March 31, 2023

CasePrepPlus

An advance sheet service summarizing recent and significant New York appellate cases

Editor: **Bruce Freeman**

NEW YORK STATE BAR ASSOCIATION
Serving the legal profession and the community since 1876

COURT OF APPEALS

CRIMINAL LAW, APPEALS.

EVEN WHERE A SENTENCE HAS BEEN AGREED TO BY THE DEFENDANT AS PART OF A PLEA BARGAIN, AN INTERMEDIATE APPELLATE COURT IS OBLIGATED TO CONSIDER WHETHER THE SENTENCE IS UNDULY HARSH OR SEVERE, SEPARATE AND APART FROM WHETHER THE SENTENCE IS LEGAL.

The Court of Appeals, in two concurring opinions, determined the matter should be sent back to the Appellate Term for consideration of defendant's argument that his plea-bargained sentence (a $500 fine) was unduly harsh or severe. An appellate court's power to reduce an unduly harsh or severe sentence can be applied, even when the sentence was part of a plea bargain: "The Appellate Term concluded that there was 'no basis for reducing the fine' ... . Although the Court was not required to go further and set forth the basis for its conclusion (see CPL 470.25 [1] ...), here, it did so, reasoning that '[d]efendant received the precise sentence for which he had bargained, which was within the permissible statutory range' ... . In other words, the sentence was legal and bargained-for. Certainly, the Appellate Term cannot be faulted for considering and addressing the legality of the sentence because the intermediate appellate courts 'cannot allow an illegal sentence to stand' ... . However, the legality of the sentence was irrelevant to the entirely separate issue of whether it was unduly harsh or severe ... , and it was improper for the Appellate Term to treat the bargained-for nature of defendant's sentence as dispositive of his challenge to the severity of the sentence." ***People v. Ba***, 2023 N.Y. Slip Op. 01468, CtApp 3-21-23

CRIMINAL LAW, APPEALS.

THE THIRD DEPARTMENT HAS BEEN APPLYING THE WRONG STANDARD TO THE REDUCTION OF A SENTENCE IN THE INTEREST OF JUSTICE FOR DECADES; HOWEVER, BECAUSE THE THIRD DEPARTMENT HAS RECENTLY STOPPED APPLYING THE WRONG STANDARD, THIS APPEAL IS MOOT.

The Court of Appeals determined the sentencing issue raised by the defendant (Baldwin) was moot. Judge Wilson, in a concurring opinion, explained that the standard applied by the Third Department for reduction of a sentence in the interest of justice is incorrect: "The question presented on this appeal is whether, for the past several decades, the Third Department has imposed an erroneous legal standard on criminal defendants seeking a reduction of their sentences in the interest of justice. Mr. Baldwin points to countless Third Department cases, including his own, in which the Third Department employed a test requiring a showing of extraordinary circumstances or abuse of discretion for it to exercise its interest of justice jurisdiction to modify a sentence. Relying on the statutory language empowering the Appellate Division to reduce 'unduly harsh or severe' sentences in the interest of justice (CPL 470.15 [6] [b]), Mr. Baldwin contends that the Third Department's test constitutes an incorrect legal standard. Mr. Baldwin argues that the Third Department's requirement that a defendant show a clear abuse of discretion or extraordinary circumstances is contrary to both our case law and the practices of the other Appellate Division departments. In *People v Delgado*, we emphasized that the Appellate Division's 'broad, plenary power to modify a sentence may be exercised, if the interest of justice warrants, without deference to the sentencing court' (80 NY2d 780, 780 [1992]). Mr. Baldwin contends that the Third Department's standard is an outlier: it is used by no other department, and has been expressly rejected by the Fourth Department (*see eg People v Thomas*, 194 AD3d 1405, 1406 [4th Dept 2021] ['We are compelled to emphasize once again that, contrary to the People's assertion, a criminal defendant need not show extraordinary circumstances or an abuse of discretion by the sentencing court in order to obtain a sentence reduction under CPL 470.15 (6) (b)']). Here, however, as Mr. Baldwin himself points out, the issue is not likely to recur. The Third Department, to its great credit, apparently noticed the pendency of this appeal and the issue it raised, after which it corrected its longstanding use of the wrong standard, making repetition of the error unlikely ...". ***People v. Baldwin*, 2023 N.Y. Slip Op. 01467, CtApp 3-21-23**

PERSONAL INJURY, CONSTITUTIONAL LAW, APPEALS.

INTERSTATE SOVEREIGN IMMUNITY IS AN ISSUE WHICH MUST BE RAISED BEFORE THE TRIAL COURT TO BE PRESERVED FOR APPEAL TO THE COURT OF APPEALS; HERE A NEW JERSEY TRANSIT BUS COLLIDED WITH A CAR DRIVEN BY A NEW YORK RESIDENT IN THE LINCOLN TUNNEL AND THE TRIAL WAS HELD IN NEW YORK; ALTHOUGH THE INTERSTATE SOVEREIGN IMMUNITY DEFENSE WAS VALIDATED BY THE US SUPREME COURT IN 2019, THE ISSUE WAS NOT RAISED BEFORE THE TRIAL COURT.

The Court of Appeals, in a full-fledged opinion by Judge Singas, over a two-judge dissenting opinion, determined the sovereign immunity defense raised for the first time on appeal by New Jersey in this traffic accident case was not preserved for appeal to the Court of Appeals. The accident happened in the Lincoln Tunnel and involved the New York resident plaintiff and a bus owned by the defendant New Jersey Transit

Corporation. New Jersey argued that the US Supreme Court had changed the law in 2019, allowing a state to preclude suit in another state absent consent thereby presenting a constitutional issue not subject to the preservation requirement. The Court of Appeals rejected that argument: "The question before us is whether we have power to hear this appeal under NY Constitution article VI, § 3 and CPLR 5601 (b) (1). To answer this threshold issue, we must consider the jurisdictional nature of interstate sovereign immunity to ascertain whether defendants' sovereign immunity defense is exempt from our general preservation rules. We conclude that a state must preserve its interstate sovereign immunity defense by raising it before the trial court, and no exception to the general preservation rule applies. Because defendants asserted their sovereign immunity defense for the first time on appeal after the United States Supreme Court decided *Franchise Tax Bd. of Cal. v Hyatt* (587 US —, 139 S Ct 1485 [2019] [hereinafter *Hyatt III*]), the argument is unpreserved in this case and there is no directly involved constitutional question supporting this appeal as of right. The appeal should therefore be dismissed." ***Henry v. New Jersey Tr. Corp.*, 2023 N.Y. Slip Op. 01466, CtApp 3-21-23**

REAL PROPERTY TAX LAW, EVIDENCE.

IN A TAX FORECLOSURE PROCEEDING, EVIDENCE THE LETTERS PROVIDING NOTICE OF THE FORECLOSURE WERE NOT RETURNED TO THE TAXING AUTHORITY DOES NOT PRECLUDE RAISING A QUESTION OF FACT WITH PROOF NOTICE WAS NOT RECEIVED.

