CRIMINAL

SECOND CIRCUIT

DECISION OF THE WEEK

USA v Weaver, 9/15/20 – **SUPPRESSION / CONCURRENCE / "NOXIOUS EFFECTS"**

The defendant appealed from an order of District Court–Northern District, denying his motion to suppress a firearm. The Second Circuit reversed. Three officers observed the defendant walking along a street in the daytime, while they drove in an unmarked police car with tinted windows in a high-crime area of Syracuse. The defendant stared into their vehicle for a few seconds, walked toward a gray sedan, and gave a subtle tug of his waistband. Then he entered the sedan, which turned a corner while using a blinker. Because the driver did not signal 100' before turning, the officers followed and pulled over the car, and then they saw the defendant push down on his pelvic area with his hands while shifting his hips. He was ordered out of the car and frisked three times, until police found a gun. Thereafter, the defendant was charged with being a felon in possession of a firearm and other crimes. He entered a plea of guilty, pursuant to an agreement that allowed him to appeal the denial of suppression. The appellate court concluded that the police had lacked an objectively reasonable belief that the defendant was armed and presently dangerous. His squirming in the car and pushing downward did not constitute the requisite specific or articulable facts. The subtle tug on his waistband could have been to pull up his pants; the high-crime area was not a significant factor here; and citizens have a right to stare. Further, innocent minority citizens might understandably scrutinize certain vehicles—out of reasonable fears about police encounters. In concurring, Judge Calabresi opined that, because of a hunch or a stereotype, the officers decided to search the defendant, and then found a way to do so. A man pulling up sagging pants or gazing at a car were not grounds for suspicion. And how often are most people stopped for not signaling 100' before turning and then made to exit the vehicle, spread eagle themselves against it, and be frisked? Persons the police suspect and dislike should not be humiliated and abused by manifestly unreasonable searches. The exclusionary rule has been a disaster: rights have been eroded as courts strive and strain to avoid excluding dispositive evidence. Moreover, most innocent, mistreated persons have no recourse, because quality immunity shields police from civil liability. The "noxious effects" of our current approach are obvious. One judge dissented.

https://www.ca2.uscourts.gov/decisions/isysquery/bc188760-752d-4c1a-9089-546c464843bb/2/doc/18-1697_complete_opn.pdf#xml=https://www.ca2.uscourts.gov/decisions/isysquery/bc188760-752d-4c1a-9089-546c464843bb/2/hilite/

NY COURT OF APPEALS

M/O Zielinski v Venettozzi, 9/15/20 – **PRISON DISCIPLINE / WITNESSES PRECLUDED**
In an Article 78 proceeding, the petitioner appealed from a Third Department order, which confirmed an administrative determination finding him guilty of violating a prison disciplinary rule. The Court of Appeals affirmed, finding substantial evidence to support the decision. Judge Wilson dissented, joined by Judge Rivera. The petitioner was punished when, upon inspection, he did not possess a razor issued to him for shaving. He alleged that it was stolen, and the prison never issued a replacement. But he was then punished for the loss of the purported second razor. Prison officials produced no documentary proof that the petitioner actually received a replacement. The hearing officer improperly testified about razor protocols, thus functioning as both judge and fact witness; offered no explanation for the basis of her statements; and precluded the petitioner from calling clearly relevant witnesses, thus violating his due process and state regulatory rights.
http://www.nycourts.gov/reporter/3dseries/2020/2020_04905.htm

SECOND DEPARTMENT

People v Wills, 9/16/20 – **WITNESSES PRECLUDED / NEW TRIAL**
The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 1st degree scheme to defraud and related crimes, arising from his purported use, for personal reasons, of grants meant for his nonprofit organization. The Second Department reversed and ordered a new trial. The defendant was deprived of his due process right to present witnesses of his own choosing. The testimony of a defendant's witness should not be prospectively excluded unless it is offered in palpably bad faith. Exclusion was improper here, where the proposed testimony did not deal with a collateral issue, but instead went to the heart of the defendant's defense. Jonathan Edelstein represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_04976.htm

People v O'Brien, 9/16/20 – **VEHICULAR MANSLAUGHTER / MULTIPLICITOUS**
The defendant appealed from a judgment of Suffolk County Court, convicting him of 2nd degree manslaughter, 2nd degree vehicular manslaughter (four counts), and related crimes. The Second Department modified. In the interest of justice, the appellate court found that three counts of vehicular manslaughter were multiplicitous; the People were only required to prove that the defendant violated one subdivision of VTL § 1192 to prove his guilt under Penal Law § 125.12 (1). In addition, the convictions for DWI and DWAI were inclusory concurrent counts of the vehicular manslaughter conviction. Legal Aid Society of Suffolk County (Lisa Marcoccia, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2020/2020_04971.htm

