CRIMINAL

COURT OF APPEALS

DECISION OF THE WEEK

People v Thiam, 10/29/19 – **PEOPLE'S APPEAL / JURISDICTIONAL DEFECT**

A police officer purportedly saw the defendant holding marijuana in public view in midtown Manhattan. Upon the defendant's arrest, the officer found a second bag of marijuana in his pocket, along with pills identified as oxycodone. The complaint contained the officer's conclusory allegations that, based on his experience and training, he had identified the substances. No testing was done on the pills, for which the defendant was charged with the class A misdemeanor of 7th degree criminal possession of a controlled substance. As to the marijuana, he was charged with 5th degree criminal possession, a class B misdemeanor, and unlawful possession, a violation. At arraignment, defense counsel argued that the People had not established that the pills were oxycodone, but did not move to dismiss the charge. Instead, pursuant to a plea deal promising a sentence of time served, the defendant pleaded to the top count. He appealed to Appellate Term, which reversed. The accusatory instrument was jurisdictionally defective, since it failed to allege facts of an evidentiary character demonstrating reasonable cause to believe that the defendant was guilty of the crime of conviction. In the interest of justice, Appellate Term dismissed the remaining charges. The People appealed.

In a three-sentence memorandum decision, a divided Court of Appeals affirmed. The trial court could not accept a plea to a facially insufficient count where an equal or lesser misdemeanor count was facially sufficient. In a lengthy concurring opinion, Chief Judge DiFiore observed that the defendant's guilty plea did not comport with due process; negatively impacted the basic fairness of the criminal justice system; and implicated public policy concerns of prosecutorial overreaching. The Chief Judge concluded, "The requirement of providing a properly pleaded accusatory instrument rests with the People, and it is not an undue burden to ensure that a plea bargain does not entail a conviction for a crime of a grade offense higher than one sufficiently charged." Judge Fahey also wrote a concurring opinion, and three judges dissented. The respondent was represented by the Legal Aid Society of NYC (Will Page, of counsel). Counsel was quoted in the NYLJ: "This decision upholds the longstanding protection in misdemeanor cases permitting our clients to challenge on appeal improperly inflated criminal charges brought by prosecutors."
http://www.nycourts.gov/reporter/3dseries/2019/2019_07712.htm

FIRST DEPARTMENT

People v Moco, 10/31/19 – **BAD *SANDOVAL* RULING / BUT HARMLESS ERROR**
The defendant appealed from a judgment of NY County Supreme Court, convicting him of 1st degree stalking and other crimes. The First Department affirmed, but observed that the People should not have been permitted to cross-examine the defendant about the underlying facts of two prior arrests that resulted in dismissals. The prosecutor had not ascertained whether the charges had been dismissed on the merits, which would have negated any good-faith basis for inquiry. Nevertheless, any prejudice from the brief questioning was minimized by the trial court's statement to the jury that the charges were dismissed and by the defendant's testimony to that effect. Any error was harmless.
http://nycourts.gov/reporter/3dseries/2019/2019_07855.htm

SECOND DEPARTMENT

People v Lambey, 10/30/19 – **SEARCH WARRANT / MOTION TO CONTROVERT**
The defendant appealed from a judgment of Dutchess County Court, convicting him of drug and firearm possession charges. The appeal brought up for review the denial of the defendant's application to controvert a search warrant. The Second Department remitted for a hearing and held the appeal in abeyance. The defendant was charged in an indictment based on evidence obtained from his apartment upon the execution of a search warrant. In the initial warrant, a police investigator stated that an undercover officer had bought narcotics from an individual called "Money," whose legal name the officer learned upon identifying the suspect in a photo ID procedure. However, police discovered that the wrong person was identified as "Money" and thus did not execute the warrant. The same day, police applied for a second warrant, stating that a confidential informant had provided information that a person known as "Money" sold narcotics out of the subject premises and possessed a handgun. In an omnibus motion, the defendant sought to controvert the search warrant and to suppress the evidence found. After the trial court summarily denied the application, the defendant pleaded guilty. The reviewing court held that County Court erred. Probable cause must be determined solely on the basis of a record fully available to the defendant. When the instant motion was made, defense counsel did not have access to even a redacted copy of the search warrant applications. Upon remittal, the People were to provide to counsel with such applications, redacted to protect the identities of CI and the undercover officer. A hearing was to be held and a new determination made regarding the defense motion. David L. Steinberg represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_07793.htm