The Court of Appeals, reversing the Appellate Division, in a full-fledged opinion by Judge Cannataro, determined the controlling statute, Real Property Tax Law (RPTL) 1125(1)(b), does not preclude plaintiff in a tax foreclosure proceeding from presenting evidence the statutory notice requirements were not complied with. The statute states that notice of the foreclosure "shall be deemed received" if neither the certified letter nor the letter sent by first class mail are returned within 45 days. The taxing authority presented evidence the letters were not returned. Plaintiff presented evidence notice was sent to the wrong address and the certified letter lacked a postmark. The Court of Appeals held plaintiff had raised a question of fact about compliance with the statutory notice requirement, notwithstanding the evidence the letters were not returned: "By its unambiguous terms, RPTL 1125 (1) (b) (i) relates to whether notice will be 'deemed received,' not whether the taxing authority has complied with the statutory mailing requirements. Although the taxing authority must ensure that '[a]n affidavit of mailing of such notice [is] executed' ... , the statute expressly provides that "[t]he failure of an intended recipient to receive any such notice shall not invalidate any tax or prevent the enforcement of the same as provided by law" ... . It is only when both the certified mailing and the first class mailing are returned that the statute requires the taxing authority to take additional action beyond the requirements set forth in RPTL 1125 (1) (b) (i) ... . That is not the end of the analysis, however, in cases where the interested party argues, as plaintiff does here, that the taxing authority failed to comply with the mailing requirements set forth in RPTL 1125 (1) (b) (i). ... RPTL 1125 (1) (b) (i) contains no 'presumption of service' ... . Nor does section 1125 (1) (b) (i) bar an interested party from submitting evidence that would call the taxing authority's compliance with its requirements into issue or limit the proof an interested party may use to raise an issue of fact with respect to that compliance only to evidence that both the certified and first class mailings were returned. Courts 'may not create a limitation that the legislature did not enact' ...". ***James B. Nutter & Co. v. County of Saratoga*, 2023 N.Y. Slip Op. 01469, CtApp 3-21-23**

FIRST DEPARTMENT

CIVIL PROCEDURE.

PLAINTIFF DID NOT ALLEGE SUFFICIENT CONTACTS WITH NEW YORK TO SUPPORT LONG-ARM JURISDICTION OVER THE DEFENDANT IN ISRAEL; THE EVIDENCE DID NOT JUSTIFY JURISDICTIONAL DISCOVERY.

The First Department, reversing Supreme Court, determined plaintiff did not demonstrate a basis for long-arm jurisdiction over the defendant in Israel, and did not make a "sufficient start" to justify jurisdictional discovery: "Plaintiff, a Rhode Island corporation with its principal place of business in Nevada, commenced this action against defendant, a resident of Israel, alleging that defendant breached his fiduciary duty to plaintiff by failing to perform his marketing and management duties while serving as plaintiff's director. ... [D]efendant submitted evidence to show that he had no contacts with New York, had not been in New York since mid-2018, and that the specific transactions alleged in the complaint involved business contacts in Texas and Rhode Island, not New York. In opposition, plaintiff did not dispute defendant's showing, but submitted evidence that it leased an office and opened a bank account in New York with defendant's approval and assistance, and an affidavit of its chief executive officer who made vague and unsubstantiated assertions that defendant did business on plaintiff's behalf in New York at unspecified times with unnamed employees and customers, which was insufficient to establish long-arm jurisdiction ... . Because plaintiff failed to make a 'sufficient start, via tangible evidence,' of showing that defendant transacted any business in New York having any substantial relationship to the claim alleged in the complaint, jurisdictional discovery was not warranted, and the complaint should have been dismissed ...". ***Noris Med., Inc. v. Siev*, 2023 N.Y. Slip Op. 01482, First Dept 3-21-23**

CIVIL PROCEDURE, FREEDOM OF INFORMATION LAW (FOIL), CIVIL RIGHTS LAW.

PLAINTIFF SUED THE CITY AND POLICE UNDER 42 U.S.C. § 1983 ALLEGING THE CITY AND POLICE HAD AN UNCONSTITUTIONAL POLICY OR PRACTICE ALLOWING POLICE OFFICERS TO FILE FALSE CHARGES, TESTIFY FALSELY AND FALSIFY EVIDENCE WITHOUT CONSEQUENCES; PLAINTIFF WAS ENTITLED TO RECORDS OF SIMILAR COMPLAINTS OR INVESTIGATIONS PURSUANT TO THE CPLR DISCOVERY PROVISIONS AND WAS NOT RESTRICTED TO A FOIL REQUEST.

The First Department, reversing (modifying) Supreme Court, determined plaintiff's request for certain police records should not have been denied. Plaintiff sued the city under 42 U.S.C. § 1983 alleging an unconstitutional policy or practice by the police which allows officers to swear out false criminal charges, testify falsely at trial and falsify evidence without consequences. Plaintiff sought records of complaints and investigations of similar conduct by officers in a specific task force. Because plaintiff is suing the city, his requests could be brought both pursuant to the Freedom of Information Law (FOIL) and the CPLR discovery provisions. Supreme Court should not have restricted plaintiff's access to records to that available under the FOIL: "Supreme Court improvidently exercised its discretion with respect to plaintiff's requests seeking records of complaints and investigations of allegedly similar conduct by officers in the same task force, as those requests did not, in fact, constitute a fishing expedition ... . Plaintiff limited his requests to officers assigned only during the six months before his arrest ... , and his reference to lawsuits, investigations by the Internal Affairs Bureau, and complaints to the Civilian Complaint Review Board also sufficiently identified documents sought with 'reasonable particularity' (CPLR 3120[2] ...). Without allowing disclosure of allegations of misconduct by other officers, it is unlikely that plaintiff could demonstrate 'that the municipality had a custom or practice that was both widespread and reflected a deliberate indifference to its citizens' constitutional rights' ... ... Supreme Court should not have imposed a limitation precluding plaintiff from seeking records directly from defendants instead of under FOIL. 'When a public agency is one of the litigants, . . . it has the distinct disadvantage of having to offer its adversary two routes into its records' ... , and the availability of FOIL does not replace the concomitant right to disclosure under the CPLR." ***Badia v. City of New York*, 2023 N.Y. Slip Op. 01582, First Dept 3-23-23**

CRIMINAL LAW, IMMIGRATION LAW, EVIDENCE, ATTORNEYS, JUDGES.

DEFENDANT SUFFICIENTLY RAISED INEFFECTIVE ASSISTANCE AND PREJUDICE ISSUES IN HIS MOTION TO VACATE HIS CONVICTION BECAUSE HE WAS NOT INFORMED HE COULD BE DEPORTED BASED ON THE GUILTY PLEA; THE JUDGE SHOULD NOT HAVE DENIED THE MOTION WITHOUT A HEARING.

The First Department, reversing Supreme Court and recalling an vacating a prior appellate decision, determined defendant sufficiently raised ineffective assistance of counsel and prejudice in his motion to vacate his conviction on the ground he was not informed of the possibility of deportation before entering a guilty plea. The motion should not have been denied without a hearing: "Defendant moved to vacate the judgment of conviction based on *Padilla v Kentucky* (559 US 356 [2010]), which held that criminal defense attorneys must advise noncitizen clients about the deportation risks of a guilty plea. In light of the affidavits from defendant, defendant's plea counsel (indicating no recollection or notation that he discussed immigration consequences with defendant), and his sister, as well as motion counsel's representation that plea counsel admitted in an interview that he was not well-versed in immigration law, defendant presented sufficient evidence that counsel's performance fell below an objective standard of reasonableness, such that a hearing was warranted if a sufficient showing was similarly raised as to prejudice. Regarding whether defendant was prejudiced by counsel's alleged deficient performance, we also find that defendant's submissions are sufficient to warrant a hearing. Given the length of time defendant has resided in the United States, his ties to the United States, his lack of ties to the Dominican Republic, and his employment history, defendant demonstrated a reasonable possibility that, but for counsel's errors, he would not have pleaded guilty and instead proceeded to trial ...". ***People v. Guzman-Caba*, 2023 N.Y. Slip Op. 01593, First Dept 3-23-23**

EMPLOYMENT LAW, LABOR LAW, CIVIL PROCEDURE, EVIDENCE.

