END-OF-YEAR FOURTH DEPARTMENT CASE ROUND-UP

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On November 20th, 2020, the Appellate Division, Fourth Department handed down decisions in twenty criminal cases, addressing a variety of procedural and substantive issues including: preservation and forfeiture of arguments, speedy trial (due diligence), resisting arrest, SORA findings, ineffective assistance of counsel, prosecutorial misconduct, "opening the door" (to otherwise inadmissible evidence), reasonable suspicion, criminally negligent homicide, criminal contempt, alibi, impeachment of one's own witness, expert witnesses and lay opinion testimony.

The following is a summary of those cases:

1. People v Hill 2020 NY Slip Op. 06913: ISSUES FORFEITED BY GUILTY PLEA:

The court held that upon his guilty plea (to Assault 2d degree); the defendant forfeited his claims 1. that the People committed a Brady violation in connection with Discovery (as any such material was turned over before the plea); 2. that two counts of the indictment were duplicative, 3.that the evidence before the Grand Jury was legally insufficient (see also People v Snyder 2020 NY Slip Op. 06919); 4.that the prosecutor's conduct in the Grand Jury impaired the integrity of the proceedings.

2. People v Snyder 2020 NY Slip op. 06919: BAIL JUMPING/ LEGAL SUFFICIENCY:

The defendant pled guilty to Bail Jumping 2d degree (a class E felony), stemming from her failure to return to court for proceedings in connection with a violation of probation (VOP). Before doing so, the defendant had moved unsuccessfully to dismiss the indictment, alleging that the evidence before the grand jury was legally insufficient because the defendant's failure to appear at a VOP proceeding did not meet the statute's requirement that the proceeding be "in connection with a charge against her of committing a felony."

On appeal, the defendant argued that the indictment was jurisdictionally defective for the same reason advanced in the lower court. The AD rejected the defendant's argument, holding that an indictment is defective only if it does not effectively charge the defendant with the commission of a specified crime. (People v Marshall 299 AD2d 809 [4th dep't 2002]). The court was satisfied that the indictment properly accused the defendant of having violated every element of PL 215.56, including that she failed to appear in connection a charge against her of committing a felony. (Although there was no new felony charge, the VOP derived from the underlying conviction which was a felony).

The court also held that the defendant's claim of INSUFFICIENCY OF THE EVIDENCE before the Grand Jury was FORECLOSED by her guilty plea. (People v Colon 151 AD3d 1915 [4th dep't 2017]).

3. People v Edwards 2020 NY Slip op. 06920: (RESISTING ARREST):

In this case, the defendant appealed from a judgment entered upon a guilty verdict, alleging that the proof at trial was legally insufficient to establish beyond a reasonable doubt that the arrest was authorized.

The court noted that an arrest is authorized when it is based on PROBABLE CAUSE (People v Finch 27 NY3d 408 [2014]), which is determined not by the defendant's guilt but upon the sufficiency of the OFFICER'S BELIEF that the defendant committed an act (or acts) constituting a criminal offense. (People v Shulman 6 NY 3d 341[2005]). By that standard, the proof was legally sufficient to establish that the arrest was based on probable cause and, therefore, was authorized. (People v Howard 132 AD3d 1266 [4th dep't 2015).

With respect to the defendant's claim that there was insufficient proof of his intent to prevent the officer from effecting an authorized arrest, the court held that such INTENT could be RATIONALLY INFERRED from his conduct. (People v Barboni 21 NY3d 393 [2013]).

The court also rejected the defendant's claim of JUROR MISCONDUCT, noting that not every fact-finder faux pas is so inherently prejudicial as to require reversal (People v Brown 48 NY2d 388 [1979], and there was no showing that any substantial right of the defendant was prejudiced. (People v Gonzalez 228 AD2d 722 [3d dep't 1996]).

4. People v Gatling 2020 NY Slip Op. 06921 (SUFFICIENCY OF SORA FINDINGS):

The defendant appealed from the lower court's finding that he was a LEVEL 2 SEX OFFENDER and which summarily denied his request for a downward departure.