THIRD DEPARTMENT

People v Talmadge, 9/17/20 – **PERJURY / AFFIRMED**
The defendant appealed from a judgment of Ulster County Court, convicting him of 1st degree perjury. The charge was based on false testimony that was material to a pistol permit reinstatement proceeding. At the reinstatement hearing, the defendant testified that he had not consumed alcohol on the date of the incident which caused the suspension of his permit. An officer who responded to the incident said otherwise. Contrary to the defendant's argument, he did testify under oath, as established by the hearing transcript and testimony by the presiding judge. Further, the People demonstrated that the defendant's testimony was material to the reinstatement hearing. In such matters, the judge considered an applicant's character; and an applicant's consumption of alcohol while in possession of a firearm was indicative of character. Thus, the defendant's false testimony could have influenced the court and was perjurious.
http://nycourts.gov/reporter/3dseries/2020/2020_05000.htm

to lose by fleeing to escape imprisonment for the rest of his life. His callous behavior towards his deceased brother revealed that he lacked any affection for family and that release into the custody of relatives might place them at risk. The defendant had expressed no remorse. His concern over contracting the Covid-19 if he remained incarcerated was insufficient to justify release. The county jail had implemented significant safeguards. The defendant was committed to the custody of the Essex County Sheriff until bail was posted: $500,000 cash, $2 million insurance company bail bond, or $2 million partially secured surety bond with a 10% deposit.
http://nycourts.gov/reporter/3dseries/2020/2020_51053.htm

FAMILY

THIRD DEPARTMENT

Matter of Bonnie AA. v Kiya DD., 9/17/20 –
EXTRAORDINARY CIRCUMSTANCES / GRANDMOTHER
The father appealed from an order of Chemung County Family Court which granted the maternal grandmother's petition to modify a prior custody order. In affirming, the Third Department noted that Family Court had correctly concluded that the grandmother was not required to prove the existence of extraordinary circumstances, given a prior judicial determination finding that such standard had been met. Thus, the father's preferred status as the birth parent had already been lost by the prior determination. The only questions before Family Court were whether there had been a change in circumstances since entry of the prior order and, if so, whether the best interests of the children would be served by a modification of that order. The answer to both questions was "yes".
http://nycourts.gov/reporter/3dseries/2020/2020_05001.htm

Matter of Jerry VV. v Jessica WW., 9/17/20 – **NO DEFAULT / APPEALABLE**
The mother appealed from an order of Greene County Family Court, which granted the father's petition for custody following a fact-finding hearing, at which the mother failed to appear. The Third Department affirmed. A party may not appeal from an order entered on default. However, a party's absence did not necessarily constitute a default, particularly where counsel appeared and participated. The mother's counsel did attend the fact-finding hearing. Although counsel offered a weak explanation for the client's nonappearance, she objected to a default finding, unsuccessfully requested an adjournment, and actively participated by cross-examining the sole witness, objecting to the admission of documents, and presenting a closing argument. Thus, the order was not entered on default and was appealable.
http://nycourts.gov/reporter/3dseries/2020/2020_05005.htm

Matter of Siouffi v Siouffi, 9/17/20 – **CHILD SUPPORT / AFFIRMED**
The father appealed from orders of Clinton County Family Court, which dismissed his child support modification petition, held him to be in violation of a support obligation set forth in a judgment of divorce, and awarded counsel fees to the mother. The Third Department affirmed. Family Court did not err in dismissing the modification petition. In their separation agreement, the parties had validly opted out of statutory bases to modify support. Thus, the father bore the burden of showing a substantial change in circumstances warranting a downward modification. He had made $500,000 as a physician before resigning from a position to accept another job for half that salary. The father failed to meet his burden of demonstrating that his prior employment ended through no fault of his own and to produce adequate evidence of his job search and efforts to procure equivalent employment. The award of counsel fees to the mother was proper. As the father noted, the trial court found his failure to pay support non-willful. However, courts have discretion to award counsel fees in any proceeding to enforce or modify support. Further, the parties' agreement provided that the party who brought a successful action regarding a breach of the agreement was entitled to reasonable counsel fees.
http://nycourts.gov/reporter/3dseries/2020/2020_05002.htm

Matter of Noah ZZ. v Amanda YY., 9/17/20 – **CHILD / NAME CHANGE**
The father appealed from a Broome County Supreme Court order, which granted the mother's application pursuant to Civil Rights Law Article 6 to change the surname of the parties' child. The Third Department affirmed. The mother had sole custody and wanted to create a hyphenated last name that included both parents' surnames. The child had a medical condition, and the child's surname presented confusion in the mother's extensive dealings with medical and insurance providers, various foundations from which she sought grants pertaining to the child's diagnosis, and the school. The father charged that the mother sought to alienate the child from him and ostracize the child from his family and that the proposed name change would negatively impact the child's masculinity. The objections were lame; the new name promoted the child's interests.
http://nycourts.gov/reporter/3dseries/2020/2020_05007.htm