THE COMPLAINT STATED A CAUSE OF ACTION FOR UNPAID OVERTIME WITHOUT SPECIFYING PARTICULAR DATES OR WEEKS; AFFIDAVITS ARE NOT DOCUMENTARY EVIDENCE WHICH WILL SUPPORT A "DOCUMENTARY EVIDENCE" MOTION TO DISMISS.

The First Department, reversing Supreme Court, determined the complaint stated a cause of action for unpaid overtime wages pursuant to the Labor Law and the proof submitted by defendant did not support a motion to dismiss based on documentary evidence: "Plaintiffs' complaint sufficiently states a claim for unpaid overtime wages in violation of Labor Law §§ 191 and 663 and 12 NYCRR 142-2.2 ... . Plaintiffs allege that they were not compensated for hours spent before and after their shift, loading company vehicles and receiving job assignments, before traveling to construction sites throughout the New York City region ... . Although the complaint does not contain the particular dates or weeks that plaintiffs were allegedly underpaid, it provides sufficient notice of their causes of action for unpaid wages and overtime based on pre-shift and post-shift work performed at defendant's yard ... . In addition, defendant's documentary evidence is insufficient to support a motion to dismiss under CPLR 3211(a)(1). Dismissal on the basis of documentary evidence is appropriate only if that evidence 'utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law' ... . Affidavits are not documentary evidence that can support a 3211(a)(1) motion ... . The documentary evidence fails to utterly refute plaintiffs' claim that they were not timely paid overtime compensation. Despite defendant's assertions, it is unclear whether the daily reports submitted with its motion properly reflect the alleged work performed before plaintiffs' shifts began or after their shifts had purportedly ended." ***Rosario v. Hallen Constr. Co., Inc.*, 2023 N.Y. Slip Op. 01490, First Dept 3-21-23**

FAMILY LAW, CRIMINAL LAW, CIVIL PROCEDURE.

THE JUVENILE DELINQUENCY PETITIONS WERE TIMELY FILED; THE CORRECT APPLICATION OF THE COVID TOLL OF THE STATUTE OF LIMITATIONS EXPLAINED.

The First Department, reversing Family Court, determined the juvenile delinquency petitions were timely fifed because of the COVID toll imposed by the Executive Orders: "By Executive Order No. 8.202.8, issued on March 20, 2020 due to the Covid-19 pandemic, the 'time limit[s] for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state' were 'tolled' ... . 'A toll suspends the running of the applicable period of limitation for a finite time period, and the period of the toll is excluded from the calculation of the relevant time period' ... . However, a suspension 'simply delays expiration of the time period until the end date of the suspension' ... . By its plain terms, Executive Order 8.202.8 tolled the statute of limitations ... , until that order and subsequent Executive Orders extending the tolling period were rescinded by Executive Order 8.210, issued on June 24, 2021 and effective the next day ... . Since the period of the toll must be excluded from the calculation of the filing deadline ... , the juvenile delinquency petitions were timely filed on July 2,2021. Respondent allegedly committed his first unlawful act on December 21, 2019. Normally, the filing deadline for the petitions would have been respondent's 18th birthday — June 7, 2021, which was 534 days after he allegedly committed the first act. When the first executive order took effect on March 20, 2020, there were 444 days remaining before respondent's 18th birthday. By adding 444 days to June 24, 2021, when the executive order's tolling provisions were terminated, the Agency's deadline for filing the petitions was August 25, 2022. Here, the Agency refiled and served the second set of petitions on July 2, 2021, only eight days after the executive orders were rescinded. The order rescinding the prior Executive Orders meant that the statute of limitations would start running again, 'picking up where it left off' ... . We also note that Family Court's narrow interpretation of the Executive Order would deprive respondent of the benefits of Family Court intervention ...". ***Matter of Isaiah H.*, 2023 N.Y. Slip Op. 01587, First Dept 3-23-23**

INSURANCE LAW, EVIDENCE, CIVIL PROCEDURE.

IN THIS NO-FAULT INSURANCE CASE, THE INSURER REQUESTED AN EXAMINATION UNDER OATH (EUO) WITHOUT AFFORDING THE MEDICAL PROVIDER SPECIFIC, OBJECTIVE JUSTIFICATION FOR THE REQUEST; SUMMARY JUDGMENT SHOULD NOT HAVE BEEN AWARDED TO THE INSURER.

The First Department, reversing Supreme Court in this no-fault insurance case, determined the insurer did not provide the medical provider with objective justification for its request for an examination under oath (EUO). Summary judgment should not have been awarded to the insurer: "Although plaintiff timely requested an EUO and subsequently issued a timely denial ... , the motion court erred in granting summary judgment. 11 NYCRR 65-3.5 (e) requires an EUO request be based on application of objective standards, and that the insurer must have a specific objective justification. Summary judgment is premature under CPLR 3212 where an insurer fails to provide a medical provider with its objective justification for requesting the EUO ... . This Court has explained that the insurer's reason for the EUO is essential for medical providers to oppose an insurer's summary judgment motion, and that information is in the exclusive knowledge and control of the insurer ...". ***Country-Wide Ins. Co. v. Alicea***, 2023 N.Y. Slip Op. 01474, First Dept 3-21-23

LANDLORD-TENANT, CONTRACT LAW, INSURANCE LAW, NEGLIGENCE.

IN THIS SIDEWALK SLIP-AND-FALL CASE, THE MASTER LEASE VIOLATED GENERAL OBLIGATIONS LAW § 5-321 WHICH PROHIBITS A LEASE AGREEMENT FROM PROVIDING THAT THE LANDLORD BE INDEMNIFIED FOR LIABILITY FOR THE LANDLORD'S NEGLIGENCE.

