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CasePrepPlus

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COURT OF APPEALS

CRIMINAL LAW.

MISDEMEANOR COMPLAINT ADEQUATELY ALLEGED POSSESSION OF BRASS KNUCKLES.

The Court of Appeals, in a full-fledged opinion by Judge Abdus-Salaam, determined the misdemeanor complaint sufficiently alleged possession of brass knuckles: " '[A] reasonable, not overly technical reading' of the accusatory instrument here satisfies our sufficiency standard ... , as it supplied 'defendant with sufficient notice of the charged crime to satisfy the demands of due process and double jeopardy' ... . The accusatory instrument clearly informed defendant that he was in criminal possession of 'brass metal knuckles,' a per se weapon, in violation of Penal Law § 265.01 (1). The term 'brass metal knuckles' gave defendant a clear description of the object recovered from his pocket at a specific time and place. Under the common and natural definition of the term, as well as the dictionary definition, defendant was adequately informed of the charge against him. * * * [T]he character of metal knuckles is such that one need only look at the object to discern whether it is in fact metal knuckles. Thus, the officer here did not have to 'exercise . . . professional skill or experience' to conclude defendant possessed metal knuckles ... , and the accusatory instrument did not require any specific description of the officer's training or experience." ***People v. Aragon*, 2016 N.Y. Slip Op. 07104, CtApp 11-1-16**

CRIMINAL LAW.

EXPANDABLE METAL BATON IS A "BILLY" WITHIN THE MEANING OF THE PENAL LAW.

The Court of Appeals, in a full-fledged opinion by Judge Stein, over an extensive dissent, determined the accusatory instrument sufficiently alleged the illegal possession of a "billy." The accusatory instrument stated that a police officer observed defendant with a "rubber gripped, metal, extendable baton (billy club)" in his rear pants pocket. Based upon his training and experience, the officer stated that "said baton device is designed primarily as a weapon, consisting of a tubular, metal body with a rubber grip and extendable feature and used to inflict serious injury upon a person by striking or choking." The term "billy" is not defined in the Penal Law. When the law was enacted a billy club was a fixed wooden baton. The question before the court was whether a metal, expandable baton constituted a "billy" within the meaning of the statute: "In our view, … the only plausible interpretation of the term 'billy' encompasses a collapsible metal baton ... . Our conclusion in this regard does not rest — as the dissent suggests — on whether or not law enforcement personnel has chosen to use this particular type of instrument. Rather, our determination follows from the common understanding of the term 'billy' and our view that the baton at issue here fits comfortably within the definition thereof. Therefore, we hold that the accusatory instrument alleging that defendant possessed a metal, extendable striking weapon with a handle grip, was sufficient to charge him with possessing a 'billy' under Penal Law § 265.01 (1) so as to provide sufficient notice for him to prepare a defense and to protect him from multiple prosecutions." ***People v. Ocasio*, 2016 N.Y. Slip Op. 07105, CtApp 11-1-16**

CRIMINAL LAW.

PEOPLE V. CATU, WHICH INVALIDATED GUILTY PLEAS WHERE THE PERIOD OF POSTRELEASE SUPERVISION WAS NOT DISCUSSED, SHOULD NOT BE APPLIED RETROACTIVELY.

The Court of Appeals, in a full-fledged opinion by Judge Pigott, with a concurring opinion and over a dissenting opinion, determined the 2005 case which invalidated guilty pleas accepted without express notice of the period of post-release supervision (PRS) (*People v. Catu*, 4 NY3d 242) should not be applied retroactively. In both cases before the court, the pre-*Catu* convictions by guilty plea were challenged to prohibit their consideration as predicate crimes for sentencing in post-*Catu* offenses. The analysis, which encompasses federal and state constitutional law, is too complex to fairly summarize here: "... [N]either [defendant's] conviction was obtained in violation of the law as it existed at the time of their respective convictions. Both state and federal law required that a defendant demonstrate that he would not have pleaded guilty had he known about a mandatory term of his sentence. It was not until our 2005 decision in *Catu* that a defendant was entitled to automatic vacatur. * * * Our *Catu* 'automatic vacatur' rule did not constitute … a 'watershed rule'... . *Catu* was not necessary to prevent an impermissibly large risk of an inaccurate conviction, and it is doubtful that the failure of the courts to apprise defendants ... of the PRS component resulted in them pleading guilty to crimes that they did not commit. Indeed, when presented with their prior convictions, defendants ... acknowledged that they were the individuals mentioned in the predicate

