

CRIMINAL

COURT OF APPEALS

***People v Drelich*, 10/11/18 – PEOPLE’S APPEAL / ACCUSATORY INSTRUMENT OKAY**

A misdemeanor complaint alleged that the defendant requested “manual stimulation” from an undercover officer for \$15 and thereby committed 3rd degree patronizing a prostitute. Upon a guilty plea in NYC Criminal Court, he was convicted of disorderly conduct. In an appeal to the Appellate Term, First Department, the defendant contended that the accusatory instrument was deficient, since “manual stipulation” could have referred to nonsexual conduct—such as a foot rub, therapeutic massage, chiropractic adjustment, personal training, or thumb wrestling. The mid-level appeals court agreed. In a memorandum decision, the Court of Appeals reversed. Inferences of sexual conduct could be drawn from the factual context—a late night solicitation of a physical personal service from a person on a public street in exchange for a sum of money.

http://www.nycourts.gov/reporter/3dseries/2018/2018_06785.htm

SECOND DEPARTMENT

DECISION OF THE WEEK

***People v Herskovic*, 10/10/18 – GANG ASSAULT / FLAWED DNA PROOF / REVERSED**

The defendant appealed from a Kings County Supreme Court judgment convicting him of 2nd degree gang assault and other charges. The appeal arose from a case in which Hasidic Jewish men were accused of beating and partially blinding a young black student. The instant defendant was the only man convicted at trial. The Second Department found that the verdict against the weight of evidence and dismissed the indictment. The victim testified that he was assaulted by 20 men, but was unable to identify any of them, and he and other witnesses gave conflicting accounts. Further, the DNA evidence was “less than convincing;” the “high-sensitivity” DNA analysis used by Medical Examiner was problematical. Donna Aldea represented the appellant.

http://nycourts.gov/reporter/3dseries/2018/2018_06763.htm

***People v Powell*, 10/10/18 – MURDER REVERSED / DNA PROOF MISREPRESENTED**

The defendant appealed from a Kings County Supreme Court judgment convicting him of 2nd degree murder and 2nd degree CPW. The Second Department reversed and ordered a new trial. A witness said that he saw the defendant shoot the victim; and an expert addressed DNA on the gun. Two unpreserved issues warranted reversal: prosecutorial misconduct and the lack of an accomplice-in-fact instruction. During summation, the prosecutor misrepresented the DNA analysis, thus depriving the defendant of a fair trial. Moreover, she encouraged inferences of guilt based on facts not in evidence and improperly injected her own credibility into the trial and vouched for a witness’ credibility. Further, counsel was ineffective in failing to object to the summation and to request an accomplice corroboration charge. Appellate Advocates (A. Alexander Donn, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2018/2018_06768.htm

***People v Salako*, 10/10/18 – FOREIGN PREDICATE INVALID / INTEREST OF JUSTICE**

The defendant appealed from a Queens County Supreme Court judgment convicting him, upon his guilty plea, of attempted 2nd degree robbery. The Second Department modified in the interest of justice by vacating the second VFO adjudication. The defendant correctly contended that the predicate California offense was not equivalent to a New York violent felony. Such contention would survive a valid appeal waiver, so deciding if the waiver was valid was unnecessary. Although the defendant failed to preserve the predicate felony issue, the appellate court reached it in the interest of justice. Penal Law § 70.04 requires enhanced sentences for violent felons with prior violent felonies. As to out-of-state predicates, the Court of Appeals has applied a strict equivalency standard, which the People failed to meet. Appellate Advocates (Kendra Hutchinson, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2018/2018_06770.htm

APPELLATE TERM, FIRST DEPT.

***People v Stephens*, 10/11/18 – TRESPASS / AGAINST WEIGHT**

The Appellate Term, First Department reversed a Bronx Criminal Court conviction of 3rd degree criminal trespass and dismissed the information. At the time of the alleged incident, while inside a subway restroom, the testifying officer purportedly observed the defendant enter the station without paying his fare. The defendant testified that he was on his way home from work when he swiped his MetroCard before entering the turnstile; that he saw two others jump the turnstile; and that officers were unable to catch those individuals before confronting him. Since the testifying officer's observations were made through vents in a door, and there was no other proof to establish guilt, the conviction was not adequately supported, the Appellate Term held.

http://nycourts.gov/reporter/3dseries/2018/2018_51427.htm

FAMILY

FIRST DEPARTMENT

***Matter of Caron C.G.G. (Alicia G.)*, 10/11/18 – GUARDIANSHIP / AUNT**

New York County Family Court granted kinship guardianship petitions filed by the maternal aunt. The First Department affirmed. The aunt demonstrated extraordinary circumstances, given that for seven years, the two children had been living with her, while the mother had only sporadic contact. The aunt's guardianship was in the children's best interests, since she offered stability and loving care. As required by statute, an age-appropriate consultation had been held with the children. Given that the older child was age 15, her wishes were entitled to some weight, and she wanted to stay with the aunt. The AFC relayed that the younger child was "okay" continuing to live with the aunt if the mother could visit, and the order provided for liberal visitation.