The First Department, in this sidewalk slip-and-fall case, in a decision too complex to fairly summarize here, determined a provision of the master lease violated General Obligations Law § 5-321: "General Obligations Law § 5-321 states that '[e]very covenant, agreement or understanding in or in connection with or collateral to any lease of real property exempting the lessor from liability for damages for injuries to person or property caused by or resulting from the negligence of the lessor, his agents, servants or employees, in the operation or maintenance of the demised premises or the real property containing the demised premises shall be deemed to be void as against public policy and wholly unenforceable.' The Court of Appeals, in *Hogeland v Sibley, Lindsay & Curr Co.* (42 NY2d 153 [1977]) and *Great N. Ins. Co. v Interior Constr. Corp.* (7 NY3d 412 [2006]), established an exception to General Obligations Law § 5-321. Parties to a lease agreement may execute a provision requiring the tenant to indemnify the landlord from the landlord's own negligence. However, the lease must also contain an insurance provision 'allocating the risk of liability to third parties' because '[c]ourts do not, as a general matter, look unfavorably on agreements which, by requiring parties to carry insurance, afford protection to the public' ... . Accordingly, the Court of Appeals reasoned that when an indemnity clause is coupled with an insurance procurement provision, a tenant is obligated to indemnify the landlord for its share of liability, and such agreement does not exempt the landlord from liability to the plaintiff, but allocates the risk to a third party through insurance ... . Insurance procured by the tenant in satisfaction of the indemnity clause provides the injured plaintiff with adequate recourse for the damages suffered ... . Article 13 of the master lease requires Regent [the landlord] to be indemnified for all claims 'provided however that the same shall not arise from the willful acts of Landlord during the term of this Lease.' On its face, we find that this provision violates General Obligations Law § 5-321." ***Bessios v. Regent Assoc., Inc.*, 2023 N.Y. Slip Op. 01583, First Dept 3-23-23**

SECURITIES, CONTRACT LAW.

A MUTUAL MISTAKE IN AN AGREEMENT CONCERNING THE PRICE OF SHARES OF STOCK WARRANTED REFORMATION OF THE CONTRACT.

The First Department, in a full-fledged opinion by Justice Pitt-Burke, determined a mutual mistake in an agreement justified reformation of the contract. The opinion is too detailed to fully summarize here: "[W]e find that Supreme Court correctly held that the parties intended to include an antidilution provision that provided for the adjustment of both the share price and the number of shares when common stock was issued at a price below plaintiffs' exercise price, and that, as result of mutual mistake, inadvertently left the word 'sentence' and did not change it to the plural, 'sentences' in section 3(b) ... .Accordingly, upon exercise of their warrants, plaintiffs were entitled to the value of the adjusted number of shares that were owed but not delivered (565,822 shares)." ***Empery Asset Master, Ltd. v. AIT Therapeutics, Inc.*, 2023 N.Y. Slip Op. 01585, First Dept 3-23-23**

TRUSTS AND ESTATES.

THE COMPLAINT STATED CAUSES OF ACTION FOR UNDUE INFLUENCE, CONVERSION AND UNJUST ENRICHMENT.

The First Department, reversing Supreme Court, determined plaintiff stated causes of action for conversion, unjust enrichment and undue influence exercised by the defendant with regard to changing the beneficiary on $6 million account: "[T]he circumstances requiring scrutiny include the alleged facts that plaintiff was decedent's closest living relative, that they had a continuing close relationship, and that he had been the designated beneficiary for 10 years, while defendant was a neighbor and relatively recent friend ... . Moreover, plaintiff sufficiently alleges defendant's financial motive (the $6 million-plus value of the account), opportunity (that his aunt and defendant were neighbors, and his aunt's advanced age, fragile physical health, and inability to print the change of beneficiary form independently), and actual exercise of undue influence (the execution and mailing of the change of beneficiary form and the suspicious circumstances surrounding the writing of a $15,000 check to defendant weeks later) ... . Furthermore, accepting the pleadings as true, the allegations that plaintiff's aunt attempted to stop payment on the $15,000 check and that she complained to others that defendant had tricked her into writing the check, and changed her will to remove defendant as her executor, but did not change or revoke the beneficiary form, together support an inference that the aunt either was not aware of the form or was not aware of its effect." ***Salitsky v. D'Attanasio*, 2023 N.Y. Slip Op. 01597, First Dept 3-23-23**

SECOND DEPARTMENT

CRIMINAL LAW.

BECAUSE THE OFFENSE TO WHICH DEFENDANT PLED GUILTY (ATTEMPTED CRIMINAL POSSESSION OF A WEAPON THIRD) WAS NOT A LESSER INCLUDED OFFENSE OF ANY OFFENSE CHARGED IN THE INDICTMENT, IT IS NOT CLASSIFIED AS A VIOLENT FELONY; DEFENDANT SHOULD NOT HAVE BEEN SENTENCED AS A SECOND VIOLENT FELONY OFFENDER.

The Second Department determined defendant should not have been sentenced as a second violent felony offender. Defendant pled guilty to attempted criminal possession of a weapon third, which was not a lesser included offense of any of the offenses charged in the indictment. Therefore the attempted criminal possession of a weapon third cannot be classified as a violent felony: "Penal Law § 70.02 defines a class E violent felony offense, in pertinent part, as 'an attempt to commit any of the felonies of criminal possession of a weapon in the third degree as defined in subdivision five, six, seven or eight of section 265.02 as a lesser included offense of that section as defined in section 220.20 of the criminal procedure law' ... in turn defines a 'lesser included offense' as one where the defendant pleads 'to an offense of lesser grade than one charged in a count of an indictment' ... . Thus, a plea of guilty to attempted criminal possession of a weapon in the third degree 'constitutes a violent felony offense only when the defendant has been initially charged with criminal possession of a weapon in the third degree and pleads guilty to the attempted crime as a lesser included offense' ... . Here, the defendant pleaded guilty to attempted criminal possession of a weapon in the third degree as an added count to the indictment, which did not charge him with the completed crime of criminal possession of a weapon in the third degree. Under the circumstances, the Supreme Court should not have sentenced the defendant as a violent felony offender ...". ***People v. Nyack*, 2023 N.Y. Slip Op. 01532, Second Dept 3-22-23**

CRIMINAL LAW.

VEHICLE AND TRAFFIC LAW § 1192(2) (DWI) IS A LESSER INCLUDED OFFENSE OF VEHICLE AND TRAFFIC LAW § 1192(2-a) (AGGRAVATED DWI).

The Second Department noted that driving while intoxicated in violation of Vehicle and Traffic Law § 1192(2) is a lesser included offense of aggravated driving while intoxicated in violation of Vehicle and Traffic Law § 1192(2-a): "[D]riving while intoxicated in violation of Vehicle and Traffic Law § 1192(2) is a lesser included offense of aggravated driving while intoxicated in violation of Vehicle and Traffic Law § 1192(2-a) (see CPL 300.30[4] ...). A verdict of guilt upon the greater count is deemed a dismissal of every lesser count (see CPL 300.40[3]). Accordingly, we vacate the conviction of driving while intoxicated in violation of Vehicle and Traffic Law § 1192(2) and the sentence imposed thereon, and dismiss that count of the indictment ...". ***People v. Watson*, 2023 N.Y. Slip Op. 01538, Second Dept 3-22-23**

CRIMINAL LAW.

THE MISDEMEANOR INFORMATION WAS BASED ON THE POLICE OFFICER'S UNEXPLAINED CONCLUSION THE DOCUMENT WAS FORGED AND DID NOT ALLEGE FACTS TO SUPPORT ALL THE ELEMENTS OF THE OFFENSE; CONVICTION REVERSED AND INFORMATION DISMISSED.