felony statements filed by the People, and that they did not wish to challenge any of the allegations contained within their respective statements." ***People v. Smith*, 2016 N.Y. Slip Op. 07106, CtApp 11-1-16**

CRIMINAL LAW.

THE TOLLING PROVISION, WHICH TOLLS THE FIVE-YEAR STATUTE OF LIMITATIONS FOR CERTAIN SEXUAL OFFENSES UNTIL THE VICTIM TURNS 18, WAS PROPERLY APPLIED TO RENDER THE INDICTMENT TIMELY; THERE IS NO CONFLICT BETWEEN THE TOLLING PROVISION AND THE STATUTE OF LIMITATIONS.

The Court of Appeals, in a full-fledged opinion by Judge Rivera, with a two-judge concurrence, determined that the tolling provision, which tolls the five-year statute of limitations for certain sexual offenses involving a child until the child turns 18, applied here and the indictment, brought when the victim was 21, was timely. The opinion delves into an extensive statutory-interpretation analysis which is too detailed to fairly summarize here: "Defendant claims his prosecution is time-barred because the applicable five-year limitations period set forth in CPL former 30.10 (3)(e) expired before the filing of the felony complaint, and the statute of limitations is not subject to tolling under CPL 30.10 (3)(f). Defendant's argument is unpersuasive, misconstrues the statutory provisions, and ignores the relevant legislative history. The crime for which defendant stands convicted is expressly encompassed by CPL 30.10 (3)(f), and involves the type of conduct the legislature sought to address by expansive, albeit delayed, prosecution of multiple acts of sexual abuse against a minor. * * * Unlike CPL 30.10 (3)(e), which is a self-contained statute of limitations, CPL 30.10 (3)(f) is a tolling provision and as such is dependent on reference to time limits found elsewhere in the statute. Defendant mistakenly equates the two subsections — as if they are both statutes of limitations — when he claims they are in conflict and the specific provision of CPL 30.10 (3)(e) overrides the general provision of CPL 30.10 (3)(f). The more apt comparison is to the two statutes of limitations CPL 30.10 (3)(e) and 30.10 (2)(b), which harmoniously coexist as a specific and general statute of limitations, respectively, and which in no way lead to the conclusion promoted by defendant, that CPL 30.10 (3)(e) is superfluous. Regardless, there is no conflict obvious from the interplay of subsections (3)(e) and (3)(f). One sets forth a five-year prosecution deadline and the other explains when the clock begins to run on that deadline." ***People v. Pabon*, 2016 N.Y. Slip Op. 07108, CtApp 11-1-16**

CRIMINAL LAW, ATTORNEYS.

INEFFECTIVE ASSISTANCE OF COUNSEL COULD NOT HAVE AFFECTED THE PROCEEDINGS; DEFENDANT'S MOTION TO SET ASIDE HIS CONVICTION PROPERLY DENIED.

