CRIMINAL

COURT OF APPEALS

People v Manragh, 11/20/18 – **EXCLUSION OF WITNESS / NO GRAND JURY DEFECT**
The defendant contended that his guilty plea was entered involuntarily because the prosecutor failed to notify the grand jury of his request to call a particular witness and to allow the grand jury to vote whether to hear that witness, in violation of CPL 190.50 (6). The Court of Appeals disagreed. Even after entering a valid guilty plea, a defendant may not forfeit a claim of a constitutional defect implicating the integrity of the grand jury process. However, in the instant case, the proffered testimony was largely inadmissible and would have inculpated the defendant. Since the exclusion of such testimony did not implicate the integrity of the grand jury process, the claimed violation did not survive the guilty plea.
http://www.nycourts.gov/reporter/3dseries/2018/2018_07924.htm

People v Watts, 11/20/18 – **COUNTERFEIT TICKETS / FORGED INSTRUMENT**
Based on the sale of counterfeit concert tickets, the defendant was charged with 2nd degree criminal possession of a forged instrument. He contended that the tickets were merely revocable licenses and thus did not affect a legal right, interest, obligation or status. The Court of Appeals disagreed. Even a revocable license generally has considerable legal significance in that it gives the holder permission to do what would otherwise be a crime. To the extent that the defendant suggested that event tickets are not essential to the functioning of New York's economic system, the Court of Appeals noted the commercial significance of concert and sports event tickets.
http://www.nycourts.gov/reporter/3dseries/2018/2018_07926.htm

People v Garland, 11/20/18 – **BULLET IN LEG / SERIOUS INJURY / DISSENT**
The defendant challenged 1st degree assault convictions based on legally insufficient evidence of serious physical injury. He fired five shots into a crowd and struck a 15-year-old bystander in the leg. The victim had crutches for two months; bullet fragments were never removed; and he could not participate in competitive sports. The majority concluded that the jury acted rationally in finding that the wound constituted a serious physical injury. Judge Wilson dissented. The victim was not at substantial risk of dying; he had no serious disfigurement or protracted health impairment; and he had not lost the function of any bodily organ. The Legislature has determined that the degree of actual injury to the victim is a crucial determinant of the punishment to be meted out—even if the insubstantiality of the injury is the result of pure dumb luck.
http://www.nycourts.gov/reporter/3dseries/2018/2018_07927.htm

FIRST DEPARTMENT

People v Brown and ***Salkey***, 11/20/18 – **PEOPLE'S APPEALS / SUPPRESSION UPHELD**
The People appealed from orders of Bronx County Supreme Court which granted the defendant Brown's motion to suppress physical evidence and the defendant Salkey's motion to suppress a lineup identification. The First Department affirmed. At the time of the gunpoint seizure of the defendants, the police had an anonymous tip that failed to provide reasonable suspicion to support immediate forcible seizure without any inquiry. Furthermore, the People did not provide credible evidence to validate a search of the bags incident to a lawful arrest. The record also supported the suppression of an officer's lineup identification of Salkey, who had fled the scene, as the unattenuated fruit of the unlawful stop and frisk. The prosecution's vague testimony provided no explanation of how Salkey came to be placed in a lineup and no basis for finding attenuation from the initial illegality. The Legal Aid Society of NYC (Jose Rodriguez-Gonzalez, of counsel) represented Brown. Kevin McLoone represented Salkey.
http://nycourts.gov/reporter/3dseries/2018/2018_07956.htm

People v Mason, 11/20/18 – **ANALYST MORE THAN CONDUIT RE DNA / AFFIRMED**
The defendant appealed from a judgment of New York County Supreme Court convicting him of 1st degree robbery and 4th degree CPW. The First Department affirmed. The testimony of an analyst from the Office of the Chief Medical Examiner, which linked the defendant's DNA to a sample found on a firearm recovered from the crime scene, did not violate his right of confrontation. The analyst's testimony amply established that she used her own independent analysis of the raw data to make the comparison, and the analysis was not merely a conduit for the conclusions of others.
http://nycourts.gov/reporter/3dseries/2018/2018_07944.htm

People v Joe, 11/20/18 – **MOTION TO WITHDRAW PLEA / DENIAL UPHELD**
The defendant appealed from a judgment of Bronx County Supreme Court convicting him of 2nd degree conspiracy. The First Department affirmed. The plea court providently exercised its discretion in denying his motion to withdraw his plea and in declining to appoint new counsel. The allegedly coercive conduct by defense counsel amounted to nothing more than frank advice about the consequences of going to trial. By correcting a factual misstatement by his client, counsel did not take an adverse position. The defendant's pro se ineffective assistance of counsel claims were unreviewable on direct appeal because they involved matters outside the record.
http://nycourts.gov/reporter/3dseries/2018/2018_07965.htm