The Second Department, reversing the conviction and dismissing the misdemeanor information, determined the factual allegations in the information were not sufficient to provide notice of the charged offense. The information relied on the police officer's conclusory statement that the document was forged: "Where ... an allegation 'involves a conclusion drawn by a police officer that involves the exercise of professional skill or experience, some explanation concerning the basis for that conclusion must be evident from the accusatory instrument' ... ... [T]he information failed to include sufficient factual allegations regarding the basis for the officer's conclusion that the 'Texas buy tag' was forged. Mere reliance on 'his training in the detection and identification of forged instruments' is insufficient. Although the officer made reference to the use of 'Z-finest,' he did not explain what 'Z-finest' is or how it helped him determine that the tag was forged. Further, he did not explain or describe the Texas 'buy tag.' These allegations are too conclusory to meet the prima facie case requirement on the issue of whether the buy tag was a forgery ... . [E]ven assuming that the information sufficiently alleged that the buy tag was a forgery, the information failed to provide sufficient factual allegations to 'establish a presumption that [the] defendant had knowledge of the forged nature of the instrument' ...". ***People v. Rodriguez*, 2023 N.Y. Slip Op. 01535, Second Dept 3-22-23**

CRIMINAL LAW, EVIDENCE.

DNA EVIDENCE RECOVERED AFTER THE DEFENDANT WAS CONVICTED OF MURDER POINTED TO THE VICTIM'S BOYFRIEND AS THE PERPETRATOR; BECAUSE THE EVIDENCE AGAINST THE DEFENDANT WAS A SINGLE IDENTIFICATION WITNESS WHO WAS 88 YEARS OLD AND HAD POOR VISION, THE DNA EVIDENCE MAY HAVE LED TO A MORE FAVORABLE VERDICT; NEW TRIAL ORDERED.

The Second Department, vacating defendant's murder conviction and ordering a new trial, determined the DNA evidence (from under the victim's fingernails) procured after the trial may have resulted in a verdict more favorable to the defendant. Defendant was identified as the perpetrator by an 88-year-old witness who had poor vision. The DNA recovered from the victim was that of the victim's boyfriend. There was no other evidence tying defendant to the scene: "[T]he defense theory at trial was one of mistaken identity. The defendant posited that the perpetrator was actually Samuels's [the victim's] boyfriend, Jermaine Robinson. No physical evidence linked the defendant to the crime. The only identity evidence offered by the People at trial was the testimony of a single eyewitness, Marchon, who was 88 years old at the time of the incident and suffered from significantly impaired vision. Marchon's description to the police of the perpetrator's appearance was not conclusive and was, in part, more consistent with Jermaine Robinson's appearance. Under the facts of the case, it would not have been unreasonable to conclude that Marchon confused Samuels's estranged husband with her current boyfriend in making her identification to the police. Marchon also was not able to conclusively identify the defendant at trial. Moreover, various members of the defendant's family provided alibi evidence for his whereabouts on the day of the attack. Finally, two Allen charges ... were required before the jury was able to reach a verdict. Under all of these circumstances, while not a 'virtual certainty,' there existed a reasonable probability that the verdict would have been more favorable to the defendant had the DNA evidence been admitted at trial ...". ***People v. Robinson*, 2023 N.Y. Slip Op. 01533, Second Dept 3-22-23**

CRIMINAL LAW, IMMIGRATION LAW, APPEALS.

ALTHOUGH THE DEFENDANT WAS AWARE THE GUILTY PLEA MAY HAVE A NEGATIVE IMPACT ON HIS IMMIGRATION STATUS HE WAS NOT SPECIFICALLY INFORMED DEPORTATION WAS POSSIBLE; MATTER SENT BACK TO GIVE THE DEFENDANT THE OPPORTUNITY TO MOVE TO VACATE THE PLEA.

The Second Department determined defendant was not informed of the possibility of deportation before entering the guilty plea, although defendant was aware the plea may have a negative impact on his immigration status. The issue need not be preserved for appeal. The matter was sent back to afford defendant the opportunity to move to vacate the plea: "At the plea proceeding, the court questioned the defendant as to whether he had discussed with defense counsel 'the possible negative impact on [his] immigration status as a result of [his] pleas of guilt.' The defendant replied: 'Yes. I did explain to him that I was concerned about that.' The court then inquired whether the defendant had 'an opportunity to discuss these pleas and their impact on [his] immigration status with an immigration attorney.' In response, the defendant indicated that he had discussed the matter with an immigration attorney, who had informed him of the 'possibility' that he would lose 'TPS [Temporary Protected Status].' The court did not advise the defendant of the possibility of deportation as a consequence of the guilty plea." ***People v. Hernandez*, 2023 N.Y. Slip Op. 01530, Second Dept 3-22-23**

DEBTOR-CREDITOR.

RECOVERY OF A $280,000 SETTLEMENT PURPORTEDLY PAID TO DEFENDANTS BY PLAINTIFF IS BARRED BY THE STRUCTURED SETTLEMENT PROTECTION ACT WHICH REQUIRES COURT APPROVAL PRIOR TO PAYMENT.

The Second Department, reversing Supreme Court, determined the complaint seeking to recover settlement funds ($280,000) purportedly made to the defendants should have been dismissed. The settlement was never approved by a court in violation of the Structured Settlement Protection Act (SSPA) (General Obligations Law 5-1701): "[D]efendants demonstrated that the complaint fails to state a cause of action, on the ground that the plaintiff's claims are prohibited by the SSPA. Enacted in 2002, the purpose of the SSPA ... was to establish 'procedural safeguards for those who sell settlements that are awarded as a result of litigation,' due to a recognition that '[m]any of the people who receive

such settlements are being compensated for very serious, debilitating injuries, and have been unfairly taken advantage of in the past by the businesses that purchase their settlements' ... . 'Under this law, transfers such as the one at issue are prohibited unless approved by a court of competent jurisdiction based upon express findings ... that the transfer is in the best interest of the payee and that the discount rate, fees and expenses used to determine the net amount advanced are fair and reasonable' (... General Obligations Law § 5-1706). In circumstances ... where payment for a structured settlement transfer is made to the payee prior to the court's approval of the transfer, whether intentionally or due to a mistaken belief that the transfer had already been approved, a proposed transferee must seek nunc pro tunc approval of the transfer, and such approval is not guaranteed ...". ***Pinnacle Capital, LLC v. O'Bleanis*, 2023 N.Y. Slip Op. 01540, Second Dept 3-22-23**

FAMILY LAW, CONSTITUTIONAL LAW.

FAMILY COURT PROPERLY PROHIBITED FATHER FROM POSTING BLOGS DISPARAGING THE CHILD'S RELATIVES ON SOCIAL MEDIA, BUT THE RESTRICTIONS WERE TOO BROAD IN THAT THEY WENT BEYOND THE NEEDS OF THE CASE.

The Second Department determined Family Court had properly prohibited father from posting blogs disparaging the child's relatives on social media, but that the restrictions on future speech should have been more narrowly tailored to the needs of the case: " 'A prior restraint on speech is a law, regulation or judicial order that suppresses speech on the basis of the speech's content and in advance of its actual expression' ... . A party seeking to impose such a restraint bears a 'heavy burden of demonstrating justification for its imposition' ... . Such party must demonstrate that the speech sought to be restrained is 'likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest' ... . An order imposing a prior restraint on speech 'must be tailored as precisely as possible to the exact needs of the case' ... . Here, that portion of the order which directed the father to erase, deactivate, and delete 'any existing blogs and likenesses' was 'not tailored as precisely as possible to the exact needs of the case' … . Specifically, this restriction required the father to delete 'any existing blogs and likenesses,' regardless of whether the blogs or likenesses relate to the child, the mother, the mother's family, or the instant proceedings...". ***Matter of Walsh v. Russell*, 2023 N.Y. Slip Op. 01522, Second Dept 3-22-23**

FAMILY LAW, CRIMINAL LAW.