The Court of Appeals, in a full-fledged opinion by Judge Pigott, determined defendant had been wrongly informed by his attorney that he was subject to consecutive sentences, and therefore defendant had received ineffective assistance of counsel. However, the People presented evidence that, because of the horrendous nature of the crime, there was no possibility defendant would have been offered a plea bargain. Therefore the erroneous advice could not have affected the proceedings. Defendant's motion to set aside his conviction was properly denied: "... [D]efendant was required to show more than incorrect advice by defense counsel. Here, the record supports the Appellate Division's determination that there was no possibility that a reduced plea would have been offered to defendant. Therefore, the incorrect advice could not have affected the outcome of the proceedings. The People entertained no plea possibility or any reduction in the sentence given, among other things, the maximum sentence defendant faced for killing two adults and injuring a third was an aggregate term of just 5 to 15 years. Nor was there any proof that the court would have extended an offer to a reduced sentence. Rather, the sentencing court remarked that it did not think the maximum sentence was enough punishment for defendant under the circumstances of this case." ***People v. Bank*, 2016 N.Y. Slip Op. 07110, CtApp 11-1-16**

CRIMINAL LAW, EVIDENCE.

DEFENDANT PROPERLY IMPEACHED WITH SPONTANEOUS STATEMENTS MADE TO THE POLICE AT THE SCENE OF HIS ARREST; SPONTANEOUS STATEMENT MADE NO MENTION OF AN ATTACK ON DEFENDANT BY THE COMPLAINANT WHICH DEFENDANT DESCRIBED AT TRIAL.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, with a concurring opinion, determined defendant was properly impeached with a spontaneous statement made to police at the time of his arrest for robbing the complainant. At trial, defendant testified the complainant had struck him with a board. However, the alleged attack with a board was not mentioned in defendant's spontaneous statement at the scene: "Here ... defendant's statement was not the product of interrogation, but was made spontaneously at the scene, prior to the issuance of Miranda warnings. In addition, the substance of defendant's spontaneous statement was not inculpatory, but a description of the complainant's conduct and was made to inform the police when the information was timely to their decision as to whether to arrest defendant or complainant. Even more significant, defendant admitted in his direct testimony that he was not silent and that he had given the police his version of complainant's misconduct at the scene. Consequently, the credibility of his initial spontaneous statement was legitimately called into question by his trial testimony. Here, defendant elected to provide some explanation of what happened at the scene, and it was unnatural to have omitted the significantly more favorable version of events to which he testified at trial — that complainant had assaulted him. '[D]efendant's conspicuous omission of these exculpatory facts in

his voluntary statement to police tended to show that his trial testimony was a recent fabrication' ...". ***People v. Chery*, 2016 N.Y. Slip Op. 07109, CtApp 11-1-16**

PERSONAL INJURY, MEDICAL MALPRACTICE.

DEFENSE EXPERT'S CONCLUSORY ASSERTIONS DID NOT RAISE A QUESTION OF FACT ABOUT THE ALLEGATIONS THE NEGLIGENT PRESCRIPTION OF TWO DRUGS CAUSED HEART DAMAGE.

The Court of Appeals, with a concurrence and over a three-judge dissent, determined defendant's motion for summary judgment was properly denied in this medical malpractice action. The complaint alleged the negligent prescription of two drugs caused heart damage. The majority concluded that conclusory statements in the defense expert's affidavit did not raise a question of fact about the plaintiff's allegations of malpractice: "Here, defendant's expert proffered only conclusory assertions unsupported by any medical research that defendant's actions in prescribing both drugs concurrently did not proximately cause plaintiff's AV heart block. These conclusory statements did not adequately address plaintiff's allegations that the concurrent Lipitor and azithromycin prescriptions caused plaintiff's injuries. By ignoring the possible effect of the azithromycin prescription, defendant's expert failed to 'tender[] sufficient evidence to demonstrate the absence of any material issues of fact' ... as to proximate causation and, as a result, defendant was not entitled to summary judgment. Because defendant failed to meet his prima facie burden, it is unnecessary to review the sufficiency of the plaintiff's opposition papers ...". ***Pullman v. Silverman*, 2016 N.Y. Slip Op. 07107, CtApp 11-1-16**

FIRST DEPARTMENT

CRIMINAL LAW.