The AD held that the court failed to comply with CL 168-n(3) requiring that its FINDINGS of fact and CONCLUSIONS of law be SET FORTH ON THE RECORD. Instead of doing so, the court only read from a standardized form order and ruled without explanation that it was "entirely adopting the case summary and risk assessment instrument (RAI), prepared by the Board of Examiners (of Sexual Offenders." The court also read off the points in the RAI and denied the defendant's request for a downward departure in conclusory fashion. This perfunctory procedure was deemed to insufficient under the statute (People v Dean 169 AD3d 1414 [4th dep't 2019], so the case was remitted to the lower court to set forth its findings as statutorily required.

5. People v Turner 2020 NY Slip Op. 06906: SORA: ALCOHOL/SUBSTANCE ABUSE HISTORY:

Here, the AD affirmed the lower court's finding that the defendant was a LEVEL 2 SEX OFFENDER, finding that: he failed to preserve his claim that the court violated due process by accepting his waiver of appearance at the SORA hearing (People v Poleun 119 AD3d 1378 [4th dep't 2014]) and proceeding without him. (People v Wise 127 AD3d 834 [2d dep't 2015]).

The court was also satisfied that the People had established the 15-point assessment for "history of drug and/or alcohol abuse" by clear and convincing evidence (People v Kowal 175

AD3d 1057 [4th dept 2019]), based on the facts that he had participated in outpatient treatment near the time of the underlying offense, was required to engage in substance abuse counseling while incarcerated and admitted to a history of drug abuse (for which he was diagnosed as cannabis and alcohol dependent). The court said that it was not necessary for the defendant to have been abusing drugs or alcohol right at the time of this incident to accrue points in this risk-factor category. (People v Kunz 150 AD3d 1696 [4th dep't 2017]).

6. People v Neil 2020 NY Slip Op. 06922: (INEFFECTIVE ASSISTANCE OF COUNSEL/TRIAL):

Here, the AD rejected the defendant's claim of ineffective assistance of counsel for failing to clear up a misimpression that the defendant was involved in a similar crime (Attempted Murder) a month earlier, and that counsel improperly asked certain fingerprint expert witnesses whether their work had been verified.

The court held that the defendant FAILED TO MEET HIS BURDEN of showing the ABSENCE of STRATEGIC OR OTHER LEGITIMATE EXPLANATIONS for counsel's challenged actions. (People v Lopez-Mendoza 33 NY3d 565 [2019].

The court also rejected the defendant's claim of PROSECUTORIAL MISCONDUCT in summation as UNPRESERVED (People v Rogers 186 AD3d 1046 [4th dep't 2020] and, in the court's estimation, counsel's failure to object to what amounted to an isolated comment was not so egregious as to render counsel ineffective or deprive the defendant of a fair trial. (People v Kilbury 83 AD3d 1579 [4th dep't 2011]).

7. People v Seymore 2020 NY Slip op. 06924 (INEFFECTIVE ASSISTANCE/GUILTY PLEA):

The AD held that while the defendant's claim of INVOLUNTARINESS of his plea survived his guilty plea (to Assault 2d degree) (People v Thomas 34 NY3d 545 [2019]), the defendant FAILED TO PRESERVE this argument because he DID NOT MOVE TO WITHDRAW the plea or vacate the judgment of conviction. (People v Lopez 71 NY2d 662[1988]). And, while this case, in the court's view, did not fall into that "narrow case exception" to the preservation requirement, the record established that the plea was knowingly, voluntarily and intelligently entered. (People v Seeber 4 NY3d 780 [2005]).

The court also held that the defendant's challenge to the legal sufficiency of the factual allegations in the indictment DID NOT SURVIVE his guilty plea or the appeal waiver (which the defendant DID NOT contest on appeal). (People v Guerrero 28 NY3d 110 [2016]).

Also unpreserved (and otherwise precluded by his waiver of appeal), was the defendant's claim that he was denied due process by the People's alleged failure to respond to a demand for a BILL of PARTICULARS.

Similarly, the defendant's claim that the lower court erred in denying his request for a new lawyer during a pre-plea proceeding was precluded by both his uncontested waiver of appeal and guilty plea. And, to the extent that this claim implicated the issue of voluntariness, while it survived the appeal waiver, it was UNPRESERVED because, as noted above, the defendant had not MOVED TO VACATE his plea. The court found any such argument to be without merit

in any event inasmuch as the defendant had expressed satisfaction with his attorney (#2) before pleading guilty.