FORMER SISTERS-IN-LAW WHO LIVED ONE MILE APART AND SAW EACH OTHER FREQUENTLY FOR 30 YEARS HAD AN "INTIMATE RELATIONSHIP" WHICH SUPPORTED THE FAMILY OFFENSE PROCEEDING.

The Second Department, reversing Family Court, determined the long-term relationship (as sisters-in-law) qualified as an "intimate relationship" which supports a family offense proceeding: "For purposes of Family Court Act article 8, 'members of the same family or household' is defined to include 'persons related by consanguinity or affinity,' and 'persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time' ... ... [T]he petitioner demonstrated that the parties had been in an 'intimate relationship' within the meaning of Family Court Act § 812(1)(e), so as to confer subject matter jurisdiction upon the court. Beyond expressly excluding from the definition of 'intimate relationship' a 'casual acquaintance' and 'ordinary fraternization between two individuals in business or social contexts' ... , 'the Legislature left it to the courts to determine, on a case-by-case basis, what qualifies as an 'intimate relationship' within the meaning of Family Court Act § 812(1)(e)' ... . Factors to consider include 'the nature or type of relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between the persons; and the duration of the relationship' ... . [T]he petitioner demonstrated that the parties had known each other for more than 30 years, that they had a close relationship as sisters-in-law for most of this period, during which they lived within one mile of one another, frequently had dinner together, engaged in social activities in each other's homes, attended most holiday celebrations together, supported each other during times of devastating family illnesses, and assisted each other with their respective children ...". ***Matter of Eno v. Illovsky*, 2023 N.Y. Slip Op. 01506, Second Dept 3-22-23**

PERSONAL INJURY, COURT OF CLAIMS, CIVIL PROCEDURE, EMPLOYMENT LAW.

THE NOTICE OF CLAIM IN THIS CHILD VICTIMS ACT SUIT AGAINST THE STATE SUFFICIENTLY ALLEGED WHEN THE ABUSE OCCURRED.

The Second Department, reversing (modifying) the Court of Claims in this Child Victims Act (CVA) suit, determined the notice of claim sufficiently alleged the time when the alleged sexual abuse of claimant took place in a state psychiatric center. The court noted that the respondeat superior cause of action should be dismissed because any sexual abuse by a state employee would not be within the scope of employment as a matter of law: "[T]he Court of Claims incorrectly determined that the claimant was required to allege the exact date on which the sexual abuse occurred ... . The claimant's allegations, including that the abuse occurred in 1993 while she was 14 years old and attending a gym class at Sagamore, were sufficient to satisfy the 'time when' requirement of Court of Claims Act § 11(b) in this claim brought pursuant to the CVA ...". ***Wagner v. State of New York*, 2023 N.Y. Slip Op. 01546, Second Dept 3-22-23**

THIRD DEPARTMENT

HUMAN RIGHTS LAW, EMPLOYMENT LAW, CIVIL PROCEDURE.

PLAINTIFF, AGE 61, WAS HIRED FOR AS A CORRECTIONS OFFICER BUT RESIGNED AFTER TWO DAYS AT THE TRAINING ACADEMY; PLAINTIFF STATED A CAUSE OF ACTION FOR AGE DISCRIMINATION AND A HOSTILE WORK ENVIRONMENT; PLAINTIFF WAS NICKNAMED "GRANDMA" AND SUBJECTED TO RIDICULE.

The Third Department, reversing Supreme Court, determined plaintiff stated a cause of action for age discrimination/hostile work environment. Plaintiff, aged 61, was hired as a corrections officer. She only lasted a couple of days at the training academy. She allegedly was immediately nicknamed "Grandma" and was subjected to ridicule: "Even though plaintiff admitted that she was prepared for the intensive, para-military nature of an academy, she testified that she was not prepared for the humiliation based on the discriminatory conduct that was 'singling [her] out by [her] age.' Despite that many of defendant's witnesses — including the drill sergeant — did not have a recollection of the alleged discriminatory conduct, the Equal Employment Opportunity Commission still had determined that there was reasonable cause to believe that defendant discriminated against plaintiff; such finding, although not dispositive, is some evidence of discrimination ... . Given that the conduct spread beyond staff and plaintiff's trainee class, but also to members of a previous class, further demonstrates the pervasive nature of the alleged discriminatory conduct — particularly in such a short period before plaintiff's resignation. Accordingly, based on the foregoing, particularly plaintiff's account of the drill sergeant's conduct and the candid admissions by the administrative sergeant as to the objective nature of the comments being discriminatory ... , we are satisfied that this proof, when viewed in a light most favorable to plaintiff, is sufficient to survive summary judgment and warrant a trial on plaintiff's hostile work environment claim ...". ***White-Barnes v. New York State Dept. of Corr. & Community Supervision*, 2023 N.Y. Slip Op. 01561, Third Dept 3-23-23**

FOURTH DEPARTMENT

CIVIL PROCEDURE, MUNICIPAL LAW.

THE CHALLENGE TO THE CITY PLANNING BOARD'S APPROVAL OF A SITE PLAN WAS SUBJECT TO THE 30-DAY STATUTE OF LIMITATIONS IN THE GENERAL CITY LAW, NOT THE FOUR-MONTH STATUTE OF LIMITATIONS IN CPLR 217.

The Fourth Department, reversing Supreme Court, determined the 30-day statute of limitations in the General City Law, not the four-month statute of limitation in CPLR 217(1), controlled in this challenge of a planning board ruling: "Petitioners' challenge to the Planning Board's conditional site plan approval is untimely because the proceeding was not commenced within the requisite 30 days (see General City Law § 27-a [11] ...). We reject petitioners' contention that their challenge to the Planning Board's waterfront consistency review finding is subject to the longer four-month statute of limitations set forth in CPLR 217 (1). '[I]n order to determine what event triggered the running of the Statute of Limitations, [courts] must first ascertain what administrative decision petitioner is actually seeking to review and then find the point when that decision became final and binding and thus had an impact upon petitioner' ... . Here, 'the [waterfront consistency review finding] challenged by petitioners was made during the course of consideration by respondent Planning Board . . . of an application for site plan approval, a process which culminated in the Planning Board's formal approval of the site plan' on January 10 ... . The 30-day statute of limitations for challenges to determinations of the Planning Board thus controls ... , and this proceeding is time-barred." ***Matter of Metzger v. City of Buffalo***, 2023 N.Y. Slip Op. 01604, Fourth Dept 3-24-23

CONTRACT LAW, CIVIL PROCEDURE, EVIDENCE.

THE COMPLAINT STATED A CAUSE OF ACTION FOR BREACH OF IMPLIED CONTRACT AND DEFENDANT'S MOTION TO DISMISS BASED ON DOCUMENTARY EVIDENCE SHOULD NOT HAVE BEEN GRANTED.

