CRIMINAL

SECOND DEPARTMENT

DECISION OF THE WEEK

People v DeFelice, 8/15/18 – ***BRADY* ISSUE / REMITTAL TO RECONSTRUCT**

The defendant was convicted of 2nd degree murder in the shooting death of his girlfriend. During the Suffolk County trial, defense counsel informed County Court that, according to the notes of an investigating detective, the police had interviewed witnesses to whom the codefendant had made statements regarding his involvement in the shooting. Defense sought the statements, arguing that they constituted *Brady* material. Alternatively, counsel asked the court to review the material in camera to determine whether it should be disclosed. The trial court agreed to do so, and ultimately no material was disclosed. On appeal, the defendant argued that a *Brady* violation occurred. The People were unable to provide to the Second Department, or even describe, the material reviewed in camera by the trial court. Yet they asserted that the defendant's *Brady* claim was based on matter dehors the record and could not be reviewed on direct appeal. The appellate court rejected such stance. The matter was remitted for a hearing to reconstruct the record as to what, if any, material was provided to the trial court for in camera review and thereafter to report to the appellate court "with all convenient speed." The appeal was held in abeyance in the interim. Judah Serfaty represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_05781.htm

People ex rel. Curdy v Warden, Westchester County, 8/15/18 – **SEX OFFENDER HOUSING**

In an Article 78 proceeding, the Second Department held that, where the petitioner/level-three sex offender had already completed more than six months of post-release supervision and could not find SARA-compliant community housing, until he found such housing, DOCCS had the authority to place him into residential treatment facility. In such ruling, the appellate court reversed a judgment of Westchester County Supreme Court directing DOCCS to arrange for the petitioner's transfer to the Queensboro Correctional Facility and to assign him to a wait list for a SARA-compliant NYC facility.
http://nycourts.gov/reporter/3dseries/2018/2018_05777.htm

APPELLATE TERM – SECOND DEPARTMENT

People v Esposito, 8/3/18 – **DEFECTIVE INFORMATION / REVERSAL**

The defendant appealed from a judgment of Richmond County Criminal Court convicting him on a jury verdict of common-law DWI and resisting arrest. The Appellate Term, Second Department reversed and dismissed the information because the factual portion was jurisdictionally defective. Regarding the defendant's operation of a vehicle, the information recited that: (1) a Hyundai SUV had been involved in a collision; and (2) the defendant, spotted two blocks away from the site of the accident, said, "I was chasing my boyfriend and I hit a tree." There was no allegation connecting the defendant to the vehicle or collision in question. Even when given a fair and not overly technical reading, the

accusatory instrument was jurisdictionally defective. Appellate Advocates (Michael Arthus, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_28245.htm

People v Cappiello, 727/18 – **DEFECTIVE PLEA / DISSENT**
The Appellate Term, Second Department affirmed a petit larceny conviction rendered in Richmond County Criminal Court. One judge dissented. While the dissenter acknowledged that there was no "mandatory catechism" for plea allocutions, she stated that the record did not evince the defendant's knowing and voluntary guilty plea. At her arraignment, the defendant pleaded guilty after the following exchange:
"PROSECUTOR: Defendant has extensive contacts with the system. Prior bench warrant. Prior convictions. CJA notes she is a flight risk. The offer was originally "A" and 30 days. I spoke with defense counsel, for arraignment only, the offer will be "A" and 20 days.
DEFENSE COUNSEL: I spoke to my client, after advising the client of her rights and new offer the DA relayed, my client advises me she wants to plead guilty to 155.25, with the understanding she will do 20 days in jail. She's unemployed, I would ask for civil judgment as to surcharge.
THE COURT: You waive allocution?
[DEFENSE COUNSEL]: Yes.***
THE COURT: I accept the plea to 155.25. Sentence is 20 days jail. Civil judgment."
The court never inquired about the surrounding circumstances. The only proof that the defendant waived her rights was counsel's general statement about advising her. The plea was entered a day after the defendant's arrest. While arraignments are conducted at a rapid pace, the plea court must ensure that a defendant enters a valid plea, the dissenter cautioned.
http://nycourts.gov/reporter/3dseries/2018/2018_51168.htm

