

From: Feathers, Cynthia (ILS)
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Subject: Recent App Div decisions of interest

First Department

People v. Watson (10/31/17)

A judgment of NY County Supreme Court, revoking probation and resentencing the defendant, was reversed on the law and remanded for a new hearing on the VOP. The defendant was not given an opportunity to be heard prior to the court's initial determination, in violation of CPL 410.70. When the defendant did speak, the court did not conduct a sufficient inquiry into whether he sought in good faith to comply with the treatment, but was prevented from doing so due to circumstances largely beyond his control. The Office of the Appellate Defender (Eunice Lee, of counsel) represented the appellant.

Second Department

People v. Estevez (11/1/17)

A judgment of Kings County Supreme Court, convicting the defendant of murder in the second degree and other counts, was reversed as a matter of discretion in the interest of justice, and the matter was remitted for a new trial. The trial court assumed the appearance of an advocate in extensively questioning defendant and highlighting apparent inconsistencies in his testimony, and in taking over the direct examination of a complaining witness at key moments in her testimony. Randall Unger represented the appellant.

People v. Andrews (11/8/17)

A judgment of Queens County Supreme Court, convicting the defendant of resisting arrest, was reversed as a matter of discretion. The complainant told police that he was approached by a black male in a white BMW who pointed a gun at him. Shortly thereafter, the victim pointed to two black males standing near a white BMW and told police, "that's them." After being frisked, defendant fled. Although his contention that the prosecution failed to present legally sufficient evidence of an authorized arrest was unpreserved, the reviewing court exercised its interest of justice jurisdiction. The evidence failed to establish that the police had probable cause to arrest the defendant. When the complainant pointed to the defendant and another man, the officers could not have concluded that it was more probable than not that the defendant was the one who drove the car and pointed the gun. Victor Knapp (Randall Unger, of counsel) represented the appellant.

People v. Newson (11/8/17)

An appeal from a judgment of Queens County Supreme Court, convicting the defendant of robbery in the first degree (two counts) and several other crimes, brought up for review an order denying suppression. An officer pursued the defendant's vehicle due to various traffic violations; stopped the vehicle; and observed a Coash handbag, camera, and cell phone in the back seat. The officer did not state that he feared for his safety and had no knowledge that the handbag may have been connected to a radio run he had received regarding a robbery. Yet he asked the defendant if there was "anything illegal" on him or in the vehicle. The defendant said, "No, officer. You can check." The officer, who had a hunch that something was amiss, looked inside the handbag, viewed photographs on the camera, and such actions led to the defendant's arrest. During an inventory search of the vehicle, a handgun was found behind the radio face bracket. Hours later, the *Mirandized* defendant made

incriminating statements. The reviewing court stated that, when questioning the defendant about “anything illegal,” the officer did not have a founded suspicion that criminality was afoot. The fruits of the unlawful inquiry—the physical evidence and statements—had to be suppressed. All counts of the indictment, except for those for traffic violations, were dismissed. One justice dissented. Appellate Advocates (Jenin Younes, of counsel) represented the appellant.

People v. Tavaréz (11/8/17)

A judgment of Kings County Supreme Court, convicting the defendant of attempted murder in the second degree and assault in the first degree, was reversed as a matter of discretion in the interest of justice and a new trial ordered, based on a *Crawford* violation. The male victim and a female companion did not get a clear view of the face of a stranger who attacked him; but the defendant’s appearance at the time matched the general description the pair provided. Neither the victim nor the female companion identified the defendant in court. Through the testimony of friends, the defendant explained that he was at the scene of the crime, but he denied guilt. When the trial began, both sides expected that a friend of the victim’s, who had identified the defendant at a show-up, would testify. However, the prosecution could not locate him. Based on detailed testimony of the arresting officers and a jury note, the jurors likely inferred that the non-testifying witness had identified the defendant to the officers, the appellate court stated. The officers’ testimonial hearsay violated the defendant’s constitutional right to confront witnesses against him. Appellate Advocates (John Latella and Kendra Hutchinson, of counsel) represented the appellant.