With respect to the defendant's claim of INEFFECTIVE ASSISTANCE OF COUNSEL for failing to: request a bill of particulars, to investigate the case or communicate with him, the court noted that while such claims survive the waiver of appeal and guilty plea, the defendant failed to establish that the plea bargaining process was INFECTED by the allegedly ineffective assistance or that he entered the plea only BECAUSE OF counsel's poor performance. (People v Rausch 126 AD3d 1535 [4th dep't 2015]). The court also noted that the defendant had received an ADVANTAGEOUS PLEA. (People v Shaw 133 AD3d 1312 [4th dep't 2015]).

The court also rejected the defendant's argument that this third lawyer was ineffective at sentencing (for alleged lack of familiarity with his case and his background). (People v Saladeen 12 AD3d 1179 [4th dep/t 2004]). The court found that counsel was sufficiently familiar with the case and, in light of the defendant's prodigious criminal history, no amount of advocacy would have impacted the sentence.

Finally, the defendant's challenge to the SEVERITY OF THE SENTENCE was deemed to be FORECLOSED by his unchallenged appeal waiver (People v Pitman 163 AD3d 1461 [4th dep't 2018]), and his sentence as a SECOND VIOLENT FELONY OFFENDER was supported by the record (People v Camp 134 AD3d 1461[4th dep't 2015]), (although the certificate of conviction and commitment form had to be amended to reflect the defendant's correct status). (People v Mobayed 158 AD3d 1221 [4th dep't 2018]).

8. People v Sullivan 2020 NY Slip Op. 06929: GUILTY PLEA/ WAIVER OF APPEAL:

The AD rejected the defendant's claim that his waiver of appeal was invalid and that his sentence upon his guilty plea to Burglary 2d degree was unduly harsh and severe, The court was satisfied based on a review of the record of the oral colloquy and the written waiver that it was knowing, voluntary and intelligently made. (People v Thomas 34NY3d 545 [2019]). Consequently, the defendant's challenge to the severity of the sentence was foreclosed. (People v Lopez 6 NY3d 248 [2006]).

9. In contrast, in People v Davis 2020 NY Slip Op. 06896, the AD held that both the oral and written waivers of appeal were INVALID because the court MISCHARACTERIZED the waiver as an ABSOLUTE BAR to any/all appeals. Nevertheless, the court was deemed not to have abused its discretion in denying the defendant Youthful Offender (YO) status. (People v Johnson 182 AD3d 1036 [4th dep't 2020]).

10. And in People v Seppe 2020NY Skip op. 06888: the court held that the defendant's challenge to his waiver of appeal and the severity of his sentence was RENDERED MOOT by the fact that the defendant had ALREADY COMPLETED the sentence.

11. People v Ramos-Perez 2020 NY Slip op. 06902:

Here, the AD rejected the defendant's claim that his guilty plea to Robbery 1st degree (which survived the waiver of appeal) was involuntary where the record established that he ADMITTED that the plea was voluntary and acknowledged that no threats or promises had been made to induce his plea. He also indicated that he had sufficient time (several weeks, in fact), to consider the plea and discuss it with counsel. In any event, the court considered his claims to be FORECLOSED by his FAILURE TO MOVE TO WITHDRAW his plea or VACATE the judgment of conviction. (People v Connolly 70 AD3d 1510 [4th dep't 2010]).

12. People v Lovett 2020 NY Slip Op. 06892: INEFFECTIVE ASSISTANCE /SUPPRESSION HEARING:

The defendant appealed from a judgment of conviction entered upon his guilty plea to three counts of Criminal Possession of a Weapon (CPW) 2d degree and two counts of CPW 3d degree, alleging that his lawyer was ineffective for failing to impeach a police witness at a suppression hearing with a police report which, in his view, contradicted his testimony about the sequence of events leading up to the stop of his vehicle for an alleged Vehicle and Traffic violation.

The AD held that to the extent the defendant's claim survived his plea, it was lacking in merit for failing to establish the ABSENCE of any STRATEGIC or other LEGITIMATE EXPLNATION for counsel's forbearance. (People v Rivera 71 NY 2d 705 [1988]). The court also pointed out that the police report lacked any demonstrable impeachment value anyway.

