CRIMINAL

SECOND DEPARTMENT

DECISION OF THE WEEK

People v Reddick, 8/1/18 – **COURT CLOSURE PROPER / DETECTIVE OPINION IMPROPER**
During a Kings County trial on CPW and assault charges, Supreme Court excluded the defendant's family members from the courtroom while the complainant testified. On appeal, the defendant contended that he was denied his right to a public trial. The Second Department observed that closure of the courtroom is an exceptional measure that must be sparingly taken and concluded that an overriding interest was demonstrated: the victim feared testifying in the presence of the excluded persons. The closure was limited, and the trial court properly determined that no lesser alternative would protect the interests at stake. However, the court erred in permitting a police detective to testify that, in his opinion, the defendant was the person depicted in surveillance video footage. Generally, lay witnesses must testify only to facts, and not to their opinions and conclusions drawn from facts. There was no showing that the detective was more likely than the jury to correctly determine whether the defendant was depicted in the video. But the error was harmless.
http://nycourts.gov/reporter/3dseries/2018/2018_05608.htm

People v Loney, 8/1/18 – **YO-ELIGIBLE DEFENDANT / SENTENCE VACATED**
The defendant paid $100 to stay in a bedroom of a Brooklyn basement apartment. While sitting in the kitchen, he was shot by unknown persons. Police entered the apartment to search for the assailants and found firearms and marijuana. The defendant, age 17 at the time, was charged and convicted of 3rd degree CPW and unlawful possession of marijuana. Supreme Court denied his application for youthful offender status, based on the mistaken belief that he was convicted of an armed felony. The Second Department held that the weapons offense did not require proof that the firearm was loaded, so the defendant was eligible for YO treatment without a finding of mitigation. The matter was remitted for a new determination as to YO status and resentencing. Appellate Advocates (Caitlin Halpern, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_05606.htm

People v Ross, 8/1/18 – **MODIFICATION / CONCURRENT SENTENCES**
In Kings County, the defendant was convicted of 2nd degree murder and 2nd degree CPW and sentenced to consecutive terms. The Second Department modified. The sentences had to run concurrently, where no evidence established that the defendant's possession of the gun was separate and distinct from his shooting of the victim. Appellate Advocates (Samuel Brown and Leila Hull, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_05610.htm

THIRD DEPARTMENT

People v Jemmott, 8/2/18 – **DEFECTIVE WARRANT / HARMLESS ERROR**
The defendant was convicted of 2nd and 3rd degree CPW. On appeal, he maintained that Ulster County Court erred in failing to suppress photographs of a gun retrieved during a search of his cell phone. The Third Department agreed. The warrant was based on a detective's affidavit discussing the underlying incident and detailing the affiant's knowledge of gang activity in the area of the arrest. County Court reasoned that, as a matter of "common sense and every day experience," the application was sufficient. Recent U.S. Supreme Court decisions have emphasized the significant privacy interest in information stored in one's cell phone, the reviewing court observed. Here the allegations did not indicate that the search would yield salient evidence. However, the photographs did not reveal that the gun depicted was the one seized. Given the overwhelming proof linking the defendant to the gun, the error was harmless.
http://www.nycourts.gov/reporter/3dseries/2018/2018_05632.htm

People v Lang, 8/2/18 – **PLEA VACATUR / WORSE RESULT AFTER TRIAL**
The defendant, then age 70, fatally shot his brother outside their Essex County farmhouse. He pleaded guilty to manslaughter in the first degree and was sentenced to a determinate term of 15 years, followed by five years' post-release supervision. The Third Department reversed, finding that the plea was coerced. 127 AD3d 1253. Following a trial, the defendant was convicted of murder and 4th degree CPW and sentenced to an aggregate term of 17 years to life. The Third Department sustained denial of a motion to suppress the defendant's statements to police. Generally, a person in custody cannot be questioned without receiving *Miranda* warnings. An exception exists where the questions are a reasonable response to an exigent situation. At the hearing, a State trooper testified that he went to the defendant's house in response to a 911 call. While en route, he was advised that the defendant reported that he shot his brother, was inside the house, and had left a gun on the porch. Another trooper arrived. When the defendant emerged, he was not holding anything. Upon arrest, he was asked where the victim and the gun were. Once the gun was secured, a trooper placed the defendant in his police car and *Mirandized* him. The questions about the location of the victim and gun were meant only to help the victim and to secure the area, the reviewing court stated. An acquittal would not have been unreasonable—the jury could have determined that the defendant was too intoxicated to intend to kill the victim. However, the defendant admitted that he acted purposefully after an argument. Thus, the appellate court concluded that the verdict was not against the weight of the evidence.
http://www.nycourts.gov/reporter/3dseries/2018/2018_05639.htm