The Fourth Department, reversing Supreme Court, determined the complaint stated a cause of action for breach of implied contract and the defendant's motion to dismiss the breach of implied cause of action based on documentary evidence should not have been granted: " 'Whether an implied-in-fact contract was formed and, if so, the extent of its terms, involves factual issues regarding the intent of the parties and the surrounding circumstances' ... . Contrary to the court's determination, whether plaintiff 'can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss' ... and, here, plaintiff's allegations sufficiently state a cause of action for breach of an implied contract arising from an implicit agreement to extend the brokerage contract ... . Similarly, the complaint sufficiently alleges the elements of a claim for unjust enrichment ... . 'A motion to dismiss pursuant to CPLR 3211 (a) (1) will be granted if the documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the [plaintiff's] claim[s]' ... . Although contracts are among the types of documentary evidence that may be considered for purposes of CPLR 3211 (a) (1) ... , we conclude that the contract submitted by defendants in support of their motion failed to 'utterly refute . . . plaintiff's allegations [that the contract was implicitly extended] or conclusively establish a defense as a matter of law' ...". ***University Hill Realty, Ltd v. Akl*, 2023 N.Y. Slip Op. 01634, Fourth Dept 3-24-23**

CRIMINAL LAW, EVIDENCE, ATTORNEYS.

THE PROSECUTOR DID NOT INSTRUCT THE GRAND JURY ON ALL OF THE ELEMENTS OF PROMOTING A SEXUAL PERFORMANCE OF A CHILD AND IMPROPERLY CROSS-EXAMINED THE DEFENDANT IN THE GRAND JURY PROCEEDINGS; ALTHOUGH DEFENDANT WAS PROPERLY CONVICTED, THE INDICTMENT WAS DISMISSED WITHOUT PREJUDICE.

The Fourth Department, reversing the conviction after trial and dismissing the indictment (without prejudice), determined the prosecutor did not properly instruct the grand jury on the law and improperly cross-examined the defendant in the grand jury proceedings: "[T]he prosecutor failed to instruct the grand jury, pursuant to the holding in *People v Kent* (19 NY3d 290 [2012]), that some 'affirmative act' is required to prove the crime, and that 'viewing computer images of a sexual performance by a child on a computer does not by itself constitute promotion of such images' (CJI2d[NY] Penal Law § 263.15). Although it is well established that a grand jury 'need not be instructed with the same degree of precision that is required when a petit jury is instructed on the law' ... , we conclude under the circumstances of this case that the deficiencies in the prosecutor's charge impaired the integrity of the grand jury proceeding and gave rise to the possibility of prejudice. We further conclude that the potential for prejudice was increased by the prosecutor's cross-examination of defendant during the grand jury presentation in a manner that was 'calculated to unfairly create a distinct implication that [defendant] was lying' ...". ***People v. Congdon*, 2023 N.Y. Slip Op. 01622, Fourth Dept 3-24-23**

Practice Point: The grand jury should have been instructed that some affirmative act in addition to simply viewing child pornography of a computer is required for the offense of promoting the sexual performance of a child.

Practice Point: The prosecutor increased the prejudice resulting from the improper instruction on the law by improperly cross-examining the defendant in the grand jury proceeding to imply that the defendant was lying.

Practice Point: Even though the defendant was properly convicted at trial, the flaws in the grand jury proceeding required dismissal of the indictment.

CRIMINAL LAW, EVIDENCE, JUDGES.

THE JUDGE SHOULD NOT HAVE DETERMINED THE TRIAL WITNESS'S IDENTIFICATION OF DEFENDANT WAS CONFIRMATORY FOR THE FIRST TIME AT TRIAL; A MIDTRIAL *RODRIGUEZ* HEARING SHOULD HAVE BEEN HELD; MATTER REMITTED.

The Fourth Department, remitting the matter for a hearing to determine whether a witness's identification of defendant was confirmatory, noted that the judge should not have found the identification confirmatory for the first time based on the witness's trial testimony. A *Rodriguez* hearing should have been when the issue came up at trial: "The witness in question disclosed on cross-examination at trial that he had identified defendant as the assailant in a photograph shown to him by the police. The People's CPL 710.30 notice did not reference this identification. Defense counsel thus asked the court to strike the witness's testimony on the ground of lack of notice, but the court, relying on the witness's trial testimony, ruled that the People were not required to give notice because the identification was confirmatory. That was error. As the Court of Appeals has made clear, 'prior familiarity should not be resolved at trial in the first instance' (Rodriguez, 79 NY2d at 452 ...), and, in any event, the witness's trial testimony was not sufficient to establish as a matter of law that the identification was confirmatory. Although the witness testified that he knew defendant because he had seen him 'a couple of times' at the barber shop, and that the two had each other's phone numbers, he also testified that he did not know defendant well, that he knew him only by a common nickname, and that they never spoke again after the assault. A midtrial *Rodriguez* hearing would have allowed defense counsel to flesh out the extent of the relationship between the two men, thereby allowing the court to make a more informed determination as to whether the pretrial identification of defendant was confirmatory as a matter of law." ***People v. Alcaraz-Ubiles*, 2023 N.Y. Slip Op. 01637, Fourth Dept 3-24-23**

CRIMINAL LAW, JUDGES.

ALTHOUGH THE PEOPLE'S *SANDOVAL* APPLICATION WAS DISCUSSED IN CHAMBERS AND THE DEFENDANT WAS NOT PRESENT, THE MAJORITY CONCLUDED THAT THE JUDGE'S SUBSEQUENTLY ASKING, IN OPEN COURT AND IN THE DEFENDANT'S PRESENCE, WHETHER THE DEFENSE WANTED TO BE HEARD ON THE APPLICATION WAS SUFFICIENT; THE DISSENT DISAGREED.

The Fourth Department, over a dissent, determined that. although a discussion of the People's *Sandoval* application was held in chambers when the defendant was not present, there was subsequent open-court proceeding in the defendant's presence in which the judge offered the defense the opportunity to be heard on the application. The dissent argued the decision on the People's application was made in chambers and the defendant was not given a meaningly opportunity to participate in a *Sandoval* hearing: "Defendant contends that he was denied his right to be present at a material stage of the trial when Supreme Court conducted an in-chambers and off-the-record conference in his absence at which there was discussion regarding the People's previously submitted, written *Sandoval* application ... . We reject that contention. Although defendant was not present at the in-chambers conference, the court held a subsequent proceeding in open court in defendant's presence, at which the court offered defendant an opportunity to be heard on the People's application. Defense counsel declined. The court then made, and explained, its ruling on the People's application. Under those circumstances, we conclude that defendant was afforded a meaningful opportunity to participate at the court's subsequent de novo inquiry and his absence from the initial conference does not require reversal ...". ***People v. Sharp*, 2023 N.Y. Slip Op. 01602, Fourth Dept 3-23-23**

CRIMINAL LAW, JUDGES.

THE PLEA-BARGAINED SENTENCE WAS BELOW THE STATUTORY MINIMUM, MATTER REMITTED FOR RESENTENCING OR WITHDRAWAL OF THE PLEA AGREEMENT.

The Fourth Department remitted the matter for resentencing because the sentence imposed was below the statutory minimum: "[T]he sentence promised to defendant as part of his guilty plea and imposed upon him at sentencing, i.e., 8 years to life imprisonment, is illegal because it fell below the statutory minimum (see Penal Law §§ 70.08 [3] [b]; 265.03). Contrary to defendant's contention, however, the remedy at this stage is not to vacate his guilty plea, but to remit the matter to County Court ... . On remittal, the court will have the discretion to either, if possible, 'resentence defendant in a manner that ensures that he receives the benefit of his sentencing bargain or permit both parties the opportunity to withdraw from the agreement' ...". ***People v. Mcdowell*, 2023 N.Y. Slip Op. 01606, Fourth Dept 3-24-23**

CRIMINAL LAW, JUDGES.