THIRD DEPARTMENT

People v Walley, 10/31/19 – **SCI / JURISDICTIONAL DEFECT**
The defendant appealed from a judgment of Schenectady County Court, convicting him of 2nd degree CPW (two counts). As part of a global disposition, the defendant pleaded guilty to one count of CPW 2 in satisfaction of a six-count indictment; waived his right to be indicted on other charges; pleaded guilty to another count of CPW 2, as set forth in an SCI; and waived the right to appeal. The Third Department reversed. The failure to state the approximate time of the offense rendered the waiver of indictment invalid and the SCI jurisdictionally defective. The challenge was not precluded by the guilty plea or waiver of appeal and was not subject to the preservation requirement. A waiver of indictment must be executed in strict compliance with CPL 195.20. Although the statutory requirements may be satisfied by reading the waiver and SCI as a single document, neither document stated the relevant time. Further, this was not a situation where the time of the offense was unknown or unknowable. Indeed, the felony complaint contained information as to the time of the offense. Reference in the waiver of indictment to the felony complaint was insufficient. Thus, the plea was vacated and the SCI dismissed. Because the conviction was part of a global disposition calling for concurrent sentences and that promise could no longer be kept, the plea in satisfaction of the indictment also had to be vacated. G. Scott Walling represented the appellant
http://nycourts.gov/reporter/3dseries/2019/2019_07816.htm

Karimzada v NYS Board of Parole, 10/31/19 – **PAROLE DENIAL / INACCURATE INFO**
The petitioner appealed from a judgment of Sullivan County Supreme Court, which dismissed his CPLR Article 78 petition to review a determination of the Board of Parole denying parole release. The Third Department reversed. The petitioner, who was serving a lengthy sentence for rape and related crimes, contended that the denial was based in part on inaccurate information. The respondent had stated that, on the COMPAS Risk and Needs Assessment instrument, the petitioner was rated "high" for factors related to a history of violence and risk of absconding. In fact, the assessment level was "medium." Since such error may have affected the challenged decision, remittal for proper administrative review was ordered. Jocelyne Kristal represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_07830.htm

Benson v NYS Board of Parole, 11/3/19 – **PAROLE RESCISSION / AFFIRMED**
The petitioner appealed from a determination of the respondent rescinding a grant of parole release. The Third Department affirmed. The law on rescission did not require submission of new information—only information that was significant and not known at the time of the original determination. The majority rejected the argument that the grief and trauma of a victim's family is always known by the respondent. Victim impact statements are significant in parole decisions; and the respondent was presented with previously unknown information in the form of belated, compelling statements from the murder victim's mother and brother. Two justices dissented.
http://nycourts.gov/reporter/3dseries/2019/2019_07829.htm

People v Urtz, 10/31/19 – **IAC CLAIM / LEGITIMATE STRATEGY**
The defendant appealed from a Columbia County Court judgment, convicting him of four counts of possessing a sexual performance by a child. The Third Department rejected the argument that defense counsel was ineffective in conceding that the 10 subject items depicted a sexual performance by underage children. Counsel will not be found to be ineffective for failing to make an argument or motion that had little or no chance of success. In the instant case, the jury had to determine whether the pornographic material represented actual children. But that fact was apparent from the videos and images of sexual acts involving children. Moreover, the defense theory was that the People failed to prove that the defendant knowingly possessed the images and the videos. Thus, the defendant failed to show the lack of a legitimate strategy. Viewing counsel's performance in totality and mindful that there was an acquittal as to six of 10 charges, the reviewing court held that the defendant received meaningful representation.
http://nycourts.gov/reporter/3dseries/2019/2019_07808.htm

