CRIMINAL

DECISION OF THE WEEK

Matter of Hubert v Green, 9/7/18 – **SORA / "INITIAL DATE" DEFINED**

Correction Law § 168-h (1) states: "The duration of registration and verification for a sex offender who has not been designated a sexual predator, or a sexually violent offender, or a predicate sex offender, and who is classified as a level one risk, or who has not yet received a risk level classification, shall be annually for a period of twenty years from the initial date of registration." The statute does not define "initial date of registration." The Board of Examiners took the position that, upon moving to New York, a sex offender receives no credit for time on the registry in the original state. The petitioner, a level-one sex offender, challenged such stance in an Article 78 proceeding initiated in Rensselaer County. Supreme Court held that "initial date" means the first time a convicted sex offender registered with required state and local authorities. Mack & Associates (Lucas Mihuta, of counsel) represented the petitioner. A PDF of the decision is attached.

Thanks to Alan Rosenthal of Syracuse for bringing this decision to our attention and providing these insights: *This is a very important SORA case for people who have been on the registry in other states and then move to New York. Judges in NYC have routinely issued nunc pro tunc orders giving individuals credit for time on the registry in other states, but this is the first time a judge has taken this issue head on. The decision serves notice on defense counsel who do SORA cases that, when you represent a person who has moved from another state, you must ask the judge to provide in the classification order that the client is to be given credit for time on the registry in the original state.*

SECOND DEPARTMENT

People v Ramirez, 9/19/18 – **ID BOLSTERING / REVERSAL**

Upon a jury verdict, the defendant was convicted in Queens County Supreme Court of 2nd degree robbery. The Second Department reversed and ordered a new trial. The prosecutor elicited improper testimony from a detective, who stated that he arrested the defendant after the complainant identified him in a lineup. Such testimony implicitly bolstered the complainant's testimony by providing official confirmation of the identification. The instant error was not harmless and was compounded by improper comments regarding identification made during the People's summation. Appellate Advocates (Jonathan Schoepp-Wong, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_06120.htm

People v Falls, 9/19/18 – **COUNSEL OPPOSED CLIENT / NEW COUNSEL NEEDED**

In Orange County Court, after pleading guilty to tampering with physical evidence, the defendant sought to withdraw his plea. His attorney told the court that there was no basis for such application. The defendant's right to counsel was thereby adversely affected, and new counsel should have been appointed, the Second Department held. The matter was remanded for further proceedings. Thomas Villecco represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_06110.htm

People v Jones, 9/19/18 – **NO REASONABLE SUSPICION / INCREDIBLE OFFICER**
After Queens County Supreme Court denied the defendant's motion to suppress, he pleaded guilty to weapon possession charges. The Second Department reversed and dismissed the indictment. At the suppression hearing, a police officer testified that, at 1:50 a.m., he was on patrol in an unmarked police vehicle. The defendant was walking on the sidewalk 25 feet away, with his hand in his jacket pocket. The officer supposedly observed that the defendant had a slight bulge in his pocket and asked him to stop, but the defendant walked faster. The officer followed on foot, saw a firearm protruding from the defendant's pocket, raced toward him, and recovered the weapon. The intrusion was not justified. The encounter escalated to a level-three intrusion, but the requisite reasonable suspicion was absent. A concurring justice found the officer's testimony—that he could see a slight bulge from 25 feet away—to be incredible as a matter of law. Appellate Advocates (A. Alexander Donn, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_06114.htm

NYS TRIAL COURTS

Williams v State of NY, posted 9/18/18 – **CONFISCATED PHOTOS / INCREDIBLE OFFICER**
The claimant pro se, an inmate at a correctional facility, sought damages for the defendant's confiscation and destruction of his personal property. At trial, the proof showed that, during a routine search of the claimant's cell, a correction officer found legal documents and 53 photographs of his family members. The claimant testified that the officer confiscated the items and never returned them. The officer denied the accusation. The Court of Claims observed that the State has a duty to secure an inmate's personal property and must return confiscated non-contraband items. The claimant was credible. The officer was not. He admitted that he had "tons" of complaints against him for confiscating personal property, and he was agitated while cross-examined. The officer maliciously took the claimant's pictures, the court stated. However, only "intrinsic value" damages were permissible. One dollar per photograph was ordered.
http://nycourts.gov/reporter/3dseries/2018/2018_28282.htm

People v Wright, 9/17/18 – **INEFFECTIVE ASSISTANCE / 330 MOTION GRANTED**
In New York County Supreme Court, the defendant made a CPL 330.30 (1) motion to set aside a verdict of guilty of 2nd degree robbery and 2nd degree burglary, based on ineffective assistance of counsel. (The defendant was acquitted of 1st degree robbery.) The trial court granted the motion. Under the federal standard, counsel's representation could not be deemed ineffective, because there was no reasonable probability that, but for his performance, the result would have been different. But under the New York standard, the representation was not meaningful. Trial counsel conceded every legal point the People made, marshaled the evidence against his client, failed to point out many inconsistencies in testimony, and did not argue that the evidence showed that the defendant did not have a real gun. "Unless counsel's strategy was to make the jury feel sorry for his client based on the abysmal quality of his representation, there could be no conceivable strategic reason why a defense lawyer would act like this," the court concluded.
http://nycourts.gov/reporter/3dseries/2018/2018_28288.htm