AS CHARGED IN THIS CASE, CRIMINAL TRESPASS THIRD IS NOT A LESSER INCLUDED OFFENSE OF BURGLARY THIRD AND THE JURY SHOULD NOT HAVE BEEN SO INSTRUCTED.

The Fourth Department, reversing defendant's criminal trespass third conviction, determined the judge should not have instructed the jury on that offense as a lesser included offense of burglary third degree: " 'To establish that a count is a lesser included offense in accordance with CPL 1.20 (37), a [party] must establish 'that it is theoretically impossible to commit the greater crime without at the same time committing the lesser' ... . As charged here, '[a] person is guilty of criminal trespass in the third degree when he knowingly enters or remains unlawfully in a building or upon real property (a) which is fenced or otherwise enclosed in a manner designed to exclude intruders' (Penal Law § 140.10 [a]). The plain language of that statute 'clearly requires that both buildings and real property be fenced or otherwise enclosed in order to increase the level of culpability from trespass . . . to criminal trespass in the third degree' ... . Inasmuch as that requirement is not an element of burglary in the third degree (see § 140.20), it is theoretically possible to commit burglary in the third degree without committing criminal trespass in the third degree under section 140.10 (a), and thus 'a violation of that section cannot qualify as a lesser included offense of third-degree burglary' ...". ***People v. Newman***, 2023 N.Y. Slip Op. 01621, Fourth Dept 3-24-23

CRIMINAL LAW, JUDGES, APPEALS.

THE IMPOSITION OF TWO CONSECUTIVE PERIODS OF POSTRELEASE SUPERVISION WAS ILLEGAL.

The Fourth Department determined consecutive periods of post release supervision should not have been imposed. Although the issue was not raised on appeal, an appellate court cannot allow an illegal sentence to stand: "[T]he court erred in imposing consecutive periods of postrelease supervision. Penal Law § 70.45 (5) (c) requires that when a person is subject to two or more periods of postrelease supervision, those periods merge with and are satisfied by the service of the period having the longest unexpired time to run ... . Because we cannot allow an illegal sentence to stand ... , we modify the judgment accordingly....". ***People v. Koeberle*, 2023 N.Y. Slip Op. 01605, Fourth Dept 3-24-23**

CRIMINAL LAW, JUDGES, APPEALS.

A WAIVER OF APPEAL NOT MENTIONED UNTIL SENTENCING IN INVALID; MATTER REMITTED FOR A DECISION ON DEFENDANT'S MOTION TO REDACT STATEMENTS MADE WITHOUT COUNSEL FROM THE PREPLEA INVESTIGATION REPORT.

The Fourth Department, remitting the matter, determined (1) the waiver of the right to appeal was invalid because the waiver was not mentioned until sentencing, after defendant pled guilty, and (2) the judge never decided defendant's request to have certain statements, made without counsel, redacted from the preplea investigation report: "A waiver of the right to appeal is not effective where, as here, it is not mentioned until sentencing, after defendant pleaded guilty ... . Defendant ... contends that Supreme Court erred in failing to redact from the preplea investigation report statements that defendant made during the preplea investigation interview, because those statements were made without the presence of counsel. ... [D]efendant preserved the issue for our review by moving to redact the statements from the preplea investigation report ... . The court stated that it was reserving decision, but there is no indication in the record that the court ever issued a decision. It is well settled that a court's failure to rule on a motion cannot be deemed a denial thereof . We therefore hold the case, reserve decision, and remit the matter to Supreme Court to determine defendant's motion." ***People v. Wallace*, 2023 N.Y. Slip Op. 01616, Fourth Dept 3-24-23**

FAMILY LAW, APPEALS.

NON-RESPONDENT FATHER'S APPEAL OF THE PLACEMENT OF HIS CHILDREN WITH THE DEPARTMENT OF FAMILY AND CHILDREN'S SERVICES WAS NOT MOOT; THE CHILDREN HAD BEEN PLACED WITH RELATIVES; PLACEMENT WITH THE DEPARTMENT, AS OPPOSED TO WITH RELATIVES, TRIGGERS THE POSSIBLE FUTURE TERMINATION OF FATHER'S PARENTAL RIGHTS.

The Fourth Department determined non-respondent father's appeal of the placement of his children with the department of family and children's services was not moot. The children had been placed with relatives. Placement with the department of family and children's services, as opposed to with relatives, triggers the possible termination of father's parental rights: "[T]he Social Services Law provides that, whenever a child 'shall have been in foster care for [15] months of the most recent [22] months . . . the authorized agency having care of the child shall file a petition' to terminate parental rights unless, as relevant here, 'the child is being cared for by a relative' ... . Thus, we agree with the father

that his appeal from the order moving his children from relative placement to foster care is not moot because that change in placement 'may, in future proceedings, affect [his] status or parental rights' ... by altering the obligations of petitioner with respect to a future petition to terminate the father's parental rights....". ***Matter of Shdaya B. (Rahdasha B.--Carlton M.)*, 2023 N.Y. Slip Op. 01599, Fourth Dept 3-23-23**

ZONING, APPEALS.

THE TOWN BOARD'S FAILURE TO PROVIDE ITS REASONS FOR ITS RULING IN THIS VARIANCE PROCEEDING AND THE BOARD'S FAILURE TO MAKE ADEQUATE FINDINGS OF FACT REQUIRED THE APPELLATE COURT TO REMIT THE MATTER FOR THE SECOND TIME UNDER THREAT OF SANCTIONS.

The Fourth Department, sending the matter back to the Town Board for the second time in this variance proceeding, determined the board's failure make adequate findings of fact and explain the reasons for its decision precluded appellate review: "Generally, '[f]indings of fact which show the actual grounds of a decision are necessary for an intelligent judicial review of a quasi-judicial or administrative determination' ... . Here, we conclude that the Town Board has once again precluded intelligent judicial review of its determination inasmuch as its 'purported findings of fact are speculative and mere conclusions and contain very little[, if any,] factual matter' ... . The Town Board 'must do more than merely restate the terms of the applicable ordinance' and the procedural history preceding and subsequent to the determination; rather, the Town Board must set forth 'findings of the facts essential to its conclusion' to grant the variance in the first instance—i.e., the determination that is the subject of the appeal ... . Given that the Town Board has "failed to articulate the reasons for its determination and failed to set forth ..., we continue to hold the case, reserve decision and remit the matter to the Town Board to properly set forth the factual basis for its determination within 30 days of the date of entry of the order of this Court. We remind the parties that '[a]n attorney or party who fails to comply with a[n] . . . order of th[is C]ourt . . . shall be subject to such sanction as [we] may impose' upon motion or our own initiative after the attorney or party has a reasonable opportunity to be heard (22 NYCRR 1250.1 [h])." ***Matter of Guttman v. Covert Town Bd.*, 2023 N.Y. Slip Op. 01632, Fourth Dept 3-24-23**

To view archived issues of CasePrepPlus,
visit www.nysba.org/caseprepplus.