http://nycourts.gov/reporter/3dseries/2018/2018_06796.htm

***Matter of Dianna P. v Damon B.-D.*, 10/11/18 – RELOCATION / AFFIRMED**

New York County Family Court granted the mother's petition to relocate with the parties' child to Atlanta, Georgia. The First Department affirmed. The proof showed that the move would enhance the child's life. The mother was the sole source of financial support; the father failed to pay child support for several years. Despite an ongoing job search, the mother had been unable to find full-time work in her field in New York. But she obtained a full-time position as a sous-chef in Atlanta. The mother was better able than the respondent to provide a stable home for the child, whom she had primarily cared for since birth, and she had extended family in Georgia. Moreover, the school there offered extracurricular arts programs, and the AFC supported the relocation. While the father would lose weekend visitation, the new schedule allowed for a meaningful relationship.

http://nycourts.gov/reporter/3dseries/2018/2018_06788.htm

SECOND DEPARTMENT

***Matters of Jonah B. (Ferida B.) and (Riva V.)*, 10/10/18 – ABUSE / BY THREE ADULTS**

The petitioner and children appealed from Queens County Family Court orders dismissing abuse and derivative abuse charges against the parents and maternal grandmother. The Second Department reversed. The petitions alleged that four-month-old Talia had been diagnosed with multiple fractures. Fact-finding proof established that the injuries were inflicted while the infant was in the respondents' care. The court properly found neglect and derivative neglect as to the two other children, but erred in finding no abuse based on the lack of a serious physical injury as defined in the Penal Law. The appellate court observed that the definitions of abuse in the Family Court Act and serious physical injury in the Penal Law are not identical, and held that abuse and derivative abuse were sufficiently proven. The maternal grandmother appealed from the finding of neglect, contending that she was not a person responsible for the children's care. The appellate court disagreed. The grandmother came to the parents' home daily; slept over twice a week; fed, changed, and bathed Talia; and was often alone with the baby. Her role was analogous to parenting and occurred in a family setting. *See Matter of Yolanda D.*, 88 NY2d 790.

http://nycourts.gov/reporter/3dseries/2018/2018_06735.htm

http://nycourts.gov/reporter/3dseries/2018/2018_06736.htm

ARTICLES

Prosecutorial Misconduct and Other New Laws

BY HON. BARRY KAMINS

Recent *New York Law Journal* columns discussed the Commission on Prosecutorial Conduct and various criminal law amendments. The 11-member Commission would investigate complaints against prosecutors and determine whether to: admonish or censure a prosecutor, recommend to the Governor that a prosecutor be removed from office, or forward its file to other entities for action. A chapter amendment will address constitutional defects in the bill. The State District Attorneys Association has pledged to file a lawsuit challenging the law, and in the author's view, it is not clear that the Commission will become operational. The legislature enacted other criminal legislation, including creating

the new crimes of Sex Trafficking of a Child, a class B felony, and misrepresentation by a Caregiver for Children, an unclassified misdemeanor. Hazing statutes have been amended, and the crime of coercion has been restructured. Other laws benefit victims of domestic violence and human trafficking. In addition, a new law permits the use of medical marijuana for pain management. Finally, the City Council has enacted local laws that will allow inmates at NYC correctional facilities to make free phone calls and a Right to Know Act requiring police officers engaging in a variety of enumerated activities to identify themselves by providing specified information.

<https://www.law.com/newyorklawjournal/2018/10/04/new-criminal-justice-legislation-part-1>

<https://www.law.com/newyorklawjournal/2018/10/11/new-criminal-justice-legislation-part-2>

New Yorkers on the Second Circuit / *NEW YORK LAW JOURNAL*

October 11, 2018 articles reported that the U.S. Senate has confirmed to the Second Circuit Hon. Richard Sullivan, who has served in the District Court – Southern District since 2007. Also nominated for the Second Circuit, and awaiting confirmation, are Joseph Bianco, who has been a District Court – Eastern District judge since 2006; and Michael Park of Consovoy McCarthy Park, who has handled a range of white-collar litigation.

<https://www.law.com/newyorklawjournal/2018/10/11/trump-names-two-new-yorkers-to-second-circuit-two-more-for-district-court-seats>

<https://www.law.com/newyorklawjournal/2018/10/11/us-senate-votes-to-approve-sullivan-as-second-circuit-judge>

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