SECOND DEPARTMENT

People v Andujar, 11/21/18 – **MANSLAUGHTER / AGAINST WEIGHT**
The defendant appealed from a judgment of Queens County Supreme Court convicting him of 1st degree manslaughter. The Second Department dismissed the indictment finding the verdict against the weight of evidence. An acquittal would not have been unreasonable based on the testimony of a co-defendant, the sole eyewitness; several police detectives who interviewed him; and certain documentary evidence. On cross-examination, the co-defendant's testimony was incredible and unreliable. The Legal Aid Society, NYC (Svetlana Kornfeind and Scott Thomson, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_08028.htm

People v Wade, 11/21/18 – **POLICE MISCONDUCT NOT *BRADY* / ATTORNEY KNEW**
The defendant appealed from a judgment of Queens County Supreme Court convicting him of 3rd degree CPW. The defendant asserted that the People committed a BRADY violation by failing to disclose documents relating to IAB investigations and federal civil lawsuits regarding two police officers who testified against him. Such evidence was favorable to the defendant for impeachment purposes; but defense counsel knew of the documents; and there was no reasonable possibility that disclosure would have changed the outcome.
http://nycourts.gov/reporter/3dseries/2018/2018_08044.htm

THIRD DEPARTMENT

People v Perkins, 11/2/18 – **DENIAL OF ALIBI WITNESS / REVERSAL**
The defendant appealed from a judgment of Schenectady County Court convicting him of 2nd degree attempted murder and other crimes and from an order denying his CPL 440.10 motions. The Third Department found that County Court abused its discretion by denying the defendant's request to present an alibi witness based on a lack of notice. Precluding such evidence implicated the Compulsory Process Clause of the Sixth Amendment and should only be ordered in the most egregious circumstances. The People opened the door to the alibi witness by eliciting certain testimony. In these circumstances, County Court violated the defendant's constitutional right to present a defense. The error was not harmless. Fernande Rossetti represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_07972.htm

People v. Matteson, 11/21/18 – **NO SPEEDY TRIAL MOTION / 440 HEARING NEEDED**
Clinton County Supreme Court's denial of the defendant's CPL 440.10 motion, without a hearing, was error. The defendant argued that he was deprived of effective assistance because his counsel failed to move to dismiss the indictment based on a violation of his statutory speedy trial rights. There is ordinarily no strategic reason for counsel to fail to make a dispositive motion that would result in dismissal of the charges with prejudice. Because the People did not conclusively establish their entitlement to success on a speedy trial motion, a hearing was necessary to determine whether defense counsel consented to certain adjournments. The challenged order was reversed and the matter was remitted. Lisa Burgess represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_07976.htm

People v. Blackman, 11/21/18 – **FAILURE TO CONVEY OFFER / 440 HEARING NEEDED**
The defendant appealed from an order of Broome County Court which denied, without a hearing, his CPL 440.10 motion to vacate the judgment convicting him of the several drug possession crimes. He asserted an ineffective assistance claim based on the failure of defense counsel to apprise him of the potential immigration consequences of the subject charges and to explore, negotiate, and procure an immigration-friendly plea offer. The Third Department held that the defendant's affidavit alleged sufficient facts which could establish ineffective assistance. The ADA's submission demonstrated that the People offered defendant a plea deal that did not expose him to deportation and that there was a reasonable likelihood that, had defendant accepted the offer, neither the People nor County Court would have blocked the agreement. Instead, the defendant was convicted after a jury trial. There was nothing to controvert the claim that defense counsel did not present the client with any plea offer. A hearing was warranted. The defendant's persistent claims of innocence did not undermine his claims. James Sacco represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_07982.htm

People v Brassard, 11/21/18 – **DEFECTIVE PLEA / NARROW PRESERVATION EXCEPTION**
The defendant appealed from a Clinton County Court judgment convicting him of 1st degree predatory sexual assault against a child. He contended that his guilty plea must be vacated because he negated an essential element of the crime. At sentencing, the defendant stated that the sexual conduct started when the victim was 13, not 12, years old. Such statement did indeed negate the element that the victim was under age 13, yet County Court did not make any further inquiry or give the defendant an opportunity to withdraw his plea. The appellate court reversed the judgment and vacated his plea. Adam Van Buskirk represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_07978.htm