The court also rejected the defendant's claim of ineffective assistance based on counsel's not impeaching the testifying officer with the police report of another officer because that would constitute IMPROPER IMPEACHMENT. (People v Ortiz 85 AD3d 588 [1st dep't 2011]). Also unpersuasive was the defendant's complaint about counsel's not calling that other officer to testify, especially since that officer's report could have actually helped the People's case.

The court did, however, remit the case for RE-SENTENCING on the CPW 3d degree counts (non-violent felonies) because the lower court ILLEGALLY IMPOSED DETERMINATE SENTENCES and POST RELEASE SUPERVISION (PRS) when INDETERMINATE sentences were required.

13. People v Meyers 2020 NY Slip Op. 06897 INEFFECTIVE ASSISTANCE/NOTICE OF ALIBI:

In this case, the court held that the defendant's claim of ineffective assistance of counsel for failing to provide a NOTICE OF ALIBI involved matters OUTSIDE OF THE RECORD on appeal and was, therefore, more properly suited to a CPL 440.10 motion to set aside the judgment of conviction.

With respect to the defendant's ineffective assistance claim based on a failure to call an expert witness to counter the People's expert on Child Sexual Abuse Accommodation Syndrome (CSAAS), (whom the trial court did not err in permitting to testify for the People at the defendant's second trial), the court found that the defendant failed to establish that such rebuttal testimony was either available or that it would have ASSISTED THE JURY in its determination (or that he was prejudiced by its absence). (People v Kilbury 83 AD3d 1579 [4th dep't 2014]).

At his trial on charges of Course of Sexual Conduct Against a Child 1st degree (from 7/30/10-6/25/14), Criminal sex Act 1st degree, and Sexual Abuse 2d degree), the defendant sought to call his sister to testify that in the late evening hours of 7/30/10 (the date of the first incident which occurred at the home of the defendant's late friend), she picked him up and drove him to her house where he slept over.

The court precluded such testimony for lack of an alibi notice. In upholding the lower court's decision, the AD reasoned that inasmuch as the sister's testimony would have placed the defendant elsewhere during the time frame in which the first incident was alleged to have occurred, she qualified as an alibi witness for whom notice should have been provided.

Moreover, since the defendant clearly would have known who he was with (and this was the second trial after the first one was mis-tried), there was no good excuse for failing to provide the People with a notice of alibi. As such, her proposed testimony could only be construed as a recent fabrication which was properly refused. (People v Walker 294 AD2d 218 [1st dep't 2002]).

14. People v Anderson 2020 NY Slip Op. 0688: SPEEDY TRIAL/DUE DILIGENCE:

The AD reversed County Court's oral decision dismissing the indictment on speedy trial grounds for lack of due diligence in trying to locate the defendant during a seven-month period between the defendant's indictment (7/14/17) and the police first learning that he may be in Georgia (2/12/18).

The AD held that while the defendant met his initial burden of establishing that the People had not declared ready for trial within the statutory time constraints of CPL 30.30 (1)(a), (People v Alland 28NY3d 1 [2016]), the People did, contrary to the lower court's determination, meet their burden of establishing excludable time under CPL 30.30 (4)(c)(i) (People v Kendzia 64 NY2d 331 [1985]), based on a sufficient showing of due diligence (which the People had to demonstrate since there was no claim that the defendant was attempting to avoid apprehension or prosecution).

The court noted that while the police are not required to search for a defendant indefinitely, they must EXHAUST ALL REASONABLE INVESTIGATIVE LEADS as to his/her whereabouts. (People v Williams 137 AD3d 1709 [4th dep't 2016]).

At the hearing, the People established that the police routinely checked: computer data bases (which eventually led them to the defendant in Georgia), social media outlets, criminal history reports and information from other government agencies to identify possible locations where the defendant might be found. They also investigated all addresses associated with the defendant and spoke with neighbors, tenants, the defendant's mother and all of the defendant's known employers.

They did not conduct a full search of an address that popped up on a credit report but the officer noted that anyone can apply for credit online and give any address which may or may not be accurate. They did, however drive by the address, noting that it was a commercial building .

