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Summarizing recent significant New York appellate cases

It's a criminal law heavy week here at NYSBA CasePrepPlus. The Court of Appeals addressed when a witness can make an eyewitness identification for the first time at trial and what happens when the prosecution discloses material information after already certifying that it had complied with its mandatory discovery obligations and was ready for trial. And the Appellate Division looked at whether the Driver's License Suspension Reform Act authorizes as relief vacatur of convictions before it was enacted. Let's take a look at what has been happening in New York's appellate courts over the past week.

COURT OF APPEALS

CRIMINAL LAW

People v Perdue, 2023 NY Slip Op 06404 (Ct App Dec. 14, 2023)

Issue: **May a witness be properly allowed to identify a criminal defendant as the perpetrator of a crime for the first time in court, without having been subjected to any pretrial identification procedure?**

Facts: A neighbor witnessed the defendant shooting the victim, and called 911 to alert the police. When the police arrived, the neighbor told them that she could identify the shooter, but she never went through the pretrial identification process. At trial, the neighbor testified and identified the defendant as the shooter for the first time. Defendant objected and asked the trial court to preclude the identification because she did not participate in the pretrial identification process and the first time in-court identification was suggestive because defendant was the only person in the courtroom who could be the suspect. The trial court denied the motion, and defendant was convicted.

Holding: The Court of Appeals held that, "when the People call a witness who may make a first-time, in-court identification, they must ensure that the defendant is aware of that possibility as early as practicable so that the defendant has a meaningful opportunity to request alternative identification procedures. If the defendant explicitly requests such procedures, a trial court may exercise its discretion to fashion any measures necessary to reduce the risk of misidentification. The ultimate determination of whether to admit a first-time, in-court identification, like any evidence, rests within the evidentiary gatekeeping discretion of the trial court. The court must balance the probative value of the identification against the dangers of misidentification and other prejudice to the defendant." Here, the Court held, the defendant was aware from pre-trial discovery that the witness might make an identification in court, and the witness's testimony established the reliability of her first-time, in-court identification, the trial court did not abuse its discretion in denying the defendant's motion to preclude the identification.

CRIMINAL LAW

People v Bay, 2023 NY Slip Op 06407 (Ct App Dec. 14, 2023)

Issue: **Was the People's filing of a certificate of compliance with their new discovery obligations and certificate of readiness for trial illusory, where the People turned over several key discovery items that were within their possession and control and subject to the automatic disclosure requirements a few weeks later?**

Facts: When the People made their belated disclosure, the defendant moved to dismiss under CPL § 30.30, arguing that the People were not actually ready for trial within the applicable speedy trial period. The trial court denied the motion to dismiss but precluded the prosecution from using the 911 recording at trial as a sanction for the untimely disclosure. Defendant was then convicted of the charges.

Holding: The Court of Appeals held that "the key question in determining if a proper [certificate of compliance] has been filed is whether the prosecution has exercised due diligence and made reasonable inquiries to ascertain the existence of material and information subject to discovery. Although the statute nowhere defines 'due diligence,' it is a familiar and flexible standard that requires the People to make reasonable efforts to comply with statutory directives." Those reasonable efforts must be made before the certificate of compliance is filed, the Court held. "Although belated disclosure will not necessarily establish a lack of due diligence or render an initial COC improper, post-filing disclosure and a supplemental COC cannot compensate for a failure to exercise diligence before the initial COC is filed." It is the People's burden, therefore, to demonstrate their reasonable efforts in response to a defendant's motion to dismiss on speedy trial grounds, and if they fail to do so and the speedy trial time has run, the case should be dismissed. Here, the People failed to show their diligence, and thus the Court of Appeals reversed the defendant's conviction and dismissed the accusatory instrument.

FIRST DEPARTMENT

CRIMINAL LAW

***People v Castro*, 2023 NY Slip Op 06452 (1st Dept Dec. 14, 2023)**

Issue: **Does the Driver's License Suspension Reform Act (Vehicle and Traffic Law § 510[4-a]) apply retroactively and constitute an appropriate ground to vacate a criminal defendant's conviction for second-degree aggravated unlicensed operation of a motor vehicle?**

Facts: Defendant entered a plea to second-degree aggravated unlicensed operation of a motor vehicle for operating his vehicle while knowing that his license was suspended based upon having accrued 10 or more suspensions on at least 10 or more separate dates for failure to answer, appear, or pay a fine. Defendant argued that the Legislature's 2021 amendment to Vehicle and Traffic Law § 510(4-a), the DLSRA applies retroactively and constitutes an appropriate ground to vacate his conviction.