440 ALERT

A 10/28/19 Bill Status Alert from the NY State Legislature states that A748—regarding the investigation and filing of CPL 440.10 and 440.20 motions by assigned appellate counsel—has been delivered to Gov. Cuomo. As the Alert advises, where a bill is delivered to the Governor when the Legislature is out of session, the Governor has 30 days to make a decision, and the failure to act has the same effect as a veto. Links to A748 and a comment form are set forth below:

https://www.nysenate.gov/legislation/bills/2019/a748.
https://www.governor.ny.gov/content/governor-contact-form.

FAMILY

SECOND DEPARTMENT

Matter of Cox v Cruz, 10/30/19 – **RELOCATION DENIAL / TEEN'S WISHES**
The child appealed from an order of Kings County Family Court, which denied the mother's petition to modify a prior order granting custody to the paternal great-aunt upon the parents' default. The Second Department reversed. The mother sought sole custody and permission to relocate with the child to North Carolina. Family Court properly found a change of circumstances, but improperly found that the proof did not support a grant of the petition in the best interests of the child. The challenged decision lacked a sound and substantial basis in the record in light of the proof; the position of the attorney for the child; and the stated preferences of the child, who was now almost 15. Thus, the appellate court granted the mother custody and permission to relocate with the child and remitted for determination of a visitation schedule for the paternal great-aunt and the father. The

Children's Law Center (Eva Stein and Janet Neustaetter, of counsel) represented the non-party appellant child.
http://nycourts.gov/reporter/3dseries/2019/2019_07777.htm

Matter of Hamrahi v Brock, 10/31/19 – **INTIMATE RELATIONSHIP / HEARING**
The petitioner appealed from an order of Nassau County Family Court, which granted the respondent's application to dismiss an Article 8 petition based on a lack of subject matter jurisdiction. The Second Department reversed. The petitioner alleged that she and the respondent were in an intimate relationship in that the petitioner was the paternal great-grandmother of the respondent's child, and the parties had lived together in the past. As to the family offense, the petitioner alleged that, when the respondent dropped off the child at her home, and during daily phone calls, she harassed the petitioner. In her motion to dismiss, the respondent asserted that there was no "intimate relationship" within the meaning of Family Court Act § 812 (1) (e). The term "members of the same family or household" encompasses persons not related by consanguinity or affinity who have been in an intimate relationship. Relevant factors include the nature and duration of the relationship and the frequency of interaction. In light of the parties' conflicting allegations, Family Court should have conducted a hearing. Steven A. Feldman represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_07781.htm

THIRD DEPARTMENT

Matter of Aree RR. v John SS., 10/31/19 – **DELEGATING AUTHORITY / ERROR**
The mother appealed from an order of Ulster County Family Court, which partially dismissed her application to modify a prior custody order. The Third Department held that Family Court erred in delegating to the father the authority to determine whether visitation would take place under certain circumstances. The court cannot empower a party to make such a decision. The father could temporarily suspend visitation while the mother was hospitalized for a mental health condition. However, the trial court went too far in giving him such power where the mother was "decompensating or otherwise having an issue with her bipolar condition." The father was not an expert qualified to determine if such vague standard was met. If he believed that the mother was unstable, he could seek court permission to curtail visits. The lower court also erred in directing that the mother's boyfriend—a nonparty over whom the court had not obtained jurisdiction—must advise the father of any mental problems the mother might experience. The errant provisions were thus removed. Christopher Burns represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_07818.htm

Cynthia Feathers, Esq.
ILS | NYS Office of Indigent Legal Services
Director, Quality Enhancement for Appellate
And Post-Conviction Representation
80 S. Swan St., Suite 1147, Albany, NY 12210
(518) 949-6131 | Cynthia.Feathers@ils.ny.gov