DEFENDANT WAS NOT PRESENT AT AN OFF-THE-RECORD DISCUSSION OF THE ADMISSIBILITY OF PRIOR UNCHARGED OFFENSES; DEFENDANT WAS THEREFORE DEPRIVED OF HIS RIGHT TO BE PRESENT AT A MATERIAL STAGE OF HIS TRIAL.

The First Department, in a full-fledged opinion by Justice Feinman, determined defendant was deprived of his right to be present during a material stage of the trial and he was therefore entitled to a new trial and a new Molineux/Ventimiglia hearing concerning the admissibility of prior bad acts and uncharged offenses allegedly committed against his girlfriend. Defendant was charged with assaulting his girlfriend. A year before trial, a Molineux/Ventimiglia hearing was held in the defendant's presence, but the judge never ruled on the admissibility of prior uncharged offenses. The trial was held before a different judge who conducted an off-the-record conference about the uncharged offenses at which defendant was not present. Although a written summary of the off-the-record conference was drawn up, the judge's reasoning for allowing evidence of uncharged offenses was not stated in the summary. The First Department held defendant's right to be present at a material stage of his trial had been violated. ***People v. Hoey*, 2016 N.Y. Slip Op. 07150, 1st Dept 11-1-16**

TAX LAW.

AMUSEMENT TAX AND CABARET TAX PROVISIONS ARE NOT UNCONSTITUTIONALLY APPLIED TO AN ADULT ENTERTAINMENT CLUB; TAX EXEMPTIONS FOR CERTAIN TYPES OF DRAMATIC OR MUSICAL ART PERFORMANCES ARE PROPERLY NOT AVAILABLE TO THE CLUB.

The First Department, in a full-fledged opinion by Justice Tom, determined the provisions of the Tax Law which allow the imposition of an amusement tax and a cabaret tax were not unconstitutional either facially or as applied to the plaintiffs. The plaintiffs operate a men's entertainment club featuring topless dancers (Hustler Club). The Tax Law includes exemptions for certain types of entertainment, i.e., dramatic or musical art performances. Plaintiffs argued the exemptions should apply to the adult entertainment at the club, as well. In rejecting the constitutional arguments, the court wrote: "Here, the Tax Laws are laws 'of general application' ... . The Amusement Tax applies to sales at '[a]ny place where any facilities for entertainment, amusement, or sports are provided' (Tax Law § 1101[d][10]), and the Cabaret Tax applies to sales at '[a]ny roof garden, cabaret or other similar place which furnishes a public performance for profit' (Tax Law § 1101[d][12]). The Tax Laws 'ha[ve] not selected a narrow group to bear fully the burden of the tax' ... , since the taxes imposed on plaintiffs are equally applicable to many other types of entertainment and recreational activities, including sporting events, car races, amusement parks, arcades, zoos, animal performances, and magic acts ... . Nor are the performances of the sort presented at the Hustler Club "singled out for special treatment"... based on their erotic, sexual, or adult nature. The performances merely happen to fall under the very broad categories of 'entertainment' or 'amusement,' for purposes of the Amusement Tax, and "public performance for profit," for purposes of the Cabaret Tax." ***CMSG Rest. Group, LLC v. State of New York*, 2016 N.Y. Slip Op. 07280, 1st Dept 11-3-16**

SECOND DEPARTMENT

FORECLOSURE, EVIDENCE, CIVIL PROCEDURE.

PLAINTIFF'S ATTEMPT TO DEMONSTRATE STANDING FAILED BECAUSE THE SUBMITTED AFFIDAVIT DID NOT MEET THE REQUIREMENTS OF THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE; AFFIDAVIT SUBMITTED IN REPLY PAPERS CANNOT BE CONSIDERED.

