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Subject: Decisions of Interest

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CRIMINAL

Court of Appeals

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DECISION OF THE WEEK

People v Boone (12/14/17) – **JURY CHARGE / CROSS-RACIAL IDENTIFICATION**

The defendant was charged with two counts of first-degree robbery based on separate, fleeting, knife-point encounters in Brooklyn. In separate lineups and at trial, the victims identified the defendant as the perpetrator. The victims were both white, and the defendant is black. No other evidence linked the defendant to the crimes. He sought a charge instructing the jurors on cross-racial identification. The trial court denied the request, stating that the defendant had not placed the issue in evidence via expert testimony or cross-examination. The defendant was convicted on the robbery charges. The Second Department upheld the refusal to give the requested charge. Judge Rivera granted leave. In an opinion authored by Judge Fahey, the Court of Appeals observed that mistaken eyewitness identifications are the single greatest cause of wrongful convictions, and the likelihood of misidentification is higher when an identification is cross-racial. Indeed, there is near consensus among cognitive and psychologists that people have significantly greater difficulty in accurately identifying members of a different race than their own race, the court stated. Yet surveys demonstrate that a large plurality of jurors do not understand that a cross-racial identification may be less reliable. For these reasons, the risk of wrongful convictions involving cross-racial identifications demands a new approach, the court declared. Neither expert testimony nor cross-examination of the People's witnesses about their identifications is necessary to establish the right to a cross-racial jury charge. The Court of Appeals held:

> [I]n a case in which a witness's identification of the defendant is at issue, and the identifying witness and defendant appear to be of different races, a trial court is required to give, upon request, during final instructions, a jury charge on the cross-race effect, instructing
> (1) that the jury should consider whether there is a difference in race between the defendant and the witness who identified the defendant, and
> (2) that, if so, the jury should consider
> (a) that some people have greater difficulty in accurately identifying members

of a different race than in accurately identifying members of their own race and
(b) whether the difference in race affected the accuracy of the witness's identification.

The instruction would not be required where there was no dispute about the identity of the perpetrator nor when no party requested the charge. The *Boone* judgment of conviction was reversed, and a new trial was ordered. Judge Garcia wrote a concurring opinion stating that the decision to deliver a cross-racial identification charge should remain in the sound discretion of the trial court. Judge Stein joined in the concurrence. Appellate Advocates (Paul Skip Laisure, of counsel) represented the defendant.

http://www.nycourts.gov/reporter/3dseries/2017/2017_08713.htm

Second Circuit

United States v Scully (12/13/17) – **Advice-of-Counsel Defense / Erroneous Exclusion**

The defendant was convicted of several crimes in District Court – Eastern District and sentenced to 60 months. His business imported foreign versions of FDA-approved products and sold them in the U.S. at reduced prices. In a letter to the defendant, one attorney had opined (incorrectly) that the scheme was legal. The defendant was later indicted. At trial, he advanced a defense that he lacked fraudulent intent due to his good faith reliance on legal advice. The defendant was not allowed to testify about incorrect advice provided by a second attorney. Such evidence was offered to show the defendant's state of mind, and thus District Court erred in invoking hearsay concerns in excluding the evidence. The probative value of the evidence far outweighed its prejudicial effect. The error was not harmless. The challenged judgment was vacated, and a new trial was ordered. Katten Muchin Rosenman LLP represented the appellant.

http://www.ca2.uscourts.gov/decisions/isysquery/fedbcf9f-49db-4330-a12c-115801d286e5/1/doc/16-3073_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/fedbcf9f-49db-4330-a12c-115801d286e5/1/hilite/

United States v Singh (12/13/17) – **Sentence Unreasonable / Remand**

The defendant pleaded guilty to one count of illegally entering the U.S., after having been removed following a conviction for an aggravated felony. His Guidelines range was 15 to 21 months' imprisonment, and the government requested a sentence within such range. However, District Court imposed a term of 60 months. The sentence "drastically exceeded nationwide norms." The sentencing court overstated the seriousness of the prior history of criminal conduct and erred in equating the defendant's statements in mitigation with a failure to accept responsibility, despite a letter clearly expressing apology and remorse. The matter was remanded, but the request for remand to a different judge was denied. Federal Defenders of New York (Collen Cassidy, of counsel) represented the appellant.