People v Tschorn, 8/2/18 – **RECKLESS ENDANGERMENT / MAXIMUM TERM**
Charges against the defendant for reckless endangerment, criminal mischief, and prohibited use of weapons stemmed from an incident that occurred when he and his wife were staying at a relative's residence in Washington County. They awoke late at night to an alarm triggered on the driveway. The defendant admitted firing multiple rounds from his rifle toward a truck in his driveway. He agreed to plead to the entire indictment without any promise as to sentencing, and County Court imposed the maximum term. On appeal,

the defendant urged that the punishment was harsh and excessive. The Third Department affirmed. Notwithstanding mitigating factors, the defendant fired without any regard for the truck's occupant. A letter from the 71-year-old victim revealed that, even as the truck sped away, the defendant continued to fire.
http://www.nycourts.gov/reporter/3dseries/2018/2018_05640.htm

Franza v State of NY, 8/2/18 – **PAROLE DENIED / ARTICLE 78 REVIEW**
Claimant, an inmate, commenced an action seeking damages for an alleged violation of his due process rights by the Board of Parole in declining to release him following a hearing. He complained about the Board's failure to promulgate written procedures that incorporated risk and needs principles, as required by 2011 amendments to Executive Law § 259-c (4). The Court of Claims granted a motion to dismiss, and the appellate court affirmed. Executive Law Article 12-B did not authorize a private right of action for damages. Since Article 78 proceedings allowed for judicial review of parole release decisions, it was fair to infer that, had the legislature intended to create a private right of action, it would have done so.
http://www.nycourts.gov/reporter/3dseries/2018/2018_05641.htm

SECOND CIRCUIT

U.S. v Green, 7/31/18 – **PLEA DEAL / NO RESTITUTION OUTSIDE LIMITATIONS PERIOD**
The defendant was convicted of theft of government property after depositing her deceased mother's Veterans Affairs checks for two years. In a plea deal, she admitted to stealing $35,774; agreed to pay restitution equal to the sum stolen, within the applicable limitations period (five years); and reserved the right to contest any restitution ordered as to payments outside such period. The District Court ordered restitution for the full amount stolen, including amounts taken after the limitations period expired. That was error, the Second Circuit held. By its nature, the subject offense was not a continuing crime. The prosecution's attempt to circumvent the relevant language reserving rights as to restitution did not satisfy "the most meticulous standards" to which the government is held in plea bargains, the reviewing court declared. The matter was remanded to determine the proper restitution amount. Arthur Frost represented the defendant.
http://www.ca2.uscourts.gov/decisions.html

OTHER COURTS

People v Souchet, 7/27/18 – **MISDEMEANOR INFORMATION / INSUFFICIENT ON ITS FACE**
For a misdemeanor information to be sufficient on its face, it must contain factual allegations of an evidentiary character demonstrating reasonable cause to believe that defendant committed the offenses charged. Such facts must be supported by non-hearsay allegations which, if true, establish every element of the offenses. In this matter, the People had to demonstrate that the defendant had "constructive possession" of the drugs. Mere presence in the apartment or room where the drugs were found was insufficient. The accusatory instrument did not permit an inference that the defendant was in close proximity to the contraband, nor that the drugs, which were found inside a purse, were in plain view.

Moreover, the information did not allege that the defendant resided, frequented or had control over the apartment. In sum, no facts indicated his dominion and control over the premises or the contraband. For these reasons, the Bronx Criminal Court granted a motion to dismiss the accusatory instrument. Bronx Defenders (Anne Dean, of counsel) represented the defendant.
http://nycourts.gov/reporter/3dseries/2018/2018_51164.htm

People v Ramcharran, 7/19/18 – **MISDEMEANOR INFORMATION / PREJUDICE**
The defendant was charged with public lewdness based on a masturbation incident at the intersection of Northern Boulevard and 106th Street. In 2017, the People filed a superseding information that added charges of endangering the welfare of a child and harassment in the second degree. The same location was specified, but the time was changed. The People filed a bill of particulars to clarify the time. In 2018, after both parties announced their readiness for trial, the People informed the defendant of two new locations at which he was alleged to have committed the criminal acts. This belated amendment compromised the defendant's ability to conduct an effective investigation. Queens Criminal Court granted a motion to dismiss the information. The Legal Aid Society of NYC (Ariel Adams, of counsel) represented the defendant.
http://nycourts.gov/reporter/3dseries/2018/2018_28240.htm