The Second Department determined plaintiff loan service did not demonstrate standing to bring this foreclosure action. The affidavit submitted by the plaintiff did not meet the requirements of the business records exception to the hearsay rule. An affidavit submitted with the reply papers could not be considered: "…[T]he plaintiff relied on the affidavit of Jaclyn Holloway, an assistant secretary of Nationstar Mortgage, LLC (hereinafter Nationstar). Holloway alleged that, after the action was commenced, the plaintiff delivered the note to NationStar. She alleged that, 'pursuant to the business records of [the plaintiff],' the plaintiff had physical possession of the note when it commenced the action. However, the plaintiff failed to demonstrate the admissibility of the records relied upon by Holloway under the business records exception to the hearsay rule (see CPLR 4518[a]) since Holloway did not attest that she was personally familiar with the record-keeping practices and procedures of the plaintiff ... . Consequently, Holloway's allegations based on those records were inadmissible ... , and, therefore, insufficient to meet the plaintiff's prima facie burden to establish its standing ... . The plaintiff could not rely on the affidavit of its vice president to meet its prima facie burden since the affidavit was improperly submitted for the first time in its reply papers ...". . ***Aurora Loan Servs., LLC v. Baritz*, 2016 N.Y. Slip Op. 07154, 2nd Dept 11-2-16**

THIRD DEPARTMENT

CONTRACT LAW.

THE FACT THAT THE AMOUNT TO BE USED TO CALCULATE DEFENDANT'S COMPENSATION WAS NOT SET IN THE CONTRACT, BUT RATHER WAS TO BE ESTABLISHED AND AGREED TO, DID NOT INVALIDATE THE CONTRACT AS A MERE AGREEMENT TO AGREE; THE AMOUNT COULD BE DETERMINED BY EXTRINSIC INFORMATION.

The Third Department, reversing (modifying Supreme Court) determined a material term of a contract could be adequately fleshed out by extrinsic evidence. Therefore the contract should not have been invalidated as a mere "agreement to agree." Defendant was hired as a consultant by plaintiff, the parent company of a number of banks, to maximize income from overdrafts. Defendant's fee was to be based on plaintiff's income over a "baseline" amount to be established by defendant (and agreed to by plaintiff): "Supreme Court determined that, because the baseline was an indefinite material term, the agreement was unenforceable as a 'mere agreement to agree' ... . We do not agree. '[W]here it is clear from the language of an agreement that the parties intended to be bound and there exists an objective method for supplying a missing term, the court should endeavor to hold the parties to their bargain. Striking down a contract as indefinite and in essence meaningless is at best a last resort' ... . If, 'at the time of agreement the parties have manifested their intent to be bound, a price term may be sufficiently definite if the amount can be determined objectively without the need for new expressions by the parties; . . . for example, [the price term might] be . . . ascertained by reference to an extrinsic event' ... . Here, the parties' conduct evinced that they intended to be bound by the agreement and, in our view, the baseline could be ascertained with reference to an extrinsic event, that is, defendant's calculation derived from the existing historical data ... . Accordingly, we find that the agreement was enforceable." ***Tompkins Fin. Corp. v. John M. Floyd & Assoc., Inc.*, 2016 N.Y. Slip Op. 07252, 3rd Dept 11-3-16**

CRIMINAL LAW, APPEALS.

ACCEPTING A VERDICT BEFORE REQUESTED TESTIMONY WAS READ BACK TO THE JURY WAS NOT A MODE OF PROCEEDINGS ERROR AND WAS NOT PRESERVED FOR REVIEW.

The Third Department determined any error associated with a jury-request for a readback of testimony not a mode of proceedings error and was unpreserved for review. Before the requested testimony was readback, the jury indicated it had reached a verdict. The verdict was accepted without the readback taking place: "The court read the note from the jury verbatim and announced its intention to permit a readback of the requested testimony one witness at a time, to which defense counsel did not object. In explaining the procedure to the jury, the court stated, "once you've heard the first readback . . . it might answer your questions" and explained that the jury could return to deliberations while the court reporter prepared additional testimony for readback, to which defense counsel did not object. After the readback of the relevant portions of one witness's testimony, and presumably while the court reporter was preparing additional testimony for readback, the jury informed the court that it had reached a verdict. As defendant concedes, no mode of proceedings error occurred ... , and, thus, defendant's failure to lodge any complaint to any of the steps that the court took to respond to the request renders the issue unpreserved for our review ... . Moreover, defendant's current contention that the court should not have allowed

the jury to reach a verdict until the entire readback had been completed is unavailing. By informing the court that it had reached a verdict prior to the completion of the readback, the jury unambiguously indicated that it was no longer in need of previously requested information ...". ***People v. Robtoy*, 2016 N.Y. Slip Op. 07232, 3rd Dept 11-3-16**

WORKERS' COMPENSATION LAW.