The AD held that even though greater effort could have been expended, the police demonstrated sufficient due diligence in trying to find the defendant to warrant excluding this time frame from the speedy trial time calculation. (People v Lewis 177 AD3d 1351 [4th dep't 2019]).

With respect to other relevant time frames in the case, the AD declined to consider them inasmuch as the lower court did not address them. Consequently, the indictment was re-instated and the case was remitted for for a ruling on whether those other periods were excludable. (People v LaFontaine 92 NY 2d 470 [1998]).

15. People v Griffin 2020 NY Slip Op. 06882: REASONABLE SUSPICION/INVESTIGATORY DETENTION AND INQUIRY/PROBABLE CAUSE TO ARREST:

This case offers a good illustration of the permissible (and escalating) levels levels of police investigation and intrusion under People v DeBour 40 NY2d 210 (1976) based on information from an identified citizen informant (DV victim's mother), prompt police observation of furtive conduct at the scene of the call (defendant crouching down at the front of a van parked in a driveway), and observation of a handgun (after the defendant was patted down, cuffed and placed in the patrol car), on the driveway by the front bumper of the van where the defendant had first been observed.

The victim's mother informed 911 that her daughter was being physically abused by her boyfriend at a particular address. In the court's view, the police were justified in acting upon this "self-identifying" information which was beyond the realm of an anonymous call. (People Dixon 289 AD2d 937 [4th dep't 2011]).

The responding officers also had knowledge of the defendant and his girlfriend so they were able to connect the 911 information with them. Thus, upon their arrival, (when they observed both parties in the driveway late at night), the officers were deemed to have reasonable suspicion of criminal conduct (i.e domestic assault). (People v Moore 6 NY3d 496 [2006]).

Upon seeing the police, the defendant crouched down at the front of the van in the driveway and popped back up whereupon the police put him up against the house, cuffed him and placed him in the back of the patrol car. One of the officers asked him, "what's going on?" They later observed a handgun on the ground where the defendant had bent down. The defendant was then arrested after which he was given MIranda warnings and questioned.

The AD held that even though the defendant was not yet under arrest (before the gun was spotted), he was properly detained, cuffed and secured in the patrol car for officer safety while the officers tried to sort the situation out. The court stated that "not every forcible detention constitutes an arrest" (People v Drake 93 AD3d 1158 [4th dep't 2012]), and the police may handcuff a detainee for safety reasons when the circumstances so warrant. (People v Wiggins 126 AD3d 1369 [4th dep't 2015])... "A corollary of the statutory right to detain a person for questioning is the authority to frisk if the officer reasonable suspects that he/she may be in danger of physical injury by virtue of the defendant being armed." (Citing People v DeBour supra at 223).

Inasmuch as the police were responding to a call of a violent domestic where the parties were in close proximity to each other in the driveway, and in view of the defendant's furtive conduct, it was reasonable to suspect that he could pose a threat to their safety. (People v Mack 49 AD3d 1291 [4th dep't 2008]). And, though the frisk did not produce a weapon, the brief detention in the patrol car was justified while the police spoke to the defendant and his girlfriend separately. (The defendant also had a known history of running from the police).

Under the circumstances, the police conduct was deemed to constitute a minimally intrusive means of investigation intended to confirm or dispel their suspicions in short order (People v Hicks 68 NY 2d 234 [1986]), and there was no other, less intrusive avenue open to them. (People v Howard 129 AD3d 1654 [4th dep't 2015]).

Further, the initial inquiry of the defendant was deemed to be a proper investigative question to help the officers determine what was going on (People v Mitchell 132 AD3d 1413 [4th dep't 2015]), rather than custodial interrogation aimed at gathering evidence of a crime. The subsequent discovery of the gun in the same spot where the defendant had crouched down just moments before provided probable cause to arrest him. (People v Smith 167 AD3d 1505[4th dep't 2018]).

The courts also rejected the defendant's "curtilage" argument because, under the circumstances, the defendant did not have a reasonable expectation of privacy in the area where the gun was found. It was also not fenced in or otherwise secured in a way that was intended to exclude intruders. (People v Reed 115 AD3d 1334 [4th dep't 2014]). Accordingly, the defendant's motion to suppress the gun and statements made (before and after Miranda) were deemed to have been properly denied.