People v Desmornes, 7/24/18 – **MINOR TRAFFIC VIOLATION / IMPROPER ARREST**
While the CPL authorizes arrests for minor traffic violations, where a reasonable alternative exists, there is a strong preference against forcible restraint. There was an alternative in the instant case, which involved a car parked in a bus lane with its ignition off and no occupants. Issuing a parking ticket would not have required the defendant's pedigree information. Further, the police admitted that the parking violation was not the real reason for the arrest. Instead, the defendant was handcuffed because he did not provide pedigree information. A prosecution witness testified that, when an officer harbors some suspicion and the suspect refused to provide requested data, MTA police have routinely forcibly restrained the subject to extract the desired information. Such police procedure is "anathema to the Fourth Amendment and abhorrent to the values held fundamental by our Constitution," Queens Criminal Court stated. The motion to suppress was granted. The Legal Aid Society of New York (Yanique Williams, of counsel) represented the defendant.
http://nycourts.gov/reporter/3dseries/2018/2018_28239.htm

FAMILY

SECOND DEPARTMENT

DeGroat v DeGroat, 8/1/18 – **DIVORCE / PENDENTE LITE ORDER EXTINGUISHED**
In a matrimonial action, the plaintiff appealed from a Rockland Supreme Court order denying her motion for a declaration regarding the defendant's obligation to make maintenance payments for seven years, pursuant to the judgment of divorce. She contended that maintenance payments commenced in 2013, when the distributive award was paid in full, and thus they must continue until 2020. Supreme Court held that the seven-year period actually began in 2010, when the first maintenance payment was due under the judgment. Thus, the obligation ended in 2017. Pursuant to the divorce judgment, full payment of the distributive award had no bearing on the maintenance duration, only on the amount due. The Second Department affirmed. A pendente lite support order provides temporary relief pending a final judgment. Once the instant judgment was issued, the support provision therein superseded the temporary order, which was extinguished.
http://nycourts.gov/reporter/3dseries/2018/2018_05571.htm

Matter of Rudder v Garber, 8/1/18 – **NAME CHANGE / INFANT'S INTERESTS SERVED**
In a proceeding pursuant to Civil Rights Law Article 6, the father appealed from a Suffolk County Supreme Court order granting the mother's petition to change the infant's surname from Garber to Rudder-Garber. The Second Department affirmed. When the infant was born in 2012, he was given the father's surname. The parties, who never married, lived together for one year and then ended their relationship. Civil Rights Law § 63 authorized an infant's name change if there was no reasonable objection to the proposed name and the interests of the infant would thereby be substantially promoted. *See Matter of Eberhardt,* 83 AD3d 116. Supreme Court correctly held that the father's objections were not reasonable and that the infant would benefit from the change. *See Matter of Siira*, 7 AD3d 803.
http://nycourts.gov/reporter/3dseries/2018/2018_05596.htm

THIRD DEPARTMENT

Matter of Porter-Spaulding v Spaulding, 8/2/18 – **CUSTODY / MODIFICATION**
The parties had one child, born in 2009. The judgment of divorce incorporated a stipulation providing for joint legal custody with primary physical custody to the mother and parenting time to the father. He sought sole custody, and she cross-petitioned to end overnight stays on school nights. Family Court granted the mother's motion to dismiss and conducted a fact-finding hearing on her petition. Concluding that the child's *Lincoln* hearing testimony was coached, the court ordered a psychological evaluation and then denied the cross-petition, but issued an anti-disparagement order. The attorney for the child appealed. The evidence established that the parties' acrimonious relationship, not mid-week visits, adversely affected the child, the Third Department held. A witness for the mother had testified about the father's hatred and disparagement of the mother. A change in circumstances was established by such bad-mouthing of the mother in the child's presence and the child's declining academic performance. However, the unartfully written order failed to accurately implement the intention to continue the existing visitation schedule.

The challenged order was modified accordingly. Pamela Doyle Gee was the attorney for the child.
http://nycourts.gov/reporter/3dseries/2018/2018_05642.htm

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