CRIMINAL

COURT OF APPEALS

People v Xochimitl, 9/13/18 – **WARRANTLESS SEARCH / CONSENT**
Upon a jury verdict in Kings County Supreme Court, the defendant was convicted of 1st degree manslaughter. The Second Department affirmed, finding that the defendant's elderly relative voluntarily gave the police consent to enter and search the apartment she lived in with the defendant (147 AD3d 803). Yesterday the Court of Appeals affirmed in a memorandum decision. Judge Wilson's concurring opinion reasserted the rule proposed in his *People v Garvin*, 30 NY3d 174, 210, dissent: "Absent exigent circumstances, officers planning to arrest a suspect at home must obtain a warrant." Judge Rivera wrote a separate concurrence.
http://www.nycourts.gov/reporter/3dseries/2018/2018_06053.htm

FIRST DEPARTMENT

People v Holmes, 9/13/18 – **ERRONEOUS BELIEF AS TO PRS / REMAND**
The defendant appealed from a judgment of New York County Supreme Court convicting him of 2nd degree burglary (two counts). At the time of the plea, the court and counsel believed that the defendant was a predicate felony offender, and the plea offer contained the mandatory five-year term of PRS. At sentencing, upon learning that the defendant was a first felony offender, the court and counsel apparently incorrectly believed that five years was the minimum PRS period. The minimum was instead 2½ years. The First Department held that it was unclear how long a PRS term the sentencing court would have imposed, had it known that a lesser period was permissible. The case was thus remanded. One justice dissented. The Center for Appellate Litigation (Anokhi Shah, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_06055.htm

SECOND DEPARTMENT

People v Sookdeo, 9/12/18 – **JUDGE OVERSTEPS / NEW TRIAL**
A Queens County Supreme Court jury convicted the defendant of 2nd degree gang assault and other charges. The Second Department reversed, citing *People v Yut Wai Tom*, 53 NY2d 44. The *Sookdeo* trial judge interjected itself into the questioning of multiple witnesses, elicited step-by-step details about how the defendant was identified as a suspect, and created the impression that the court was an advocate for the People. Such actions deprived the defendant of a fair trial. A new trial before a different judge was ordered. Christopher Renfroe represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_06040.htm

BELATED PEREMPTORY DENIED / TWO CONVICTIONS REVERSED
Defendants ***Viera*** and ***Freeman*** and another codefendant were jointly tried for attempted 1st degree murder and other charges in Kings County Supreme Court. After the questioning

of the first group of prospective jurors was completed, the trial court divided that group into two subgroups. The People and the defense had the opportunity to exercise for-cause challenges to the first subgroup. Counsel for Viera stated that he would exercise peremptory challenges on behalf of all three defendants. After the People exercised their peremptory challenges to the first subgroup, the court asked the defense if they wished to exercise any challenges. Counsel for Viera indicated that the defense had five peremptories. The clerk named four prospective jurors to be assigned seats on the jury, including juror number eight. Speaking on behalf of all defendants, Freeman's attorney stated that one defense peremptory was missed: juror number eight. The trial court denied that request as untimely. This week the Second Department held that, given the defense's momentary delay in challenging juror number eight, the trial court had abused its discretion. Viera's and Freeman's convictions were reversed, and a new trial was ordered. The Legal Aid Society of NYC (Paul Wiener, of counsel) represented appellant Viera, and Beverly Van Ness represented appellant Freeman.
http://nycourts.gov/reporter/3dseries/2018/2018_06043.htm
http://nycourts.gov/reporter/3dseries/2018/2018_06029.htm

People v Spruill, 9/12/18 – **PEOPLE'S APPEAL / NO *BRADY* VIOLATIONS**
The People appealed from an order of Kings County Supreme Court granting the defendant's CPL 440.10 motion following a hearing, in part based on *Brady* violations. The Second Department reversed and reinstated the defendant's 2nd degree murder conviction. The nondisclosure of a DOCCS record reflecting one eyewitness's apparent suicide attempt was not a *Brady* violation, since the subject information was not favorable to the defense: at the time of the suicide attempt, the inmate reported that he feared the defendant. Further, the record in DOCCS's possession was not imputable to the People. The fact that the prosecutor had obtained a material witness order to secure the testimony of a second eyewitness was also not *Brady* material, where the record indicated that such witness feared the defendant.
http://nycourts.gov/reporter/3dseries/2018/2018_06041.htm