OTHER COURTS

People v Pallis, 8/1/18 – **MOTORHOME USED AS RESIDENCE / SUPPRESSION**
The defendant was charged with 2nd degree CPW and other crimes. Following a hearing, Kings County Supreme Court granted the defendant's motion to suppress a firearm. *Payton v New York*, 455 US 573, prohibits police from making a warrantless, nonconsensual entry into a suspect's home. Under the automobile exception, police may search a vehicle without a warrant when there is probable cause that evidence or contraband will be found there. The automobile exception may apply to a motorhome used for transportation; but in this case, the motorhome was used as a residence. It was parked in a residential area, had been stationary for a significant time, had a wire running to a telephone pole, and had a kitchen and a living area. It was inexplicable why the police chose to conduct a warrantless search. There was no excuse, the *Pallis* court asserted. Police impatience or inconvenience never outweighed constitutional interests. The Legal Aid Society of NYC (Dana Cohen, of counsel) represented the defendant.
http://nycourts.gov/reporter/3dseries/2018/2018_51178.htm

People v Darby, 8/6/18 – **UNLAWFUL SEARCH / CHARGES DISMISSED**
City Court of Gloversville suppressed drugs seized and dismissed the charges against the defendant. Police had been dispatched to a store after receiving a report of a possible

overdose. Following treatment at a local hospital, the stricken man described to the officer a person who had sold heroin to him earlier that day. In canvassing the area, police observed the defendant, who fit the description. He refused a request for identification. A struggled ensued, and the defendant pulled away while reaching for his waistband. Once free, he fled, but the officer caught him. Inside a pants pocket, marijuana and a pouch were discovered. The defendant was transported to police headquarters. There the pouch was found to contain cocaine. City Court held that the defendant's flight established probable cause for an arrest for obstructing governmental administration, but the searches of the pocket and pouch were unlawful. No evidence established that the officers had a reasonable belief that the defendant possessed a concealed weapon. Further, they did not suspect that a weapon was contained in the pouch. Kyle Davis represented the defendant.
http://nycourts.gov/reporter/3dseries/2018/2018_28242.htm

People v Flores, 8/8/18 – **ACCUSATORY INSTRUMENT DEFECTIVE / DISMISSAL**
The defendant was charged with 3rd degree assault, 4th degree CPW, and other crimes. Bronx County Criminal Court granted the defendant's motion to dismiss the accusatory instrument on statutory speedy trial grounds. The People were required to announce readiness for trial within 90 days of initiation of the criminal action, but 136 days were chargeable to them. This was due to adjournments, including when the complaining witness was purportedly on military training duty. The documentation as to military leave was inadequate to meet the "exceptional circumstance" exception. Bronx Defenders (Daniel Hamburg, of counsel) represented the defendant.
http://nycourts.gov/reporter/3dseries/2018/2018_51184.htm

People v Barba, 7/31/18 – **NO SPECIAL PROSECUTOR / NO IMPROPRIETY**
The defendant was charged with assault and related offenses for allegedly slashing the complainant with a Samurai sword. He sought the appointment of a special prosecutor. Queens County Supreme denied the motion. As a rule, courts should remove a prosecutor only to protect a defendant from actual prejudice cause by a conflict of interest. In rare situations, the appearance of impropriety is a ground for disqualification, but the defendant did not satisfy that test. Years earlier, he did refuse to cooperate with the District Attorney as a complainant in a high-profile case and did file lawsuits against the Domestic Violence Bureau. However, such facts alone did not meet the high standard for removing an elected, constitutional officer.
http://nycourts.gov/reporter/3dseries/2018/2018_28243.htm

People v Prusinski, 7/27/18 – **ATTEMPTED MURDER / GHOST-WRITING ADA**
From an Albany street corner, the defendant fired 11 shots at several people, all unknown to him. Two people were hit, and the defendant was convicted of attempted murder following a jury trial. In imposing a sentence of 22 years to life, County Court rejected arguments by appellate counsel that the conviction should be vacated and a special prosecutor appointed because of a conflict of interest presented by a business relationship between the prosecutor and defense counsel. For several years, the defendant's trial attorney had retained the ADA prosecuting the defendant to do freelance appellate ghostwriting on behalf of other defendants charged in other counties. Because such moonlighting violated District Attorney policy, the prosecutor was asked to resign,

whereupon he was promptly hired by the Albany County Public Defender's Office, according to articles in the *Albany Times Union*.