http://www.ca2.uscourts.gov/decisions/isysquery/fedbcf9f-49db-4330-a12c-115801d286e5/2/doc/16-1111_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/fedbcf9f-49db-4330-a12c-115801d286e5/2/hilite/

Second Department

People v Eulo (12/13/17) – **Defective Waiver of Indictment / Plea Vacated**

Charged in a felony complaint, the defendant waived indictment and pleaded guilty under a SCI. The NY Constitution, Art. I, § 6, and CPL 195.20 provide for waivers of indictment and require that such waivers be evidenced by a written instrument, signed by the defendant in open court. An infringement on such right is a non-waivable jurisdictional defect. The record did not contain a signed waiver, and a reference in the transcript indicating that the defendant signed a waiver did not cure the defect. The judgment of conviction was reversed, the SCI was dismissed, and the matter was remitted to Nassau County Supreme Court for further proceedings on the felony complaint. Michael Ciaffa represented the appellant.

http://nycourts.gov/reporter/3dseries/2017/2017_08684.htm

Matter of State of NY v Kerry K. (12/13/17) – **Civil Management / Unreliable Hearsay**

Following a nonjury trial in a Mental Hygiene Law Article 10 proceeding, Supreme Court concluded that the appellant suffered from a mental abnormality. After a dispositional hearing, the court issued an order of strict and intensive supervision and treatment. As to the mental abnormality determination, the reviewing court reversed, in light of an error in admitting unreliable hearsay testimony from the State's experts. In MHL Article 10 proceedings, hearsay basis testimony of an expert witness is admissible if the hearsay is reliable and its probative value substantially outweighs its prejudicial effect. The experts' testimony about a vacated 1982 conviction for two counts of rape did not satisfy such test. After the appellant served more than 10 years, the 1982 rape conviction was vacated on the consent of the District Attorney based on DNA test results. (Subsequently, the defendant was awarded $1.5 million in a claim under the Unjust Conviction and Imprisonment Act, Court of Claims Act § 8-b, which requires proof of innocence by clear and convincing evidence. *See Kotler v. State*, 255 AD2d 429.) Yet the experts were permitted to opine about the purported validity of the 1982 conviction. The error deprived the appellant of due process and was not harmless. The presumption that a trial judge sitting as a finder of fact considers only competent evidence in reaching a verdict did not logically extend to a case where the judge erroneously admitted inadmissible evidence over proper objection. A new trial was ordered. Mental Hygiene Legal Service represented the appellant.

http://nycourts.gov/reporter/3dseries/2017/2017_08671.htm

Third Department

People v Cotto (12/14/17) – **DEFECTIVE PLEA / REVERSAL**

The defendant pleaded guilty to third-degree burglary. On appeal, he argued that his plea was not knowing, intelligent, and voluntary because Madison County Court failed to advise him of the constitutional rights he was waiving. Although the argument was not preserved by an appropriate post-allocution motion, the reviewing court exercised its interest of justice jurisdiction. County Court did not reference the privilege against self-incrimination, the right to be confronted by witnesses, or the right to a jury trial. The record lacked any affirmative showing that the defendant waived his constitutional rights or any indication that he consulted with his attorney about the constitutional consequences of his guilty plea. The judgment of conviction was reversed, and the matter was remitted. Karin Morris represented the appellant.