16. People v Pinnock 2020 NY Slip Op. 06884: CRIMINALLY NEGLIGENT HOMICIDE (CNH):

The AD reversed the defendant's conviction and dismissed the indictment charging him with CNH because the verdict was AGAINST THE WEIGHT OF THE EVIDENCE (stemming from a tragic but bizarre accident involving a strange sequence of unlikely circumstances).

The evidence established that the defendant was driving a beat-up pick-up truck (with a forged inspection sticker of which he may not have been aware), slowly on the shoulder of the road with his flashers on when one of his driver-side wheels came off and rolled onto the road into the on-coming lane of traffic. A delivery truck hit the tire and tipped over on top of another vehicle (killing its driver), whereupon it collided with yet another vehicle, the occupants of which were injured.

Prosecution witnesses testified that the truck, within a few days of the accident, had exhibited loud grinding noises which caused the defendant to ask a mechanically inclined friend what the problem might be. He was told that it was probably the wheel or the brakes. A post-accident inspection revealed significant problems with the wheel, the extent of which could only have been ascertained by removing it.

Determining that an acquittal would not have been unreasonable, (People v Danielson 9 NY3d 342 [2007]), the court conducted its own independent review of the evidence and concluded that the verdict was against the weight of the evidence. (People v Bleakley 69 NY2d 490 [1987]).

Noting that CRIMINAL NEGLIGENCE requires both a FAILURE TO PERCEIVE A SUBSTANTIAL AND UNJUSTIFIABLE RISK that a certain result will occur AND some BLAMEWORTHY CONDUCT that either creates or contributes to a substantial and unjustifiable risk of such result (People v Asano 21 NY3d 677 [2103]), constituting a GROSS DEVIATION from the standard of care that a reasonable person would observe in the situation, the court determined that the evidence, at most, revealed a failure to perceive the risk, which, standing alone, is insufficient to establish criminal negligence. (People v Barth 75 NY2d 692 [1990]).

Moreover, the risk, under the circumstances, that a tire would come off the truck and roll into the street into the path of an oncoming vehicle which would fall onto another vehicle and then hit another one was not considered to be a substantial one (i.e. likely to play out that way). As such, there was no basis for criminal liability.

As the court observed, " it is well settled that the carelessness required for criminal negligence is APPRECIABLY MORE SERIOUS than that for ordinary civil negligence, and that (it) must be

such that its seriousness would be apparent to anyone who shares the community's sense of right and wrong... Mere non-perception of a risk (even if the proscribed result occurs), is not enough." (Citing People v Conway 6 NY3d 869 [2006]).

17. People v Sylvester 2020 NY Slip Op. 06891: OPENING THE DOOR...OR NOT:

Although the court found that the verdict was not against the weight of the evidence, the defendant's conviction (for Attempted Murder) was REVERSED because the trial court erroneously allowed the prosecutor to elicit testimony from several witnesses about an earlier shooting on the mistaken conclusion that defense counsel had "opened the door" to such prior bad act evidence by creating the misimpression that bullet holes found in the driver's side door of the vehicle (in which the victim was a passenger) were from this shooting. (According to the AD, the officer had confirmed on cross exam that the those holes were days or weeks old as of the date of this shooting).

The court explained that the "open door" rule only allows a party to explain or clarify on re-direct exam matters that have been put in issue for the first time on cross exam, and the trial court should normally exclude all evidence which has not been made necessary by the opponent's case in reply. (See generally, People v Massie 2 NY3d 179 [2004]).

Here, even if there was a misleading impression, the trial court allowed the prosecutor to go overboard by calling several witnesses (including a firearms examiner) to establish what was already evident from existing testimony (i.e. that these were old holes). The court noted that the open door theory does not provide an independent basis to introduce new evidence on re-direct exam, nor does it afford an opportunity to place evidence before the jury that should have been brought out, (if at all), on direct. (Citing People v Melendez 55 NY2d 445 [1982]).

The court was also troubled by the fact that such evidence was offered without any notice so that the trial court could rule in advance on the admissibility of uncharged crimes. (People v Ventimiglia 52 NY 2d 350 [1981]).

The court also held that the People improperly impeached their own witnesses in violation of CPL 60.35 under the guise of refreshing their recollections (and disclosing the contents of the prior inconsistent statements), when they had forewarning that they may well go south with respect to their identification of the defendant as the shooter.

