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Subject: Decisions of Interest

CRIMINAL

First Department

***People v Peters* (12/5/17) – CONFLICT OF INTEREST / NEW TRIAL**

During the arraignment of the defendant on drug sale charges, he was appointed the same counsel as one of the buyers, and counsel continued to represent both defendants for six months. During that time, as a condition of his plea, the buyer allocated to a description fitting the defendant. At trial—when the defendant was represented by a different attorney—the buyer testified on direct that he purchased crack cocaine from the defendant. On cross, the buyer admitted that he had told the prosecutor that the defendant was not the seller. The defendant’s trial attorney informed the court that he had confirmed that prior counsel simultaneously represented the two defendants. Counsel moved to strike the buyer’s testimony. The application was denied. That was error, the First Department held. An actual conflict of interest existed when the original counsel represented the defendant at the time of the buyer’s plea—since the defendants’ interests were opposed and counsel had acted against the defendant’s interests by advising the buyer as he did. The conflict infringed on the defendant’s right to effective assistance of counsel. The reviewing court reversed, ordered a new trial, and precluded the People from using the buyer’s testimony at any retrial. Such testimony was interwoven with the violation of the defendant’s right to meaningful representation. In other cases, courts have fashioned remedies uniquely tailored to dissipating the taint of ineffective assistance, the First Department observed, enumerating some examples. The Office of the Appellate Defender (Kate Mollison, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2017/2017_08497.htm

Second Department

***People v Lawrence* (12/6/17) – ANOTHER CONFLICT CASE / NEW TRIAL**

In connection with a shooting in Suffolk County, the defendant was charged with murder in the second degree and other crimes. Defense counsel interviewed the People's main witness, who had identified the defendant as a shooter, but recanted in the interview with counsel. Prior to trial, the People alerted County Court that defense counsel was a potential witness; and counsel agreed to forgo cross-examination of the eyewitness. Following advice by independent counsel, the defendant stated that he wanted his original attorney to continue to represent him, but he did not waive any conflict. The trial court denied the People's motion to have counsel relieved, and the defendant was convicted on all charges. The Second Department held that County Court had erred, in its balancing of two conflicting constitutional rights, when it denied the People's application to relieve defense counsel. In the circumstances presented, the defendant's right to effective assistance trumped his right to be represented by counsel of his own choosing. Defense counsel's actions had created an actual conflict: he had to either testify on his client's behalf and be disqualified or not present exculpatory evidence. The judgment of conviction was reversed, and a new trial was ordered. Laura Solinger represented the appellant.

http://nycourts.gov/reporter/3dseries/2017/2017_08538.htm

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Third Department

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People v Crippen* (12/7/17) – *PAYTON VIOLATION / STANDING ESTABLISHED

In an appeal from a Schenectady County judgment of conviction for attempted assault and other crimes, the defendant contended that County Court had erred in finding that he did not have standing to challenge his warrantless arrest based on a *Payton* violation. To establish standing, the defendant had to show a legitimate expectation of privacy in his mother's apartment, where he was arrested. The appellate court held that the defendant did have standing, based on several factors demonstrating his regular presence at his mother's apartment: he slept there overnight three or four times a week; showered, ate, watched television, and kept toiletries there; and invited guests there. Further, a private security officer at the mother's building and a police officer testified that they knew that the defendant stayed at his mother's apartment. However, the reviewing court found that the defendant's suppression motion had been properly dismissed on the merits.

http://nycourts.gov/reporter/3dseries/2017/2017_08552.htm

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Matter of Thorn v New York State Bd. of Parole* (12/7/17) – *PAROLE / RESCISSION AFFIRMED