OTHER COURTS

People v Blank, 9/6/18 – **DNA SAMPLES / EXECUTIVE LAW VIOLATED**
A Bronx County grand jury indicted the defendant for 2nd degree CPW. The People purportedly obtained his saliva sample from a water bottle he abandoned while in custody. The defendant made a motion for a CPL 240.50 (1) protective order, which Supreme Court granted. The court held that the practice of the NYC Office of the Medical Examiner, in uploading DNA samples for all purposes before the defendant's conviction and sentencing, ran afoul of Executive Law § 995-c (3). Laboratories were permitted to upload a DNA profile into the State identification database only after a defendant's conviction and sentencing. The court directed that the defendant's sample could be used only for comparison purposes with respect to the DNA profile generated from the swab of the .9mm pistol in the instant case, and must not be added to the state or OCME databases pending the defendant's conviction and sentencing. The Legal Aid Society of NYC (Alice Swenson, of counsel) represented the defendant.
http://nycourts.gov/reporter/3dseries/2018/2018_28274.htm

People v Garavito, 9/7/18 – **CPL 30.30 MOTION / CONSENT NOT BINDING**
In NYC Criminal Court, the defendant made a CPL 30.30 motion to dismiss an information accusing him of various misdemeanor charges. The court granted the motion, finding that a total of 105 days of delay were chargeable to the People, thus exceeding the statutory 90-day readiness period. As to a 41-day period, the People argued that only 11 days should be charged to them, since defense counsel agreed to waive some of the time. The court disagreed. Previously, the court had permitted a "one time only" consent adjournment. The parties then made their private agreement without court approval. Adjournments upon consent of the defense may be granted only with the court's permission and may be limited to a reasonable period. *People v Worley*, 66 NY2d 523, 528. The court was not satisfied that the consent continuance was in the interest of justice and charged the entire 41-day period to the People. Neighborhood Defender Service of Harlem (Omar Saleem, Jr., of counsel) represented the defendant.
http://nycourts.gov/reporter/3dseries/2018/2018_51278.htm

CITY COURT – HARASSMENT / INSUFFICIENT PROOF
After a pair of recent bench trials regarding 2nd degree harassment charges, City Court of Mount Vernon in Westchester County found that the proof of intent to harass, annoy or alarm was inadequate as a matter of law. When the ***People v Tarrant*** defendant drove a vehicle, the victim and her child were passengers, the adults argued, and the victim sought to exit from the rear door. The defendant closed the car door, hitting her leg. He later explained that he had feared that she would be endangered by oncoming traffic. In ***People v. Willis***, the defendant was attempting to push past the victim to retrieve a Federal Express package that had erroneously been delivered to the victim.
http://nycourts.gov/reporter/3dseries/2018/2018_51275.htm
http://nycourts.gov/reporter/3dseries/2018/2018_51279.htm

FAMILY

SECOND DEPARTMENT

Matter of Lozaldo v Cristando, 9/12/18 – **CHILD SUPPORT / NO DUTY OF THIRD PARTIES**
In Nassau County Family Court, the petitioners in a child support proceeding were the maternal aunt and uncle, who were awarded physical custody of the subject children after their mother's death and shared joint legal custody with the father. The Support Magistrate entered an order directing the father to pay 100% of the children's unreimbursed medical and educational costs and to maintain a life insurance policy designating the children as beneficiaries. Family Court denied the father's objections, and he appealed. The Second Department held that it was proper to require him to pay all of the children's medical and educations expenses. The statute required a parent to pay child support and did not require a third party to do so. Under various theories, third parties were nevertheless sometimes held responsible for paying child support, such as when there was no biological parent and the third parties agreed to adopt the child. But such circumstances did not exist here.
http://nycourts.gov/reporter/3dseries/2018/2018_06015.htm

STATEWIDE RULES

Rule 1250.9 (a) of the Statewide Practice Rules of the Appellate Division provides that, "Except where the court has directed that an appeal be perfected by a particular time," an appellant must perfect the appeal within six months of the date of the notice of appeal or order granting leave to appeal. Subdivision (b) addresses extensions.

Rule 1250.10 (a) states that appeals in civil matters that are not perfected within six months of the date of the notice of appeal, order of transfer or order granting leave to appeal, as extended pursuant to Rule 1250.9 (b), will be deemed dismiss without further order.

For Family Court appeals, assigned attorneys should consult with the relevant Appellate Division Department regarding whether such appeals will be dismissed if counsel misses a deadline after the six-month date and he or she does not have a current extension in place.

Under **Rule 1250.10 (b)**, on the motion of the court or the respondent, the court may dismiss a criminal appeal pursuant to CPL 470.60.

Rule 1250.10 (c) addresses motions to vacate dismissals.

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