People v Murray, posted 9/19/18 – **CRIMINALLY NEGLIGENT HOMICIDE / DISMISSED**
The defendant, charged with criminally negligent homicide, moved to inspect the Grand Jury minutes and dismiss the indictment. Allegany County Court reviewed the minutes and dismissed the indictment for legal insufficiency. The evidence showed that the defendant drove the victim and two others from Andover, NY to Rochester, NY to buy illegal drugs. En route, the victim snorted heroin already in his possession. On the way back to Andover, although the victim was in extremis, the defendant did not take him to the hospital until after dropping off the other passengers. Upon arrival at the hospital, the victim was pronounced dead of a drug overdose. The People contended that the delay in seeking medical care caused the death. But generally, there is no legal duty to aid another person in peril; and the defendant did not have a relationship with the victim that imposed a specific duty as to obtaining medical care—he was not the victim's parent, spouse or legal guardian. Clair Montroy III represented the defendant.
http://nycourts.gov/reporter/3dseries/2018/2018_28285.htm

People v Bing, 9/17/18 – **HEARING NEEDED / SPEEDY TRIAL MOTION**
Charged with a misdemeanor in City Court of Mount Vernon, the defendant moved to dismiss the information on statutory speedy trial grounds. The accusatory instrument was filed in January 2015, the People were required to be ready for trial within 90 days thereafter, and the defendant was not arraigned until July 2018. He contended that the People did not use due diligence to locate him. City Court held that a hearing was needed, since the prosecution failed to conclusively refute the defendant's allegations. Lawrence Pruzansky represented the defendant.
http://nycourts.gov/reporter/3dseries/2018/2018_51312.htm

SECOND CIRCUIT

USA v Paul, 9/18/18 – **"PHYSICAL RESTRAINT" ENHANCEMENT / SCOPE DEFINED**
The defendant appealed from a sentence on a robbery conviction rendered in the Eastern District. The Sentencing Guidelines provide for a two-level increase in robbery cases if any person was "physically restrained" to facilitate the offense. In the instant case, the defendant was the lookout for the robbery. At gunpoint, a pharmacy clerk was ordered by the defendant's confederate to go to the cash register. That did not constitute physical restraint, the Second Circuit held. The Sentencing Commission has explained that "physically restrained" means that a victim was subjected to forcible restraint, such as by being tied, bound, or locked up. The case was remanded for calculation of an adjusted offense level and resentencing. Mitchell Dinnerstein represented the appellant.
http://www.ca2.uscourts.gov/decisions

USA v Washington, 9/18/18 – **DISCREPANCY / SPOKEN V. WRITTEN SENTENCE**
The defendant appealed from a sentence imposed in the Southern District for his conviction of the failure to register as a sex offender. The Second Circuit held that the sentencing court unlawfully modified the sentence pronounced in the defendant's presence by adding, in the written judgment, a duty to submit to polygraph testing as part of a special condition requiring sex offender treatment. The appellate court noted that, where there was a substantive discrepancy, the spoken version ordinarily trumped the written judgment. Polygraph testing could be onerous for a defendant, who might feel at risk of self-incrimination. While some district judges required such testing as part of special

conditions, others never did so. The case was remanded for entry of an amended judgment. The Federal Defenders of New York (Allegra Glashausser, of counsel) represented the appellant.
http://www.ca2.uscourts.gov/decisions

FAMILY

SECOND DEPARTMENT

Matter of Olga L. G. M., 9/19/18 – **GUARDIANSHIP PETITION / ERRANT DISMISSAL**
Nassau County Family Court erred when it dismissed a petition by the mother to be appointed guardian of the subject child so that she could petition for special immigrant juvenile status. The mere fact that paternity had not been established for the putative father did not preclude the guardianship petition. The matter was remitted for an expedited hearing. Bruno Joseph Bembi represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_06093.htm

ARTICLES

Four Reversals from One Queens Court, 9/17/18 – ***NEW YORK LAW JOURNAL***
As set forth in the September 14 Decisions of Interest, in *People v Sookdeo*, the Second Department reversed a judgment of conviction for a gang-related assault conviction, rendered in Queens County Supreme Court, and ordered a new trial because the trial judge conducted excessive questioning of trial witnesses. This *NYLJ* article pointed out that the recent decision was one of several reversals based on trial interference by the same justice. The article quoted Richard Joselson, supervising attorney at the Legal Aid Society Criminal Appeals Bureau in NYC. "That's four reversals for this sort of thing in the last year and a half—that's very unusual," he said. "In this area, trial judges get a lot of leeway. It's only when it reaches a certain point when this appellate court or any appellate court is going to intercede as they did here," he added.
https://www.law.com/newyorklawjournal/2018/09/16/a-series-of-rare-appellate-reversal-orders-all-from-one-queens-justices-courtroom/

Wrongful Conviction of Murder / *GOLF DIGEST* HELPS FREE DEFENDANT
A *Golf Digest* article was a catalyst in a successful quest to free an innocent man, Valentino Dixon, who was convicted of murder in 1992 in Erie County, as detailed in a recent *New York Times* article. Twenty years later, the defendant was profiled in *Golf Digest* because of his detailed drawings of golf courses. Georgetown University undergraduate students participating in a prison reform project took on the case, which included a confession by another man. The defendant's lawyer made a convincing presentation to a new District Attorney, who had established a conviction integrity unit. Last week, the defendant's murder conviction was vacated, and he walked free. Among those present was the defendant's daughter, age 27, who was a few months old when he went to prison.

https://www.nytimes.com/2018/09/20/nyregion/Valentino-Dixon-golf-digest-exonerated.html

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