer's statement that drugs could cause overdoses, fights, and trips to the hospital. Though perhaps unhealthy, cocaine was not inherently dangerous. Further, the instant cocaine was bagged and not necessarily in consumable form. One justice dissented in part. Todd Monahan represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_03350.htm

People v Garno, 6/13/20 – **PERSISTENT FELON / TOO HARSH**
The defendant appealed from a Yates County Court judgment, convicting him 3rd degree arson, menacing a police or peace officer (four counts), 2nd degree criminal mischief, and 2nd degree reckless endangerment. The Fourth Department vacated the persistent felony offender adjudication and reduced the sentence. Twenty years to life was too harsh in light of the defendant's record of only two prior felonies (in 1981 and 2002) and the pretrial plea offer of 6 to 9 years. J. Scott Porter represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_03311.htm

People v Hyde, 6/12/20 – **POST-RELEASE / CONCURRENT**
The defendant appealed from a Livingston County Court judgment, convicting him of reckless assault of a child and 2nd degree assault. The Fourth Department ordered that the periods of post-release supervision run would concurrently. The consecutive periods imposed were illegal. *See* Penal Law § 70.45 (5) (c). The defendant failed to preserve the issue, but the appellate court could not allow an illegal sentence to stand. Steven Sessler represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_03319.htm

People v Carlson, 6/12/20 – **PROSECUTOR / ADMONISHED**
The defendant appealed from a judgment of Cattaraugus County Court, convicting him of 1st degree rape and other sexual offenses. The Fourth Department affirmed, but disapproved of a closing comment by the People, characterizing defense counsel's summation as evincing "a Brock Turner mentality"—thus inflaming the passions of the jury by referring to a sexual assault case of nationwide notoriety that involved allegations similar to those made here. Viewed in the context of the entire summation, however, that comment was not so egregious as to prevent a fair trial. Nevertheless, the appellate court reminded the People that a defendant is entitled to a full measure of fairness; and the prosecutor must search for the truth, ensure that justice is done, and safeguard the integrity and fairness of criminal proceedings.
http://nycourts.gov/reporter/3dseries/2020/2020_03336.htm

FAMILY

FOURTH DEPARTMENT

Ritchie v Ritchie, 6/12/20 – **SUA SPONTE RELIEF / IMPROPER**
Upon the mother's appeal from an order of Monroe County Supreme Court, the Fourth Department modified and remitted. After the mother initiated a Family Court Act Article 8 seeking an order of protection, the father had the matter removed to Supreme Court and sought to modify custody. Supreme Court awarded him sole custody for 60 days with limited visitation to the mother. Sua sponte, the trial court also ordered the mother to pay the father's counsel fees and a fine for perjury and prohibited the older child from using a cell phone or electronic devices doing extracurricular activities without the father's consent. The order was stayed in part pending appeal. Supreme Court erred in so many ways. The father did not even allege a change in circumstances, and the trial court did not consider best interests, so the custody/visitation order was reversed. Moreover, there was no legal basis for the devices/activities fiat; the fine was clearly improper; and remittal was needed as to counsel fees. Gary Muldoon represented the mother.
http://nycourts.gov/reporter/3dseries/2020/2020_03316.htm

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