The petitioner was convicted of manslaughter and attempted manslaughter in 1985. In 2015, he made his first appearance before the Parole Board and was granted parole with an open release date. Prior to such date, the petitioner's release was suspended, when the Board learned that the manslaughter victim's family had not been notified about the defendant's parole. Thereafter, four family members provided victim impact statements, and a rescission hearing was held. Following the hearing, the Board rescinded the open release date and imposed a 24-month hold, citing the petitioner's anger and hostility at the hearing, as well as information in the victim impact statements. The petitioner commenced an Article 78 proceeding. Supreme Court dismissed the application, and the Third Department affirmed. The Board had broad discretion to reverse the grant of parole if there was substantial evidence, consisting of subsequent case developments or significant information that previously existed, but was not known. However, Supreme Court had erred in finding that the Board had improperly relied on the victim impact statements. *Matter of Costello v New York State Bd. of Parole*, 23 NY3d 1002, did not preclude the Board from ever considering victim impact statements submitted after parole was granted and then rescinded. The instant statements included the revelation that the petitioner had made threats against family members of the victim. The petitioner's due process rights were not violated by the failure to provide him with the rescission report until the day of the hearing, in violation of the governing regulation. He was given an opportunity to postpone the hearing and obtain counsel, but he declined. Upon appeal, the appellant represented himself.

http://nycourts.gov/reporter/3dseries/2017/2017_08566.htm

FAMILY

First Department

***Matter of Legend S. (Tawana T.)* (12/7/17) – TERMINATION OF PARENTAL RIGHTS / DISMISSAL AFFIRMED**

The respondents were parents of a child who was born prematurely in 2008 and, upon discharge from the hospital in 2009, was placed directly into foster care as a result of findings of neglect. The agency responsible for the placement filed a 2015 permanent neglect petition seeking to terminate the respondents' parental rights. Family Court dismissed the petition on the ground that the agency had failed to prove, by clear and convincing evidence, the parents' failure to plan for the child's future for one year following placement, pursuant to Social Services Law § 384-b (7) (a). The agency and the AFC appealed. With respect to a period of compliance

with the service plan, the appellants argued that the respondents had failed to gain insights into their own behavior that led to removal, as well as into their mental health issues. But the sparse record did not support such contentions. As to a purported failure to secure adequate housing, the appellants did not address proof regarding housing-related issues beyond the respondents' control. The First Department concluded: "[T]ermination of parental rights is a drastic event...Although we recognize that the child has never lived with his parents and has spent his entire life in foster care, we cannot reverse for that reason alone." Elisa Barnes and Tennille Tatum-Evans represented the respondents.

http://nycourts.gov/reporter/3dseries/2017/2017_08601.htm

***Matter of Giannis F. (Manny M. – Vilma C.)* (12/7/17) – ARTICLE 10 / MINOR SIBLING AS “PERSONAL LEGALLY RESPONSIBLE”**

The reviewing court affirmed an order of disposition which brought up for review a fact-finding order holding that the appellant had sexually abused the subject child. The appellant failed to preserve for appellate review the argument that he was not a person legally responsible for the child. The First Department stated that, if it were to consider the issue, the court would find that the record supported the determination. The appellant was the victim's half-brother. Although he was a minor when he began abusing his half-sister—who was five years younger—minors were not excluded from the Family Ct Act § 1012 (g) definition (“the child's custodian, guardian [or] any other person responsible for the child's care at the relevant time”). Moreover, the appellant had reached the age of majority when some of the sexual abuse occurred.

http://nycourts.gov/reporter/3dseries/2017/2017_08611.htm

***Matter of Tyler Y.* (12/7/17) – JUVENILE DELINQUENT / ACOD**

An order of disposition, which adjudicated the appellant to be a juvenile delinquent upon a fact-finding determination and placed him on probation for 12 months, was reversed in the interest of justice. The delinquency finding and dispositional order were vacated. The matter was remanded with the direction that Family Court order an adjournment in contemplation of dismissal, nunc pro tunc to the date of the order of disposition. An ACOD would have been the least restrictive dispositional alternative consistent with the appellant's needs and the community's need for protection. The Legal Aid Society (John Newbery, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2017/2017_08604.htm

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