Third Department

People v. Rogers (11/9/17)

A judgment of Schenectady County Court convicted the defendant of attempted burglary in the third degree upon his plea of guilty. Pursuant to the terms of the plea deal, after successfully completing a treatment court program, the defendant was sentenced to time served. On appeal, he contended that his plea was not knowing, voluntary, and intelligent, because he suffered from a mental illness that presented a potential affirmative defense. The reviewing court found that the narrow exception to the preservation rule applied (*People v. Lopez*, 71 NY2d 662): during the plea colloquy, the defendant made statements that cast doubt on his guilt or called into question the voluntariness of the plea. An army veteran, the defendant said that he had PTSD and other mental health problems that caused hallucinations, including a voice telling him to commit the subject crime. County Court should have conducted a further inquiry about whether the defendant’s mental state potentially negated the requisite intent. The judgment was reversed on the law, the plea vacated, and the matter remitted for further proceedings. Amanda FiggsGanter represented the appellant.

Fourth Department

People v. Barber (11/9/17)

The Erie County case arose from an incident in which the defendant allegedly forced his former girlfriend into a vehicle and struck her, and she threw herself from the moving vehicle. Convictions for assault in the second degree and unlawful imprisonment in the first degree were reversed and a new trial ordered. As to the assault count, the trial court’s instruction created the possibility that the jury convicted the defendant upon a theory that was different from the one charged in the indictment. The People contended that the issue required preservation; but the Fourth Department observed that the defendant had a fundamental and non-waivable right to be tried only on the crime charged. The unlawful imprisonment conviction was reversed because the trial court erred in

refusing to charge the lesser included offense of unlawful imprisonment in the second degree, in violation of CPL 300.50 and *People v. Glover*, 57 NY2d 61. While not finding reversal warranted based on prosecutorial misconduct, the court admonished the People for a dramatic reference in the opening statement to the defendant's white T-shirt covered in the victim's blood; there were only three small spots of blood on the shirt. The Legal Aid Bureau of Buffalo (Kristin Preve, of counsel) represented the appellant.

People v. Davis (11/9/17)

That part of a judgment of Cattaraugus County Court that convicted the defendant of welfare fraud in the fourth degree was reversed and the court dismissed. The conviction was based on legally insufficient evidence. The Section 8 subsidy at issue was not administered by the Department of Social Services and did not constitute "public assistance benefits" within the meaning of Penal Law § 158.10. The defendant's interpretation of the statutory definition was supported by legislative history, showing that the statute was enacted primarily to combat Medical fraud, whereas the People's interpretation was overly broad and would extend the statute's reach beyond its intended meaning. While both interpretations were plausible, pursuant to the rule of lenity, the Fourth Department adopted the version favoring the defendant. The Legal Aid Bureau of Buffalo (Erin Kulesus, of counsel) represented the appellant.

People v. Jones (11/9/17)

In a case involving armed felony offenses, Onondaga County Supreme Court erred in failing to determine whether the defendant should be afforded youthful offender status, pursuant to the procedure set forth in *People v. Middlebrooks*, 25 NY3d 516. Therefore, the reviewing court reserved decision and remitted the matter for a proper YO determination. Hiscock Legal Aid Society (Kristen McDermott, of counsel) represented the appellant.

People v. Priest (11/9/17)

In a prior appeal from a judgment of Jefferson County Court, the Fourth Department had reversed a judgment of conviction because the SCI was jurisdictionally defective in that the defendant was charged with a class A felony and thus could not validly waive indictment. On remittal, déjà vu. The People again tried to proceed by SCI, but the instrument was jurisdictionally defective: the felony complaint charging the defendant with a class A felony was not dismissed until after the waiver of indictment and the plea to the SCI. Thus, the defendant was still charged with a class A felony at the time of the waiver and plea, in violation of CPL 195.10 (1) and *People v. Trueluck*, 88 NY2d 546. Easton Thompson Kasperek Shiffirin LLP (Danielle Wild, of counsel) represented the appellant.

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