CPL 60.35 requires that before the proponent can impeach his/her own witness on a material issue (with a prior inconsistent written or sworn statement), the witness' testimony must TEND TO DISPROVE that party's position in the case, (People v Davis 112 AD2d 722 [4th dep't 1981]).

In this case, the prosecutors knew that one witness would identify someone else and the other was going to hedge ("it could be him"), so they assumed the risk of calling them and could not then pretend to refresh their memory when what they really wanted was to get their prior incriminating statements before the jury as substantive evidence. (Under CPL 60.35[3], the contradictory contents of a witness' prior statement can only be used to impeach the witness, and the jury must be so instructed).

18. People v Barrett 2020 NY Slip Op. 06899: DV/ CRIMINAL CONTEMPT/ SUFFICIENCY:

In this case, the AD modified the judgment of conviction entered upon a guilty verdict of Criminal Contempt 1st degree in the interest of justice because the proof failed to establish that the defendant specifically violated that part of a no-contact order of protection requiring him to stay away from a designated protected party as required by PL 215.51(c). (The special information which served to elevate the charge to felony level also failed to include that specific language). Consequently, the court reduced the conviction to Criminal Contempt 2d degree (PL 215.50[3[) and sentenced the defendant to time served because he had already served the maximum for that crime.

The proof established that the defendant got into a fight while in an intoxicated state with some of his estranged wife's friends and then went to her house in violation of an order of protection, The since-ex wife and her father testified for the defendant, suggesting that she was not at the parking lot or at the house when the defendant was there. He also claimed that he acted in self defense (to assault charges involving the friends) and was too drunk in any event to form a criminal intent.

The court noted that the People had to prove, inter alia, that the defendant had been convicted within the last five years of violating a stay-away order of protection in relation to his wife. (People v Cooper 78 NY2d 476 [1991]). The Special Information (CPL 200.60), to which the defense stipulated, only stated that the defendant had previously been convicted of Criminal Contempt 2d degree without specifying that it involved a violation of a STAY-AWAY (from the person) provision. In the court' view, the stipulation to an "imprecise information" did not relieve the People of their burden of establishing the predicate conviction AS WELL AS THE RELATED FACTS (i.e. the stay-away requirement) as part of their case-in-chief.

Therefore, since the People did not prove that the predicate conviction was based on a STAY-AWAY FROM THE PERSON provision in the order of protection, they failed to establish an essential element of Contempt 1st degree. However, since the evidence was deemed legally sufficient to support the lesser-included offense of Contempt 2d degree, the conviction was modified accordingly.

19. Similarly, in People v Crittenden 2020 NY Slip Op. 06901, the AD modified the defendant's conviction of Criminal Contempt 1st degree by reducing it, in the interest of justice, to Criminal Contempt 2d degree where the proof failed to establish that the defendant intentionally had contact with the protected party in violation of a no-contact order of protection.

The evidence at trial established only that the defendant went to the victim's house at a time when he believed that she would be out of town. Therefore, in the court's view, no rational juror could find that any contact with the protected party would have been anything other than incidental.

20. People Salone 20 NY Slip Op. 06903: IMPROPER LAY OPINION AND VICTIM HISTORY:

The AD reversed the defendant's Manslaughter 1st degree conviction (by verdict) because the trial court erroneously allowed a police officer to opine that a homicide was committed. In the court's view, such testimony "usurped the jury's fact-finding function". (People v Hartzog 15 AD3d 866 [4th dep't 2005]).

The trial court was also found to have erred in allowing the victim's mother to testify about the victim's personal background including family relationships. The court said that it is "well settled that testimony about a victim's personal background that is not material to any issue in the trial should be excluded". (People v Harris 98 NY2d 452 [2002]).

Based on what it considered to be the cumulative effect of errors that subjected the defendant to substantial prejudice, the court reversed the conviction in the interest of justice and remanded the case for a new trial. (People v Calabria 94 NY2d 519 [2000]).

Thus concludes this synopsis of 20 Fourth Department cases from November 20, 2020 which can probably reviewed in 20 minutes (assuming 20/20 vision).

Merry Christmas and Happy Holidays to Everyone! TF