CALIFORNIA APPELLATE DIVISION

Morris v Superior Court, EROSION OF RIGHT TO COUNSEL / CALIFORNIA
The California Supreme Court recently agreed to hear an appeal from a case which garnered national attention and amici curiae support. The defendant was charged with driving under the influence of alcohol or drugs—misdemeanors under the California Code. Evidence was suppressed, apparently because the police employed a tactic of hanging around a local bar and using minor traffic infractions as a pretext to pull over persons to see if they were driving drunk. After the charges against the defendant were dismissed, the People filed an interlocutory appeal, and the Public Defender sought the appointment of counsel. The defendant was found ineligible for counsel based on a court rule. On appeal from the order denying counsel, the Public Defender and amici curiae argued that the Sixth Amendment required the appointment of counsel. A mid-level California appeals court held that the court rule—authorizing counsel for defendants "convicted of a misdemeanor"—did not require counsel for a defendant responding to a prosecution interlocutory appeal. The court acknowledged that, while the Sixth Amendment does not apply to appellate proceedings, a state that provides the right to appeal must make the right equally available to the rich and the poor. *See Griffin v Illinois*, 351 US 12. Limiting counsel to defendants convicted of a misdemeanor was not an "unreasoned distinction," the reviewing court held.
https://law.justia.com/cases/california/court-of-appeal/2017/e066330.html

FAMILY

SECOND DEPARTMENT

Lombardi v Lombardi, 8/15/18 – DISQUALIFICATION OF ATTORNEY / ERROR
In an action to set aside a prenuptial agreement on the grounds of duress, undue influence, and unconscionability, Suffolk County Supreme Court erred in disqualifying the husband's attorney from acting as his attorney. A party's entitlement to be represented by counsel of his own choosing should not be abridged absent a clear showing that disqualification is warranted. The wife contended that the husband's attorney might be required to testify as a fact witness in light of her involvement in the negotiation and execution of the prenuptial agreement. The Second Department disagreed. Rule 3.7 of the Rules of Professional Conduct provides that, unless certain exceptions apply, a lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact. To disqualify counsel because she may be called as a witness, a movant must demonstrate that: (1) the testimony of the opposing party's counsel is necessary to her case; and (2) such testimony would be prejudicial to the opposing party. The wife failed to make the requisite showing.
http://nycourts.gov/reporter/3dseries/2018/2018_05758.htm

Pathak v Shukla, 8/15/18 – **ATTORNEY'S FEES / FRIVOLOUS MOTION**
In a matrimonial action, Nassau County Supreme Court properly awarded the plaintiff $7,500 in attorney's fees. The contentions advanced on the defendant's motion were completely without merit in law or fact and could not be supported by a reasonable argument for an extension, modification or reversal of existing law.
http://nycourts.gov/reporter/3dseries/2018/2018_05775.htm

OTHER COURTS

Matter of D.K. v A.K., posted 8/6/18 – **RECORDING SUPPRESSED / NO CONSENT**
In a Kings County Family Court custody case, the father sought the suppression of recordings of conversations he had with the parties' child. The mother argued that she could vicariously consent to the recording of her daughter's conversations. CPLR 4506, which incorporates Penal Law § 250.05, provides that evidence of a recorded communication obtained through unlawful eavesdropping is inadmissible. Family Court held that the mother did not have a good faith basis to surreptitiously record the conversations, where her actions were based solely on the child having lengthy phone conversations and/or on purported changes in the child's behavior. The recordings were thus suppressed. The trial court noted that the instant case was decided before *People v Baldamenti*, 27 NY3d 423 (2016). *(*D.K. v A.K. *is dated March 16, 2016, but was not posted by the NY Law Reporting Bureau until August 6, 2018.)* The *People v Baldamenti* court held that, for purposes of the above statutes, consent includes vicarious consent on behalf of a minor child. The narrow test for vicarious consent requires that a parent had a good faith belief that the recording was necessary to serve the child's best interests and that there was an objectively reasonable basis for such belief. In *Baldamenti*, the test was met; the mother's paramour made threats of violence against the child, and the father validly feared for the child's safety. Yonatan Levoritz represented the father.
http://nycourts.gov/reporter/3dseries/2016/2016_51915.htm

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