Holding: The First Department held that "[n]othing in the statutory language, which is the clearest indicator of legislative intent suggests that there was any intent to authorize the vacatur of convictions under Vehicle and Traffic Law § 511 that arose from license suspensions predicated on failures to pay a fine. That the DLSRA amended Vehicle and Traffic Law § 1802 to provide for the postconviction relief of' 'installment payment plans' for fines, fees, and surcharges imposed for violation of traffic laws, is a further indicator that the vacatur of Vehicle and Traffic Law § 511 convictions was not intended." Because the Legislature did not expressly indicate that the statute should have retroactive effect to vacate prior convictions, the Court held, that was not the Legislature's intent. And, notably, the defendant's conviction was 8 years before the DLSRA was enacted, so he could not seek vacatur even if the statute had provided that as a form of relief.

SECOND DEPARTMENT

TORTS

***Qosaj v Village of Sleepy Hollow*, 2023 NY Slip Op 06395 (2d Dept Dec. 13, 2023)**

Issue: **Is a vehicle transporting construction materials for use in an ongoing road repair "actually engaged in work on a highway" within the meaning of Vehicle and Traffic Law § 1103(b), such that the driver of the vehicle will be exempt from the ordinary rules of the road and held to the "reckless disregard" standard set forth in that statute?**

Facts: The plaintiff in a personal injury action sought to hold the Village liable for a Village backhoe that struck plaintiff's vehicle in the rear and caused him injuries. At the time of the accident, the backhoe had been engaged in work on a roadway, but had left the job site to obtain more gravel and was returning to the jobsite. Supreme Court denied the parties' competing summary judgment motions.

Holding: The Second Department held that, typically, "a rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision." An exception exists to that rule, however, for vehicles that are "actually engaged in work on a highway" under Vehicle and Traffic Law § 1103(b). In such a case, the statute imposes "a recklessness standard of care." The "exemption turns on the nature of the work being performed, and is limited to vehicles performing construction, repair, maintenance or similar work." As the Court explained, "the exemption applies only when such work is in fact being performed at the time of the accident, although the statute does not require that a vehicle be located in a designated 'work area' in order to receive the protection." Here, the Court rejected the Village's argument that the backhoe was "actually engaged in work on a highway." The Court held instead that the "the act of transporting gravel to a highway worksite does not itself constitute construction, repair, maintenance, or similar work on a highway"; the backhoe was using the highway for purposes of travel, not for work. Thus, it was not covered under Vehicle and Traffic Law § 1103(b), and the ordinary negligence standard applied.

THIRD DEPARTMENT

UNEMPLOYMENT INSURANCE

***Matter of Almindo (New York State Dept. of Corr. & Community Supervision--Commissioner of Labor)*, 2023 NY Slip Op 06424 (3d Dept Dec. 14, 2023)**

Issue: **Were civil service employees who worked full time as instructors or teachers for incarcerated individuals eligible for unemployment benefits because they were "totally unemployed" over the summer of 2020 when no work was available due to the COVID-19 pandemic?**

Facts: Claimants were civil service employees who worked full time as teachers for incarcerated individuals at facilities operated by DOCCS. Their work was governed by a CBA and they were paid an annual salary to teach or supervise teaching during the academic year, which ran from approximately September 1 through June 30 according to the schedule set by each facility. Each summer, they were tra-

ditionally offered additional work, for which they received additional pay. During the summary of 2020, however, no summer work was offered due to the COVID-19 pandemic and the claimants filed for unemployment benefits. The Unemployment Insurance Appeal Board determined that the claimants were not eligible for benefits because they were not "totally unemployed" pursuant to Civil Service Law § 136.

Holding: The Third Department held that "regular unemployment insurance benefits require total unemployment, which is defined as the total lack of any employment on any day." Because the claimants could choose to be paid their annual salary for their regular school year work over a 10-month or 12-month period, and any additional work over the summer was optional and required payment of additional compensation to the claimants' annual salary, the Court held that the "Board properly rejected claimants' contention that they were employed and compensated for only 10 months each year and unemployed during the summer." Indeed, the Court held, "[t]he fact that *optional*, additional work was not available over the summer of 2020, as it had been in prior years, does not change the analysis or conclusion that claimants remained employed over the summer recess, i.e., they were not totally unemployed."

FOURTH DEPARTMENT

None.

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