http://nycourts.gov/reporter/3dseries/2017/2017_08759.htm

People v Kiah (12/14/17) – **VICTIM'S MENTAL HEALTH RECORDS / NEW TRIAL**

Following a jury trial, the defendant was convicted of rape in the first degree. On cross-examination, the victim had admitted that she previously used crack cocaine and that she was taking medication for bipolar disorder at the time of the incident. The defendant testified that the victim invited him to her apartment and asked him to bring crack cocaine, and they had consensual sex. On appeal, he contended that Albany County Supreme Court erred when it denied his motion seeking a subpoena duces tecum compelling production of the victim's mental health treatment records for in camera review. The Third Department observed that a history of treatment for a diagnosed mental condition is a sufficient good faith basis warranting in camera review of a witness's mental health records to determine if the records contain relevant and material information bearing on the credibility of the witness. In the instant case, Supreme Court did not review the requested records. The trial court had erred. Without knowing the content of the records, the reviewing court could not determine if they contained information bearing on the witness's credibility. Thus, the judgment of conviction was reversed, and a new trial was ordered. The appellate court also held that the trial court had erred in denying the defendant's motion to suppress evidence obtained upon a search of his phone, because the warrant was not executed within the 10-day limit imposed by CPL 690.30 (1). John Ferrara represented appellant.

http://nycourts.gov/reporter/3dseries/2017/2017_08752.htm

FAMILY

First Department

Matter of Michelle C. v Jerome Alvin M. (12/12/17) – **VISITATION / INCARCERATED PARENT**

The First Department affirmed a Family Court order modifying a visitation order and

denying the respondent father visitation at his correctional facility with the parties' four-year-old child. Since the prior order, the father had been convicted of attempted murder and other crimes. Four elements demonstrated that visitation was contrary to the child's best interests. First, lay and expert testimony established that the child had severe special needs, including developmental delays, seizures, tantrums, and self-injurious behavior; and his problems were exacerbated by sensory changes in his environment. Second, the father lacked an understanding of the child's special needs. Third, the father had an extensive prison sentence (a maximum of 30 years). Fourth, visitation would require six hours' transportation each way and would be done by the father's aunt, with whom the child had no relationship. The challenged order did allow the father continued, regular contact—through letter writing, phone and video communication, and required updates from the mother as to the child's medical and educational progress. *See generally Matter of Granger v Misercola*, 21 NY3d 86 (rebuttable presumption in favor of visitation applies as to incarcerated non-custodial parents). Andrew Baer represented the respondent.

http://www.nycourts.gov/reporter/3dseries/2017/2017_08637.htm

Matter of Demetrius C. (David C. – Epifania C.) (12/14/17) – **Derivative Neglect / Finding Vacated**

Family Court properly found that the respondent father had sexually abused his daughter. However, the determination that he had derivatively neglected his son was not supported by a preponderance of the evidence. The neglect finding was based on the sexual abuse, which had occurred six years earlier. The father's conduct toward his daughter was insufficient to demonstrate that his son was at risk of harm. There was no evidence that sexual abuse was ever directed at his son, who was much younger than the daughter, or that the son was aware of the abuse of his sister. Further, there was no evidence that the boy was ever at risk of becoming impaired during supervised and unsupervised visits with the father during the six years following the sexual abuse. Anne Reiniger represented the appellant.

http://www.nycourts.gov/reporter/3dseries/2017/2017_08737.htm

Blake v Blake (12/14/17) – **Sua Sponte Order Dismissing Complaint / Leave Granted**

Supreme Court sua sponte dismissed a complaint in a divorce action. The plaintiff filed a notice of appeal. The First Department observed that a sua sponte order is not appealable as of right. *See* CPLR 5701 (a) (2) (regarding appeals as of right from order where motion decided was made on notice). Given the extraordinary and unsound nature of the relief granted, the reviewing court deemed the notice of appeal to be a motion for leave to appeal and granted such leave, pursuant to CPLR 5701 (c). The power to dismiss a complaint sua sponte should be used sparingly and only in extraordinary circumstances, which did not exist in the case at bar. Thus, the challenged order was reversed, and the complaint was reinstated. Daniel Stock represented the appellant. *[The matter of appeals from sua sponte orders also arises in Family Court practice. Where an appeal is taken by notice of appeal, sometimes the reviewing court treats the notice as a leave application and grants leave in the interest of justice.* See e.g. Majuk v Carbone, *129 AD3d 1485. Other times, the court declines to grant leave and dismisses the appeal.* See e.g. Griffin v Marshall, *80 AD3d*

662.]

http://www.nycourts.gov/reporter/3dseries/2017/2017_08738.htm

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