People v Busch-Scardino, 11/21/18 – **SCI / JURISDICTIONAL DEFECT**
The defendant appealed from a judgment of Schenectady County Court convicting him of aggravated criminal contempt. She agreed to be prosecuted by an SCI, but argued that the parties must strictly comply with the statutory requirements to waive indictment and that the waiver omitted the approximate time and place of the alleged offense. The Third Department held that the waiver was invalid, and the related SCI was jurisdictionally defective. The judgment of conviction was reversed, and the SCI was dismissed. Brian Callahan represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_07979.htm

FAMILY

FIRST DEPARTMENT

Michael B. v Latasha T.-M., 11/20/18 – **CUSTODY MOD / FULL HEARING NEEDED**
The father appealed from order of Bronx County Family Court which denied his petition for modification of custody. The First Department reversed and remanded for a full hearing on the issue of whether it was in the child's best interests to relocate with his mother to Florida on a permanent basis. Family Court held a brief hearing and correctly determined that the mother's testimony about her unilateral relocation constituted a change in circumstances. However, the court abused its discretion in making a final determination without a full hearing at which the parties and the child's attorney had an opportunity to present relevant evidence. Carol Kahn represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_07929.htm

Matter of Juliette S. v Tykym S., 11/20/18 – **CUSTODY MOD / FULL HEARING NEEDED**
The mother appealed from an order of New York County Family Court which granted a motion to dismiss her custody modification petition. The First Department reversed and remanded. Family Court improperly dismissed the petition without a hearing. It was error to conclude that the child's fear of the father was unfounded where the court did not have sufficient information to determine best interests. Elena Rizzo represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_07960.htm

Matter of Abass D. (Mamadou D. – Sitan D.), 11/20/18 – **VISITATION MOD / REVERSAL**
The defendant appealed from an order of New York County Family Court which expanded the respondents' visitation to unsupervised day visits on the condition that no other adults were present, unless cleared by petitioner. The First Department reversed. Family Court's determination that the respondents should have unsupervised visitation with the children lacked a sound and substantial basis in the record. The respondents refused to even acknowledge the possibility that the children—who tested positive for sexually transmitted diseases (STD)—were sexually abused.
http://nycourts.gov/reporter/3dseries/2018/2018_07968.htm

SECOND DEPARTMENT

Krystle L.B. v Crystal L.W., 11/21/18 – **INCARCERATED PARENT / RIGHT TO BE PRESENT**
After a hearing at which the incarcerated father was neither present nor represented, Dutchess County Family Court granted the petition of Krystle L.B. to be appointed permanent guardian of the subject child. The Second Department reversed and remitted. An incarcerated parent has a fundamental right to be heard in a proceeding impacting the care and control of his child. The father's rights were violated when the Family Court elected to hear and determine the guardianship petition without producing him in court or affording him an opportunity to be heard. Dell Atwell represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_08019.htm

THIRD DEPARTMENT

Matter of Payne v Montano, 11/21/18 – **AFC INEFFECTIVE / REVERSAL**
The mother appealed from an order of Broome County Family Court which dismissed her application to modify a visitation order. She sought to eliminate the father's scheduled parenting time. Following a hearing, Family Court dismissed the mother's petition. The AFC appealed. The appellate AFC argued that the record was not sufficiently developed to find that continued parenting time with the father was in the child's best interests and that the trial AFC provided ineffective representation. The role of the AFC is: (1) to help the child express his or her wishes to the court, and (2) to take an active role in the proceedings. The Third Department concluded that the AFC should have presented witnesses or done a probing cross-examination of the mother. The dismissal was reversed and the matter remitted. Carman Garufi was the appellate AFC.
http://nycourts.gov/reporter/3dseries/2018/2018_07990.htm

Matter of Karen Tyrell FF. (Jaquasisa GG.), 11/22/18 – **ARTICLE 10 / MOOT / DISSENTS**
The respondent appealed from an order of Schenectady County Family Court which temporarily removed the subject child from her custody. Following the order, the respondent agreed to a resolution in which the violation petition was withdrawn, the neglect petition was adjourned in contemplation of dismissal, and the child returned to her care. These developments mooted the appeal, in the view of the Third Department majority. Two justices dissented, opining that the mootness exception applied. The substantive issue was whether a respondent in a proceeding under Family Ct Act article 10, part 2 may consent to the temporary removal of her child. The record showed that Family Court interpreted both §§ 1022 and 1027 as requiring the court to make a factual finding that a child is in imminent danger before issuing a temporary removal order. The question was consent obviated the need for an admission or a hearing on risk. The issue will readily recur; and appeals from temporary removal orders are routinely found to be moot because a final disposition is reached before an appeal is decided. Finally, procedures surrounding the removal of children are manifestly of public importance.
http://nycourts.gov/reporter/3dseries/2018/2018_07985.htm

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