VOCATIONAL FACTORS PROPERLY CONSIDERED IN SETTING COMPENSTATION FOR PERMANENTLY DISABLED LABORER.

The Third Department determined the Workers' Compensation Board properly took into account the claimant's "vocational factors," i.e., limited education, language barrier, work history, when setting the appropriate compensation. Claimant suffered a permanent partial disability and had been employed as a landscaper: "Here, ... claimant suffered a permanent partial disability, there is no expectation that he will ever return to his former or similar employment as a laborer, and the Board necessarily considered vocational factors when it established his loss of wage-earning capacity. Because the evidence established that claimant did not earn actual wages, the statute authorized the Board to "[fix] in the interest of justice . . . such wage[-]earning capacity as shall be reasonable . . . having due regard to the nature of his injury and his physical impairment" (Workers' Compensation Law § 15 [5-a]). ... [W]e find that the [statute's] broad discretionary language authorized the Board to consider vocational factors that reflected claimant's true ability to secure employment, particularly in the absence of evidence to negate claimant's testimony that his injury contributed to his loss of wage-earning capacity ... . Consequently, under the circumstances presented, we perceive no error in the Board's determination to fix claimant's wage-earning capacity based on the undisputed evidence of his physical disability and loss of wage-earning capacity resulting from his functional limitations and vocational impediments ...". ***Matter of Rosales v. Eugene J. Felice Landscaping*, 2016 N.Y. Slip Op. 07239, 2nd Dept 11-3-16**

WORKERS' COMPENSATION LAW.

NONWORKING CLAIMANT SUBJECT TO THE 75% CAP ON *WAGE-EARNING CAPACITY* IS NOT AUTOMATICALLY ENTITLED TO NO LESS THAN 25% *LOSS OF WAGE- EARNING CAPACITY* FOR PURPOSES OF DETERMINING THE DURATION OF BENEFITS; HERE A 15% LOSS OF WAGE-EARNING CAPACITY UPHELD.

The Third Department rejected the argument by the permanently disabled claimant that, because of a conflict between two applicable statutes, she could not be deemed to have sustained anything less than a 25% loss of wage-earning capacity. The Third Department determined the two statutory provisions were not in conflict and the evidence supported a 15% loss of wage-earning capacity: "As relevant here, in cases of permanent partial disability that are not amenable to schedule awards, 'wage-earning capacity' is used to determine a claimant's weekly rate of compensation. Specifically, in such cases, a claimant's rate of compensation is two thirds of the difference between his or her average weekly wage and his or her wage-earning capacity (see Workers' Compensation Law § 15 [3] [w]). Where a claimant is unemployed, wage-earning capacity is fixed by the Board — subject to a 75% cap (see Workers' Compensation Law § 15 [5-a]). In contrast, "loss of wage-earning capacity," a term that was added in 2007 as part of a comprehensive reform of the Workers' Compensation Law … , is used at the time of classification to set the maximum number of weeks over which a claimant with a permanent partial disability is entitled to receive benefits (see Workers' Compensation Law § 15 [3] [w]). For instance, where, as here, a claimant is found to have sustained a 15% loss of wage-earning capacity, he or she is entitled to receive benefits for 225 weeks (see Workers' Compensation Law § 15 [3] [w] [xii])". ***Matter of Till v. Apex Rehabilitation*, 2016 N.Y. Slip Op. 07247, 3rd Dept 11-3-16**

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